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THE SUPREME COURT CASES

(2017) 10 SCC

(2017) 10 Supreme Court Cases 1

(BEFORE JAGDISH SINGH KHEHAR, C.J. AND JASTI CHELAMESWAR, S.A. BOBDE, R.K. AGRAWAL, ROHINTON FALI NARIMAN, ABHAY MANOHAR SAPRE, DR D.Y. CHANDRACHUD, SANJAY KISHAN KAUL AND S. ABDUL NAZEER, JJ.)

JUSTICE K.S. PUTTASWAMY (RETD) AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 494 of 2012† with Nos. 829, 833, 932 of 2013, 37, 220 of 2015, 797 of 2016, 342, 000372 of 2017, Transfer Cases (C) Nos. 151-52 of 2013, Transfer Petitions (C) Nos. 312-13 of 2014, 921 of 2015, Contempt Petition (C) No. 144 of 2014 in Writ Petition (C) No. 494 of 2012, Contempt Petition (C) No. 674 of 2015 in Writ Petition (C) No. 829 of 2013, Contempt Petition (C) No. 470 of 2015 in Writ Petition (C) No. 494 of 2012, Contempt Petition (C) No. 444 of 2016 in Writ Petition (C) No. 494 of 2012, Contempt Petition (C) No. 608 of 2016 in Writ Petition (C) No. 494 of 2012, Contempt Petition (C) No. 844 of 2017 in Writ Petition (C) No. 494 of 2012 and SLP (Crl.) No. 2524 of 2014, decided on August 24, 2017

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† Under Article 32 of the Constitution of India

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I. Key rulings of the Court recognising Right to Privacy as basic core fundamental right

A. **Constitution of India — Pt. III and Arts. 21, 19, 14, 25, 28 and Preamble — Right to privacy — Held, is a basic fundamental right — It forms an intrinsic part of Art. 21 and freedoms guaranteed in Pt. III**

B. **Constitution of India — Pt. III and Arts. 21, 19, 14, 25, 28 and Preamble — Right to privacy — Being a basic fundamental right covered by Pt. III, decisions of Supreme Court in *M.P. Sharma*, AIR 1954 SC 300 and *Kharak Singh*, AIR 1963 SC 1295, to the extent they hold that it is not a fundamental right protected by the Constitution, overruled**

A Bench of three Judges of the Supreme Court, while considering the constitutional challenge to the Aadhaar card scheme of the Union Government noted in its order dated 11-8-2015 that the norms for and compilation of demographic biometric data by the 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 to privacy is in doubt in view of two decisions: the first—*M.P. Sharma*, AIR 1954 SC 300 ("*M.P. Sharma*"), rendered by a Bench of eight Judges and the second, in *Kharak Singh*, AIR 1963 SC 1295 ("*Kharak Singh*"), 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 case* and *Kharak Singh case* were founded on principles expounded in *A.K. Gopalan*, AIR 1950 SC 27 ("*Gopalan*"). *Gopalan case*, 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 Bench in *Rustom Cavasjee Cooper*, (1970) 1 SCC 248 ("*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*, (1978) 1 SCC 248 ("*Maneka*"), the minority judgment of Subba Rao, J. in *Kharak Singh case* was specifically approved and the decision of the majority was overruled.

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While addressing these challenges, the Bench of three Judges of the Supreme Court took note of several decisions of the Supreme Court in which the right to privacy has been held to be a constitutionally protected fundamental right. Those decisions include: *Gobind*, (1975) 2 SCC 148, *R. Rajagopal*, (1994) 6 SCC 632 and *PUCL*, (1997) 1 SCC 301 ("*PUCL*"). These subsequent decisions were rendered by the Benches of a strength smaller than those in *M.P. Sharma case* and *Kharak Singh case*. 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. On 18-7-2017, a Constitution Bench presided over by the Chief Justice considered it appropriate that the issue be resolved by a Bench of nine Judges. The order of the Constitution Bench read: "... it seems that it has become essential for us to determine whether there is any fundamental right to privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by the Supreme Court in *M.P. Sharma case* by an eight-Judge Constitution Bench, and also, in *Kharak Singh case* by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position."

Thus the following two questions arose for consideration by the present Bench:

1. Whether there is any fundamental right of privacy under the Constitution and if so, where is it located and what are its contours?

2. What is the ratio decidendi of *M.P. Sharma* and *Kharak Singh* cases and whether those cases are rightly decided?

Answering the reference in terms below, the nine-Judge Bench of the Supreme Court

Held :

Per curiam

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. The decision in *M.P. Sharma case* which holds that the right to privacy is not protected by the Constitution stands overruled. The decision in *Kharak Singh case* to the extent that it holds that the right to privacy is not protected by the Constitution also stands overruled. (Para 656)

M.P. Sharma v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077; *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332, *overruled on this point*

II. Nature and Facets of Right to Privacy — The Individual as Core of Constitutional Focus

C. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20(3), 25, 26, 28 and Preamble — Right to privacy — Natural, primordial, basic, inherent and inalienable right — It permeates the core of Preambular**

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philosophy underlying "liberty" and "dignity" as also human concepts of "life" and "personal liberty" enshrined in Art. 21 and wide ranging freedoms guaranteed under Pt. III, considered essential for a meaningful human existence — It also finds recognition in various international conventions as well as in Protection of Human Rights Act, 1993 — Absence of express enumeration of right to privacy is no ground for disregarding its omnipresence in Pt. III — Jurisprudence — Natural law and natural rights — Nature and basis of

D. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20, 25, 26, 28, 29 and Preamble — Right to privacy — Meaning — Nature, content and different facets of — Its three connotations viz. spatial control, decisional autonomy and informational control, are significant — It has a normative as well as descriptive function and negative as well as positive content — It has intrinsic as well as instrumental value — It comprehends physical as well as mental aspects — Merely because a precise definition cannot be formulated, it cannot be termed as vague and on that ground cannot be disregarded as a fundamental right — (*See also* Shortnotes *E*, *F*, *G*, *H*, *I*, *M*, *N*, *O*, *P*, *Q*, *R*, *S*, *T* and *U*)**

E. **Constitution of India — Pt. III and Preamble — Right to privacy — How inheres in different articles of Pt. III other than Art. 21; and the various rights contained within privacy, discussed and enumerated**

F. **Constitution of India — Pts. III and IV and Preamble — Intrinsic value and paramountcy of the individual and individual autonomy — Role of privacy in enabling individual autonomy and thus the enjoyment and exercise of liberty and freedoms — Held, 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 objective of Pt. III is to place citizens at centre stage and make the State accountable to them — Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Pt. III and embodying an aspiration for achieving socio-economic rights in Pt. IV**

— 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 — 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 — Privacy 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

G. **Constitution of India — Pt. III and Preamble — Privacy — Instrumental or facilitative role in enabling individual autonomy and thus, the enjoyment and exercise of liberty and freedoms — Explained in detail,**

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thereby clarifying its logically prior position to almost all other rights in Part III, and hence its nature as a core fundamental right

— The vigour and vitality of the various expressive freedoms guaranteed by the Constitution depends on the existence of a corresponding guarantee of cognitive freedom — Personal choices governing a way of life are intrinsic to privacy — The ability of the individual to protect a zone of privacy enables the realisation 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 — 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 — 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 — 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 — Thus, above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised — 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 — Recognising 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

— Privacy, thus, constitutes the basic, irreducible condition necessary for the exercise of personal liberty and the freedoms guaranteed by the Constitution — It is the inarticulate major premise in Part III of the Constitution — In the case of privacy, the case for judicial enumeration is especially strong — It is no doubt a fair implication from Art. 21, but also more — Privacy is a right or condition, logically presupposed by rights expressly recorded in the constitutional text, if they are to make sense — 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

H. **Constitution of India — Pt. III and Preamble — Right to privacy — Recognition of, as a fundamental right — Definitional uncertainty no reason against the same — There is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy**

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— 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 recognise the existence of the right to 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 there is no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution — As in the case of "life" under Art. 21, a precise definition of the term "privacy" may not be possible — However, definitional and boundary-setting challenges are not unique to the rights guaranteed in Art. 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 recognising a right and treating it as fundamental where there are strong constitutional grounds to do so

I. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20, 25, 26, 28 and Preamble — Right to privacy — Not an elitist construct — "Life" and "personal liberty" — No conflict between "life" and "personal liberty" under Art. 21 on ground that "life" pertains to the poor and "personal liberty" pertains to the rich as no such antipathy exists**

— Hence, there is no substance in the contention that right to privacy should be forsaken in the interest of welfare entitlements conferred to the poor as they are concerned only with economic well-being for subsistence of their "life" — Economic rights and civil and political rights are complementary and the former cannot be said to be subservient to the latter — Privacy is not a privilege only for a few and right to privacy is equally available to all — The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of the 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

J. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20, 25, 26, 28, 29 and Preamble — Right to privacy — Not just a common law right — Mere conferment of protection at common law would not be a bar to its constitutional recognition as an intrinsic part of Pt. III — 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 — Any interference with privacy by an entity covered by Art. 12's description of the "State" must satisfy the tests applicable to whichever one or more of the Pt. III freedoms the interference affects**

K. **Constitution of India — Pt. III — Common law right and fundamental right — Distinction — Both can be recognised simultaneously — In case of**

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interference by State, claim for violation of fundamental right would lie; and in case of interference by non-State actor, action at common law would lie — It is perfectly possible for an interest to simultaneously be recognised as a common law right and 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

L. **Common Law — Common law rights and Natural rights — Interrelationship, explained — 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 — Where a natural law right cannot be enforced at law, the common law right is evidently an instrument by which invasions into the valued interest in question can be addressed**

M. **Constitution of India — Pt. III and Preamble — Privacy — How protects and engenders heterogeneity and plurality and diversity**

— Personal choices governing a way of life are intrinsic to privacy — Thus, privacy protects heterogeneity and recognises the plurality and diversity of our culture — 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

N. **Constitution of India — Pt. III and Preamble and Art. 29 — Privacy in groups, and importance to conservation of cultural and educational rights**

— Solitude not always essential to privacy — 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 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 — The right to 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

O. **Constitution of India — Pt. III and Preamble — Privacy — Not lost in public places, but attaches to the person**

— Held, 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

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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

P. **Constitution of India — Pt. III and Preamble — Privacy distinguished from anonymity**

— 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

Q. **Constitution of India — Art. 14 — Guarantee against arbitrariness — How protects privacy as well — 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**

R. **Constitution of India — Pt. III and Art. 300-A — Right to privacy as an integral part of right to property — Right to privacy 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**

S. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20, 26, 28, 29 and Preamble — Right to privacy — Informational and technological privacy — Internet and its impact on privacy — Data mining processes, metadata, internet of things, wearable devices, social media networks, profiling, and "big data" or collection of data sets — Dataveillance and intrusive journalism — Privacy of children as a particular concern — Cyber attacks and terrorist activities — Right to control dissemination of personal information — Scope and limitations — Claim of right to privacy against State and non-State actors — Data regulation and protection — Data protection regimes — Principles they must follow — Safety of persons and legitimate State interests required to be balanced against right to privacy — Regulation of extent to which information can be stored, processed and used by non-State actors and protection of such information from State, needed — State must enact law to justify encroachment on privacy of individual — Law must be reasonable and non-arbitrary, means adopted by legislature must be proportional to object and needs sought to be fulfilled by law (*See* the tests laid down in Shortnotes *W* to *YB*)**

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T. **Constitution of India — Pt. III — Right to privacy — Other rights emanating from right to privacy, particularly in cyberspace, internet, social media, etc. — Right to identity, Right to control dissemination of personal information, Right to be forgotten — Privacy of children — Particular concern for — Commercial and other aspects of, discussed *per Kaul, J.***

U. **Constitution of India — Pt. III — Right to privacy — Information already in public domain, held, is not protected by privacy only if voluntarily parted with**

V. **Information Technology, Internet, Computer and Cyber Laws — Generally — Information — Facets of — Information has three facets: it is non-rivalrous, invisible and recombinant**

— Information is non-rivalrous 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 — Thirdly, information is recombinant in the sense that data output can be used as an input to generate more data output

III. Restrictions that may be placed on Right to Privacy — Tests and Principles for

W. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20, 25, 26, 28, 29 and Preamble — Right to privacy — Restriction on, by law — Requirements that the law must meet, explained in detail — Privacy is not an absolute right — Held, it is subject to restrictions and limitations made by the State to protect legitimate State interests or public interest**

— If a privacy claim specifically flows only from one of the expressly enumerated provisions under Art. 19, then the standard of review would be as expressly provided under Art. 19 — However, the possibility of a privacy claim being entirely traceable to rights other than Art. 21 is bleak — Without discounting that possibility, Art. 21 is the bedrock of the privacy guarantee — A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights to which the right to privacy in that situation relates

— In the context of Art. 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable — Not only the procedure, but the law must also be valid with reference to the encroachment on life and personal liberty under Art. 21 — An invasion of life or personal liberty and thus of privacy, must meet the threefold requirement of

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(*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

— 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 Pt. 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 Art. 21

— For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Art. 21 r/w Art. 14 if it is arbitrary and unreasonable; and under Art. 21 r/w Art. 19(1)(a) only if it relates to the subjects mentioned in Art. 19(2) and the tests laid down by the Supreme Court for such legislation or subordinate legislation to pass muster under the said article — Each of the tests evolved by the Supreme Court, qua legislation or executive action, under Art. 21 r/w Art. 14; or Art. 21 r/w Art. 19(1)(a) in the aforesaid examples must be met in order that State action passes 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 — 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

X. **Constitution of India — Pt. III and Preamble — Privacy — Legitimate State interests which would permit abridgement of right to privacy by enactment of law — Instantiated (non-exhaustively) — National security, including terrorist and cyber attacks, data mining to ensure that public resources are not siphoned off by the undeserving in social welfare programmes and schemes, prevention of crime, protecting interests of the Revenue, public health — Furthermore, digital platforms are a vital tool of ensuring good governance in a social welfare State**

Y. **Constitution of India — Pt. III and Preamble — Right to privacy — Restrictions on by law — Standard of compelling State interest — When may be applied**

— *Per Chelameswar, J.*, *Gobind case*, (1975) 2 SCC 148 resorted to the compelling State interest standard in addition to the Art. 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)

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— 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 the strictest scrutiny is the standard of compelling State interest to be used — As for others, the just, fair and reasonable standard under Art. 21 will apply — As to when the compelling State interest standard is to be employed, must depend upon the context of concrete cases

YA. **Constitution of India — Pt. III and Preamble — Privacy — Existence of actionable claim — Choice and Specification Test (*per Bobde, J.*)**

— 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 — 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 right bearer's actions, or otherwise — Such a formulation would exclude three recurring red herrings — 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 — Thirdly, neither would such a formulation require to hold that private information must be information that is inaccessible to all others

YB. **Constitution of India — Pt. III and Arts. 21, 19, 14, 20, 25, 26, 28, 29 and Preamble — Right to privacy — Tests of privacy — Reasonable expectation or legitimate expectation test — Efficacy of, and applicability of, discussed, *per Khehar, C.J., Agrawal, Chandrachud & Nazeer, JJ. and per Nariman, J.***

IV. Nature and Facets of Dignity — Fundamental and Integral Core of Fundamental Rights

YC. **Constitution of India — Pt. III and Preamble — Dignity — Fundamental and integral core of fundamental rights — Relationship of dignity, with life and liberty — Role of privacy as an essential aspect of dignity and in assuring dignity — Explained in detail**

— Human dignity is an integral part of the Constitution — Reflections of dignity are found in the guarantee against arbitrariness (Art. 14), the lamps of

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freedom (Art. 19) and in the right to life and personal liberty (Art. 21) — Held, there is 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 — 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 Pt. 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 — Privacy is the constitutional core of human dignity

— Privacy has both a normative/instrumental and descriptive/inherent function — At a normative or instrumental level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded — At a descriptive or inherent level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty — 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 — Constitutional Law — Values in Constitution — Dignity as a Constitutional value — Nature and scope — Place and position in the Constitution

YD. **Constitution of India — Pt. III and Preamble — Dignity — Intrinsic and instrumental value of, explained — Facilitative role of dignity in enjoyment and exercise of liberty and freedoms**

YE. **Constitution of India — Preamble and Pt. III — Dignity and Fraternity, Unity and Integrity of the Nation — Interrelationship between, explained — 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**

YF. **Constitution of India — Art. 14 — Dignity — Reflection of dignity in Art. 14, held, is found in guarantee against arbitrariness as well, in addition to other articles in Pt. III**

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YG. **Constitution of India — Art. 19 — Dignity — Reflection of dignity in Art. 19, held, is found in lamps of freedom contained in Art. 19, in addition to other articles of Pt. III**

V. Nature of Right to Life and Liberty and Restrictions that may be placed thereon as per "Procedure established by law"

YH. **Constitution of India — Pt. III and Preamble — Right to life and personal liberty — Nature of — Held, inherent or natural to human beings — They are not bestowed or conferred for the first time by the Constitution — Majority view in *ADM, Jabalpur*, (1976) 2 SCC 521, overruled — Dissenting view of *Khanna, J.* in *ADM, Jabalpur case*, held, is the correct position of law — 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 — Natural rights — What are, and their inalienable nature — Explained**

YI. **Constitution of India — Arts. 21, 19 and 14 — "Procedure established by law" — Substantive challenge to law on ground of violation of "procedure established by law" — The impugned law, held, must meet threefold requirements viz. (1) legality; (2) need defined in terms of legitimate claim; and (3) proportionality which ensures nexus between objects and means adopted to achieve them (*see also* Shortnote *YJ*)**

YJ. **Constitution of India — Art. 21 — "Procedure established by law" — Substituted in place of "due process" by Framers of the Constitution — Expression "due process" omitted as it might lead to vagaries of interpretation — In any case, "procedure established by law" as well as law itself must be shown to be just, fair and reasonable in case of challenge based on violation of Art. 21 (*see also* Shortnote *YI*) — Constitutional Law — Due process — Substantive due process**

VI. Preamble, Fundamental Rights and Judicial Review — Nature and Scope

YK. **Constitution of India — Preamble — Scope, nature and ambit of — Justice, liberty, equality, fraternity and dignity — Expanding dimensions of these constitutional values — Significance in human life — Held, 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 — Constitutional vision of protecting fundamental human values manifested in fundamental rights — Liberty and dignity inseparably interlinked with life**

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YL. **Constitution of India — Preamble and Pt. III — Dignity, Equality and Liberty — Foundational pillars of the Constitution — The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution**

YM. **Constitution of India — Pt. III — Interrelatedness and overlapping of fundamental rights, and cumulative and composite tests that laws abridging fundamental rights must meet, explained in detail — Liberty being the core that animates Pt. III**

— At a substantive level, the constitutional values underlying each article in Pt. III 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

— 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 — A better view of the whole scheme of Pt. III 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 — Words and Phrases — "Liberty"

YN. **Constitution of India — Pt. III — Interpretation — Court should endeavour to expand the reach and ambit of fundamental rights — It should strike a balance between changing needs and protection of fundamental rights**

YO. **Constitution of India — Pt. III — Supreme Court should interpret the nature and extent of constitutional guarantees with the object of achieving justice, liberty and dignity and determine whether any right claimed (such as the right to privacy), when not expressly guaranteed as a fundamental right, is implicit and inherent in Pt. III**

YP. **Constitution of India — Pt. III — Scope of Supreme Court's power of interpretation of the Constitution — Judicial interpretation of existence of a right (such as the right to privacy) as an inherent guarantee under Pt. III not an exercise in nature of constitutional amendment**

— 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 — There is nothing unusual in the judicial enumeration

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of one right on the basis of another under the Constitution — 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 — A Constitution has to be read in such a way that the 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

YQ. **Constitution of India — Pt. III and Preamble — Fundamental rights — Reason for constitutional protection of, and effect of such constitutional protection — 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 of even the Constitution — 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 — Moreover, when a right is conferred with an entrenched constitutional status in Pt. 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

YR. **Constitution of India — Pt. III, Arts. 32, 136 & 226 and Preamble — Judicial review of legislation — Guarantee against impermissible encroachments of fundamental rights — It must be recognised 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**

YS. **Constitution of India — Pts. III & IV and Preamble — Relationship between civil and political rights and socio-economic rights — Role of civil and political rights (CPR) in ensuring that benefits of socio-economic rights (SER) are justly and equitably distributed, explained**

— Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Pt. III and embodying an aspiration for achieving socio-economic rights in Pt. IV — Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects — Above all, it is the right to question, the right to scrutinise and the right to dissent which enables an informed citizenry to scrutinise the actions of the Government

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— 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 is that 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 monopolise 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 subserves the purpose of ensuring that socio-economic benefits actually permeate to the underprivileged 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

VII. Constitutional Interpretation

YT. **Constitution of India — Arts. 145 and 141 — Power of interpretation of the Constitution — 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 the Supreme Court alone under Art. 145(3) which is to decide what the interpretation of the Constitution shall be, and for this purpose the Constitution entrusts this task to a minimum of five Judges of the Court**

YU. **Constitutional Interpretation — Dynamic and evolving process — Constitutional doctrines should be evolved and expanded in consonance with evolution of society — Interpretation should be in present day socio-economic and political context and not in "originalist" context of era when Constitution was framed and came into existence — Original intent theory itself contemplates that the Constitution is organic in nature — While doing so, Court should leave open path for succeeding generations to meet new challenges — While roots of constitutional tree of justice remaining firm, continuous growth of rights in the form of its branches and leaves through interpretative process together constitute the "great brooding spirit" of Law**

YV. **Constitutional Interpretation — Constitution's "dark matter" — As important as express provisions — Implications can be derived in absence of express words — Supreme Court should probe into non-expressive aspect**

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keeping in mind aspiration for liberty of People of India — Court has to ascertain constitutional scheme, purpose and limitations, for which text of the Constitution not the only material — Constitutional Law — Silences of the Constitution/Implied Limitation

YW. **Constitutional Interpretation — Aids to construction — External aids — Foreign Constitutions/law/views — English decisions — Deserve to be considered but Constitution of India should be interpreted keeping in view socio-economic and political conditions of our country**

YX. **Constitutional Interpretation — Aids to construction — External aids — Historical background, Constituent Assembly Debates, etc. — Constituent Assembly Debates (CAD) — Held, can be considered by Court but cannot form conclusive basis for interpretation of a constitutional provision — CAD should not be regarded as a seminar on the issue debated**

VIII. Miscellaneous

YY. **Constitution of India — What does Constitution of a country signify**

YZ. **Constitution of India — Art. 14 and Arts. 21 & 19 — Guarantee against arbitrariness — Scope — Reiterated, no legislation can suffer from manifest arbitrariness — Moreover, not only is this principle applicable in case of direct challenges under Art. 14, but is also imported into the composite principle that "procedure established by law" which seeks to abridge life or liberty, or any aspect thereof, such as privacy, must be just, fair and reasonable — So also when applying the test of reasonableness under Art. 19**

Z. **Constitution of India — Art. 14 — Guarantee against arbitrariness — Scope — Proportionality as essential facet of — Held, 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**

ZA. **Constitution of India — Arts. 25, 19(1)(a) and 21 — Right to freedom of conscience — Aspects of, reflected in articles other than Art. 25**

— While the right to freely "profess, practise and propagate religion" may be a facet of free speech guaranteed under Art. 19(1)(a), the freedom of 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 Art. 21

ZB. **International Law — International Conventions — Should be read into constitutional rights and interpreted in consonance therewith in absence of any inconsistency with Constitution of India**

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Held :

Per Chandrachud, J. (for Khehar, C.J., Agrawal, J., himself and Nazeer, J.)

Interpretation of the Constitution

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 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. (Para 130)

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. (Para 259)

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. (Para 324)

International Conventions

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". Where there is a contradiction between international law and a domestic statute, the Court would give effect to the latter. In 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

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Per Chandrachud, J. (for Khehar, C.J., Agrawal, J., himself and Nazeer, J.) *(contd.)*

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. (Paras 148 and 154)

Article 12 of the Universal Declaration of Human Rights, recognises the right to privacy. Similarly, the International Covenant on Civil and Political Rights was adopted on 16-12-1979 and came into effect on 23-3-1976. India ratified it on 11-12-1977. The Protection of Human Rights Act, 1993 which has been enacted by Parliament refers to ICCPR as a human rights instrument. On 30-6-2014, a report was presented by the office of the United Nations High Commissioner for Human Rights. (Paras 148, 149 and 151)

Bachan Singh v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580; *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932; *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438; *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212, *affirmed*

"The Right to Privacy in the Digital Age", Report of the Office of the United Nations High Commissioner for Human Rights (30-6-2014), p. 5, para 13, *referred to*

Preamble to 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 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). 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. (Paras 107 and 108)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *relied on*

Sajjan Singh v. *State of Rajasthan*, (1965) 1 SCR 933 : AIR 1965 SC 845, *affirmed on this point*

Interrelationship between Fundamental Rights

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 interrelationship between rights. That is how the requirements of fairness and non-discrimination animate both the substantive and procedural aspects of

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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. The impact of the decision in *Cooper case* 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 interrelated, 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 watertight compartments, the post-*Maneka case* 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. (Paras 259 and 260)

Judicial recognition of the existence of a constitutional right to 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. 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. (Paras 321 and 260)

Rustom Cavasjee Cooper v. *Union of India*, (1970) 1 SCC 248, *followed*

Maneka Gandhi v. *Union of India*, (1978) 1 SCC 248, *affirmed* and *followed*

Satwant Singh Sawhney v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836; *Sunil Batra* v. *UT of Delhi*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Charles Sobraj* v. *Supt., Central Jail*, (1978) 4 SCC 104 : 1978 SCC (Cri) 542; *M.H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468; *Hussainara Khatoon (1)* v. *State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23; *Prem Shankar Shukla* v. *UT of Delhi*, (1980) 3 SCC 526 :

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1980 SCC (Cri) 815; *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353; *Attorney General of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413; *Paramanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721; *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520; *Virender Gaur* v. *State of Haryana*, (1995) 2 SCC 577; *Rudal Sah* v. *State of Bihar*, (1983) 4 SCC 141 : 1983 SCC (Cri) 798; *Umesh Kumar* v. *State of A.P.*, (2013) 10 SCC 591 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237; *Olga Tellis* v. *BMC*, (1985) 3 SCC 545, *considered*

Evolution of Privacy doctrine

The evolution of the comparative framework of law and history reflects the basic need of every individual to live with dignity. Urbanisation 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 interconnected lives. (Para 41)

R.M. Malkani v. *State of Maharashtra*, (1973) 1 SCC 471 : 1973 SCC (Cri) 399; *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965); *LIC* v. *Manubhai D. Shah*, (1992) 3 SCC 637; *'X'* v. *Hospital 'Z'*, (1998) 8 SCC 296; *Manoj Narula* v. *Union of India*, (2014) 9 SCC 1; *K.S. Puttaswamy* v. *Union of India*, (2015) 8 SCC 735; *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 641, *considered*

Roe v. *Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973); *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877); *Joginder Kumar* v. *State of U.P.*, (1994) 4 SCC 260 : 1994 SCC (Cri) 1172, *cited*

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; Gautam Bhatia: "State Surveillance and the Right to Privacy in India: A Constitutional Biography", *National Law School of India Review* (2014), Vol. 26(2), pp. 138-139; *William Blackstone* in his *Commentaries on the Laws of England* (1765); *John Stuart Mill*: *On Liberty* (1859); *Austin* in his *Lectures on Jurisprudence* (1869); Harvard Law Review, *Samuel D. Warren* and *Louis Brandeis*; 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, p. 261; James Madison, "Essay on Property", in Gaillard Hunt (Ed.), *The Writings of James Madison* (1906), Vol. 6, pp. 101-103; Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1890), Vol. 4, No. 5, p. 193; Thomas Cooley, *Treatise on the Law of Torts* (1888), 2nd Edn.; Dorothy J. Glancy, "The Invention of the Right to Privacy", *Arizona Law Review* (1979) Vol. 21, No. 1, p. 1; Alpheus Mason: *Brandeis : A Free Man's Life* (1956) 70, *referred to*

Privacy — Natural right

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. The human element in life is impossible to conceive without the existence of natural rights. 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. (Paras 42 and 46)

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John Locke: Second Treatise of Government (1760); William Blackstone: *Commentaries on the Laws of England* (1765), American Declaration of Independence (1776); *Declaration of the Rights of Man and of the Citizen* (1789) adopted by the French National Assembly; Roscoe Pound: The spirit of Common Law (1921), Roscoe Pound: The Revival of Natural Law (1942); *Edwin W. Patterson* in *A Pragmatist Looks at Natural Law and Natural Rights* (1955), Edwin W. Patterson, "A Pragmatist Looks At Natural Law and Natural Rights", in Arthur L. Harding (Ed.), *Natural Law and Natural Rights* (1955), pp. 62-63, *referred to*

Inalienability

Natural rights are inalienable because they are inseparable from the human personality. 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 and protects the right of the individual to choose and preserve liberty. 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. (Paras 42, 318 and 47)

Craig A. Ster and Gregory M. Jones; "The Coherence of Natural Inalienable Rights", *UMKC Law Review* (2007-08), Vol. 76(4), pp. 971-972; Ronald Dworkin: *Taking Rights Seriously* (Duckworth, 1977), *referred to*

Life, Liberty and dignity — Nature of, and Interrelationship between — Privacy as an essential aspect of dignity

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 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. 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. (Paras 118, 102 and 320)

Gobind v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *affirmed*

In *ADM, Jabalpur*, (1976) 2 SCC 521, the issue before the Supreme 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 majority Judges rejected the submission of the detenu 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. It was held "The safeguard of liberty is in the good sense of the people and in the system of representative and responsible Government

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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.". The judgments rendered by all the four Judges constituting the majority in *ADM, Jabalpur*, (1976) 2 SCC 521 are seriously flawed. 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 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. Khanna, J. 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. (Paras 132 and 136)

ADM, Jabalpur must be and is accordingly overruled. The decision in *Bhanudas Krishna Gawde*, (1977) 1 SCC 834, which followed *ADM, Jabalpur is also overruled*. (Para 139)

ADM, Jabalpur v. *Shivakant Shukla*, (1976) 2 SCC 521; *Union of India* v. *Bhanudas Krishna Gawde*, (1977) 1 SCC 834 : 1977 SCC (Cri) 208, *overruled*

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1, *relied on*

Buck v. *Bell*, 1927 SCC OnLine US SC 105 : 71 L Ed 1000 : 274 US 200 (1927); *Korematsu* v. *United States*, 1944 SCC OnLine US SC 135 : 89 L Ed 194 : 323 US 214 (1944), *referred to*

Siddhartha Mukherjee, *The Gene: An Intimate History* (Penguin Books Ltd., 2016) pp. 78-85, *referred to*

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. 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. There is 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

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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). (Paras 319, 318, 107 and 108)

Prem Shankar Shukla v. *UT of Delhi*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815; *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : 1984 SCC (L&S) 389; *Khedat Mazdoor Chetna Sangath* v. *State of M.P.*, (1994) 6 SCC 260 : 1994 SCC (Cri) 1643; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013; *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, (2010) 3 SCC 786 : (2010) 1 SCC (L&S) 894; *Mehmood Nayyar Azam* v. *State of Chhattisgarh*, (2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449; *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438; *Shabnam* v. *Union of India*, (2015) 6 SCC 702 : (2015) 3 SCC (Cri) 355; *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761 : (2016) 3 SCC (Civ) 551, *affirmed*

Aharon Barak: *Human Dignity—The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015), *cited*

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. (Para 119)

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 intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation 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

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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. 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. (Para 298)

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 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; a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21. (Para 127)

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

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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. Recognising 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. (Para 297)

Privacy represents the core of the human personality and recognises 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

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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. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves 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. (Paras 299 and 322)

Olga Tellis v. *BMC*, (1985) 3 SCC 545; *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, *affirmed*

Golak Nath v. *State of Punjab*, (1967) 2 SCR 762 : AIR 1967 SC 1643; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *Behram Khurshid Pesikaka* v. *State of Bombay*, (1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215, *referred to*

State of W.B. v. *Subodh Gopal Bose*, AIR 1954 SC 92 : 1954 SCR 587; *Ujjam Bai* v. *State of U.P.*, (1963) 1 SCR 778 : AIR 1962 SC 1621; *Moti Lal* v. *State of U.P.*, 1950 SCC OnLine All 197 : AIR 1951 All 257, *cited*

Privacy — Concept Connotations/Facets

Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves 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. (Para 322)

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. (Para 326)

Privacy has distinct connotations including (*i*) spatial control; (*ii*) decisional autonomy; and (*iii*) informational control. 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. (Para 248)

Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, p. 32; Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38 Issue 2, p. 566, *referred to*

An article published in 2017 titled "*A Typology of Privacy*" in the University of Pennsylvania Journal of International Law presented 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-

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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. (Paras 249 and 250)

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. (Para 323)

Malak Singh v. *State of P&H*, (1981) 1 SCC 420 : 1981 SCC (Cri) 169; *State of Maharashtra* v. *Madhukar Narayan Mardikar*, (1991) 1 SCC 57 : 1991 SCC (Cri) 1; *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632; *PUCL* v. *Union of India*, (1997) 1 SCC 301; *State of Karnataka* v. *Krishnappa*, (2000) 4 SCC 75 : 2000 SCC (Cri) 755; *Sudhansu Sekhar Sahoo* v. *State of Orissa*, (2002) 10 SCC 743 : 2003 SCC (Cri) 1484; *Sharda* v. *Dharmpal*, (2003) 4 SCC 493; *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496; *National Legal*

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Services Authority v. *Union of India*, (2014) 5 SCC 438; *ABC* v. *State (NCT of Delhi)*, (2015) 10 SCC 1 : (2016) 1 SCC (Civ) 1 : 7 SCEC 383; *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1, *affirmed*

The Court herein has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. (Para 324)

Entick v. *Carrington*, (1765) 19 St Tr 1029 : 95 ER 807; *Albert* v. *Strange*, (1849) 1 Mac & G 25 : 41 ER 1171; *Kaye* v. *Robertson*, 1991 FSR 62 (CA); *R.* v. *Director of Serious Fraud Office, ex p Smith*, 1993 AC 1 : (1992) 3 WLR 66 (HL); *Wainwright* v. *Home Office*, (2004) 2 AC 406 : (2003) 3 WLR 1137 (HL); *Douglas* v. *Hello! Ltd.*, 2001 QB 967 : (2001) 2 WLR 992 (CA); *Douglas* v. *Hello! Ltd. (No. 3)*, 2006 QB 125 : (2005) 3 WLR 881 (CA); *Prince of Wales* v. *Associated Newspapers Ltd.*, 2008 Ch 57 : (2007) 3 WLR 222 : 2006 EWCA Civ 1776 (CA); *Murray* v. *Express Newspapers plc*, 2009 Ch 481 : (2008) 3 WLR 1360 (CA); *R. (GC)* v. *Commr. of Police of the Metropolis*, 2011 UKSC 21 : (2011) 1 WLR 1230 (SC); *JR38, In re*, 2015 UKSC 42 : (2015) 3 WLR 155 (SC); *PJS* v. *News Group Newspapers Ltd.*, 2016 UKSC 26 : (2016) 2 WLR 1253 (SC); *Meyer* v. *Nebraska*, 1923 SCC OnLine US SC 150 : 67 L Ed 1042 : 262 US 390 (1923); *Olmstead* v. *United States*, 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928); *Eisenstadt* v. *Baird*, 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 92 S Ct 1029 : 405 US 438 (1972); *Paris Adult Theatre I* v. *Slaton*, 1973 SCC OnLine US SC 165 : 37 L Ed 2d 446 : 413 US 49 (1973); *Carey* v. *Population Services International*, 1977 SCC OnLine US SC 103 : 52 L Ed 2d 675 : 431 US 678 (1977); *Smith* v. *Maryland*, 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 (1979); *Planned Parenthood* v. *Casey*, 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833 (1992); *Minnesota* v. *Olson*, 1990 SCC OnLine US SC 61 : 109 L Ed 2d 85 : 495 US 91 (1990); *Kyllo* v. *United States*, 2001 SCC OnLine US SC 61 : 150 L Ed 2d 94 : 533 US 27 (2001); *Lawrence* v. *Texas*, 2003 SCC OnLine US SC 73 : 156 L Ed 2d 508 : 539 US 558 (2003); *Bowers* v. *Hardwick*, 1986 SCC OnLine US SC 165 : 92 L Ed 2d 140 : 478 US 186 (1986); *National Aeronautics and Space Admn. ("NASA")* v. *Nelson*, 2011 SCC OnLine US SC 155 : 178 L Ed 2d 667 : 562 US 134 (2011); *Whalen* v. *Roe*, 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977); *Nixon* v. *Administrator of General Services*, 1977 SCC OnLine US SC 152 : 53 L Ed 2d 867 : 433 US 425 (1977); *United States* v. *Jones*, 2012 SCC OnLine US SC 13 : 565 US 400 (2012); *Florida* v. *Jardines*, 2013 SCC OnLine US SC 18 : 569 US 1 (2013); *Riley* v. *California*, 2014 SCC OnLine US SC 71 : 180 L Ed 2d 285 : 573 US __ (2014); *National Media Ltd.* v. *Jooste*, (1996) 3 SA 262 (A); *Bernstein* v. *Bester*, 1996 SCC OnLine ZACC 2 : (1996) 2 SA 751 (CC); *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*, 1998 SCC OnLine ZACC 15 : (1999) 1 SA 6 (CC); *Investigating Directorate: Serious Economic Offences* v. *Hyundai Motor Distributors (Pty) Ltd.*, 2000 SCC OnLine ZACC 14 : (2001) 1 SA 545 (CC); *Minister of Home Affairs* v. *Fourie*, 2005 SCC OnLine ZACC 20 : (2006) 1 SA 524 (CC); *NM* v. *Smith*, 2007 SCC OnLine ZACC 6 : (2007) 5 SA 250 (CC); *Commr. of Official Languages* v. *Lavigne*, 2002 SCC OnLine Can SC 53 : (2002) 2 SCR 773; *Plant* v. *R.*, 1993 SCC OnLine Can SC 92 : (1993) 3 SCR 281; *Hunter* v. *Southam Inc.*, 1984 SCC OnLine Can SC 36 : (1984) 2 SCR 145; *R.* v. *Dyment*, 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417; *R.* v. *Walter Tessling*, 2004 SCC OnLine Can SC 68 : (2004) 3 SCR 432 : 2004 SCC 67; *Spencer* v. *R.*, 2014 SCC OnLine Can SC 34 : (2014) 2 SCR 212 : 2014 SCC 43; *J McB* v. *LE*, Case C-400/10 PPU, 2010 ECR I-nyr; *Varec SA* v. *État belge*, Case C-450/06, 2008 ECR I-581; *Niemietz* v. *Germany*, (1992) 16 EHRR 97; *Costello-Roberts* v. *United Kingdom*, (1993) 19 EHRR 112; *S and Marper* v. *United Kingdom*, 2008 ECHR 1581; *Uzun* v. *Germany*, Application No. 35623/05, decided on 2-9-2010 (ECHR) : (2010) 53 EHRR 852; *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)* v. *Spain*, C-468/10, decided on 24-11-2011, 2011 ECR I-12181 : ECLI : EU : C : 2011 : 777; *Digital Rights Ireland Ltd.* v. *Minister*, (2014) 3 WLR 1607 : C-293/12, decided on 8-4-2014

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(CJEU); *RE* v. *United Kingdom*, Application No. 62498/11, decided on 27-10-2015 : 2015 ECHR 947; *Roman Zakharov* v. *Russia*, Application No. 47143/06, decided on 4-12-2015 (ECHR) : (2016) 63 EHRR 17; *Artavia Murillo ("In Vitro Fertilization")* v. *Costa Rica*, 2012 SCC OnLine IACTHR 30 : Ser. C No. 257, decided on 28-11-2012 (Int-Am Ct HR); *Escher* v. *Brazil*, 2009 SCC OnLine IACTHR 54 : Ser. C No. 200, decided on 6-7-2009 (Inter-Am Ct HR), *referred to*

A v. *B plc*, 2003 QB 195 : (2002) 3 WLR 542 : (2002) EWCA Civ 337 (CA), *cited*

"Privacy", *Stanford Encyclopaedia of Philosophy* (2002), available at <https://plato.stanford.edu/entries/privacy/>; Julie E. Cohen, "What Privacy is For", *Harvard Law Review* (2013), Vol. 126, p. 1904; Judith Jarvis Thomson, "The Right to Privacy", *Philosophy and Public Affairs* (1975), Vol. 4, pp. 295-314; Richard Posner, *The Economics of Justice* (Harvard University Press, 1981); Robert Bork, *The Tempting of America: The Political Seduction of the Law* (Simon and Schuster, 1990); Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); William L. Prosser, "Privacy", *California Law Review* (1960), Vol. 48(3), pp. 383-423; Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38, Issue 2, p. 496; *Id*, at p. 497; Lord Neuberger, "Privacy in the 21st Century", the UK Association of Jewish Lawyers and Jurists' Lecture (28-11-2012), *referred to*

Informational privacy

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. 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. 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 aggregation, information provides a picture of the being: of things which matter and those that do not, of things to be disclosed and those best hidden. (Para 300)

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>.; Press Release 45/2017, available at <http://trai.gov.in/sites/default/files/PR_No.45of2017.pdf>, *referred to*

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 non-rivalrous, invisible and recombinant. Information is non-rivalrous 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

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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". Thirdly, information is recombinant in the sense that data output can be used as an input to generate more data output. (Para 303)

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), p. 153, *referred to*

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. 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". 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. The challenges which big data poses to privacy interests emanate from 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. (Para 304)

Yvonne McDermott: "Conceptualizing the Right to Data Protection in an Era of Big Data", *Big Data and Society* (2017), p. 1; 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 p. 159. The article attributes Daniel Solove's work on privacy as — Daniel J. Solove, *Understanding Privacy* (2008) 70; Yvonne McDermott, "Conceptualizing the Right to Data Protection in an Era of Big Data", *Big Data and Society* (2017), p. 4, *referred to*

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. (Para 306)

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. (Para 307)

Another aspect which data protection regimes seek to safeguard is the principle of non-discrimination which ensures that the collection of data should

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be carried out 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. (Para 308)

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 subserves 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. (Para 309)

Richard A. Posner: "Privacy, Surveillance, and Law", *The University of Chicago Law Review* (2008), Vol. 75, p. 251., *referred to*

The State does have a legitimate interest when it monitors the web to secure the nation against cyber attacks and the activities of terrorists. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold 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 manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate 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 threefold requirement for a valid law arises out of the mutual interdependence 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. (Paras 309 and 310)

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

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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 unauthorisedly 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. (Para 311)

A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other. 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. (Para 312)

Jeffrey M. Skopek: "Reasonable Expectations of Anonymity", *Virginia Law Review* (2015), Vol. 101, pp. 691-762, *referred to*

The Union Government constituted a Group of Experts on privacy under the auspices of the erstwhile Planning Commission. The Expert Group in its Report (dated 16-10-2012) 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: Notice, choice and consent, collection limitation, purpose limitation, Access and correction. Disclosure of information, Security, Openness, and Accountability. (Para 314)

"Report of the Group of Experts on Privacy" (16-10-2012), Government of India, available at <http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf>, *referred to*

During the course of the hearing of these proceedings, the Union Government has placed on the record an Office Memorandum dated 31-7-2017 by which it has

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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. It is expected that the Union Government shall follow up on its decision by taking all necessary and proper steps. (Para 315)

Constituent Assembly Debates

There is no substance in the submission that the Founding Fathers of the Constitution, having rejected the notion of privacy being a fundamental right, it would be outside the realm of constitutional adjudication for the Court to declare a fundamental right to privacy. 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. (Paras 251 and 258)

B. Shiva Rao: *The Framing of India's Constitution* (Indian Institute of Public Administration, 1967) Vol. 2, p. 75; B. Shiva Rao: *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration, 1968) pp. 219-20, *referred to*

The Constitution does not contain a separate article telling that privacy has been declared to be a fundamental right. Nor has the Court tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. 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, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21. (Paras 298 and 127)

Statutory protection to privacy

The submission 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, 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

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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. 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 a law creating a corresponding statutory right negates the rationale for a constitutional right or renders the constitutional right unnecessary. (Paras 263 to 265)

Elitist Construct

The submission that the right to privacy must be forsaken in the interest of welfare entitlements provided by the State suggesting 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 through history to wreak the most egregious violations of human rights. Above all, it is the right to question, the right to scrutinise and the right to dissent which enables an informed citizenry to scrutinise the actions of the 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 scrutinise 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 the Supreme Court. (Para 266)

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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 is that 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 monopolise 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 subserves the purpose of ensuring that socio-economic benefits actually permeate to the underprivileged 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. (Para 267)

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. (Para 270)

There is 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 sterilisation. 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. (Para 271)

Minister of Health v. *Treatment Action Campaign*, 2002 SCC OnLine ZACC 17 : (2002) 5 SA 721 (CC), *referred to*

Amartya Sen: *Development as Freedom* (Oxford University Press, 2000) pp. 178-79; Amartya Sen, *The Idea of Justice* (Penguin Books, 2009) at p. 339; Amartya Sen, *Development as Freedom* (Oxford University Press, 2000) at p. 180; Amartya Sen, *The Country of First Boys* (Oxford University Press) pp. 80-81; Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", *Public Law* (2017), at p. 394; *Minister of Health* v. *Treatment Action Campaign*, 2002 SCC OnLine ZACC 17 : (2002) 5 SA 721 (CC); Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", *Public Law* (2017), p. 395, *referred to*

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Common Law right

a 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 b 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 is subject to the range c of legislative annulments open to a majoritarian government. Any abridgment must meet the requirements prescribed by Article 21, Article 19 or the relevant freedom. (Para 272)

Anna Jonsson Cornell, "Right to Privacy", *Max Planck Encyclopaedia of Comparative Constitutional Law* (2015), *referred to*

d ***Substantive due process***

The submission is that the requirement of a valid law with reference to Article 21 is not conditioned by the notion of substantive due process which has been evolved in relation to the US Constitution but is inapposite in relation to the Indian Constitution. (Para 273)

Lochner v. *New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905); *Adair* e v. *United States*, 1908 SCC OnLine US SC 24 : 52 L Ed 436 : 28 S Ct 277 : 208 US 161 (1908) (Fifth Amendment); *Adkins* v. *Children's Hospital*, 1923 SCC OnLine US SC 105 : 67 L Ed 785 : 43 S Ct 22 : 261 US 525 (1923) (Fifth Amendment); *Tyson & Bro.* v. *Banton*, 1927 SCC OnLine US SC 63 : 71 L Ed 718 : 47 S Ct 426 : 273 US 418 (1927) and *New State Ice Co.* v. *Liebmann*, 1932 SCC OnLine US SC 63 : 76 L Ed 747 : 52 S Ct 371 : 285 US 262 (1932); *National Labor Relations Board* v. *Jones & Laughlin Steel Corpn.*, 1937 SCC OnLine US SC 79 : 81 L Ed 893 : 301 US 1 (1937); *West Coast Hotel Co.* v. *Parrish*, f 1937 SCC OnLine US SC 58 : 81 L Ed 703 : 57 S Ct 578 : 300 US 379 (1937), *referred to*

William B. Lockhart, et al, *Constitutional Law: Cases — Comments Questions* (West Publishing Co., 1986) 6th Ed, p. 394; B. Shiva Rao: *The Framing of India's Constitution : A Study* (Indian Institute of Public Administration, 1968) at p. 235; B. Shiva Rao, *The Framing of India's Constitution*, Vol. 2, pp. 20-36, 147-153; Granville Austin: *The Indian Constitution : Cornerstone of a Nation* (Oxford University Press, 1966) p. 103; *Constituent* g *Assembly Debates*, Vol. 7 (6-12-1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm>; Granville Austin, *The Indian Constitution : Cornerstone of a Nation* p. 105; *Constituent Assembly Debates*, Vol. 7 (13-12-1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p25a.htm>, *referred to*

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 h when the Constitution was adopted. In the Constituent Assembly, the Drafting

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Per Chandrachud, J. (for Khehar, C.J., Agrawal, J., himself and Nazeer, J.) *(contd.)*

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 viewpoints for decision by the House. Evidently "due process" was substituted with the expression "procedure established by law". "Liberty" was qualified by "personal". (Para 290)

The evolution of Article 21, since the decision in *Cooper*, (1970) 1 SCC 248 indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or watertight 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. (Para 291)

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 which is based on the 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. (Para 292)

Charanjit Lal Chowdhury v. *Union of India*, AIR 1951 SC 41; *Ram Krishna Dalmia* v. *S.R. Tendolkar*, AIR 1958 SC 538; *Burrakur Coal Co. Ltd.* v. *Union of India*, AIR 1961 SC 954; *Pathumma* v. *State of Kerala*, (1978) 2 SCC 1; *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675 : 1982 SCC (Tax) 30; *State of Bihar* v. *Bihar Distillery Ltd.*, (1997) 2 SCC 453; *State of A.P.* v. *K. Purushotham 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*, (2005) 8 SCC 534; *Bhanumati* v. *State of U.P.*, (2010) 12 SCC 1; *K.T. Plantation*

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(P) Ltd. v. *State of Karnataka*, (2011) 9 SCC 1 : (2011) 4 SCC (Civ) 414; *State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481; *Namit Sharma* v. *Union of India*, (2013) 1 SCC 745 : (2013) 1 SCC (Civ) 786 : (2013) 1 SCC (Cri) 737 : (2013) 1 SCC (L&S) 244; *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27; *State of A.P.* v. *McDowell & Co.*, (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; *BDA* v. *Aircraft Employees' Coop. Society Ltd.*, (2012) 3 SCC 442, *affirmed*

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. (Para 293)

State of Madras v. *V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, *affirmed*

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 threefold 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. (Para 325)

Above all, it must be recognised 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. (Para 295)

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. (Para 296)

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Per Chandrachud, J. (for Khehar, C.J., Agrawal, J., himself and Nazeer, J.) *(contd.)*

A.K. Gopalan v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248; *Sunil Batra* v. *UT of Delhi*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580; *Mithu* v. *State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405; *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152; *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90; *Mohd. Arif* v. *Supreme Court of India*, (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408; *Rajbala* v. *State of Haryana*, (2016) 2 SCC 445, *considered*

State of A.P. v. *McDowell & Co.*, (1996) 3 SCC 709; *A.S. Krishna* v. *State of Madras*, 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409, *cited*

Per Chelameswar, J. (concurring)

What is a Constitution

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. The degree of refinement of the Constitution depends upon the wisdom of the people entrusted with the responsibility of framing the Constitution. (Para 351)

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. (Para 352)

Interpretation of the Constitution

If a right is recognised by the express language of a statute, no question of implying such a right from 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. 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. The Constitution is the fundamental law adumbrating the powers and duties of the various organs of the State and rights of the subjects and limitations thereon, of the State. 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, the intensity of analysis to ascertain the purpose is required to be more profound. The implications arising from the scheme of the Constitution are "Constitution's dark matter" and

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are as important as the express stipulations in its text. The principle laid down by the Supreme Court in *Kesavananda*, (1973) 4 SCC 225, 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 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. 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. (Paras 344 to 346)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *relied on*

Romesh Thappar v. *State of Madras*, AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842; *Mithu* v. *State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405; *Olga Tellis* v. *BMC*, (1985) 3 SCC 545; *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645; *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666; *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat*, (1997) 7 SCC 622 : 1997 SCC (Cri) 1120 : 1997 SCC (L&S) 1784; *M.C. Mehta* v. *Kamal Nath*, (2000) 6 SCC 213; *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520; *Satwant Singh Sawhney* v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836; *Hussainara Khatoon (1)* v. *State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23; *T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342; *Devika Biswas* v. *Union of India*, (2016) 10 SCC 726; *Melbourne Corpn.* v. *Commonwealth*, (1947) 74 CLR 31 (Aust); *State of Bihar* v. *Lal Krishna Advani*, (2003) 8 SCC 361; *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956; *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479, *considered*

ADM, Jabalpur v. *Shivakant Shukla*, (1976) 2 SCC 521, *overruled*

A.K. Gopalan v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88, *held, overruled on this point*

Constituent Assembly Debates

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 canons 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 to 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. The 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 to privacy in the limited context of "searches" and "secrecy of correspondence". Dimensions of the right to privacy are much larger and were not fully examined. The question whether the expression

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"liberty" in Article 21 takes within its sweep the various aspects of the right to privacy was also not debated. (Para 350)

Fundamental rights — Need for — Interrelation

All 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. 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". The answer is that the Constituent 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. The purpose sought to be achieved is twofold. Firstly, to place the expression "liberty" beyond the argumentative process 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. The authority of the 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 clause; 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. It is now clearly held by the Supreme 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, etc. (Paras 353 to 363)

The interrelationship of Articles 19 and 21, if understood as 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.

(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 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. (Para 364)

Thus 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

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not enumerated. The expression "liberty" is capable of taking within its sweep not only the right to move freely, guaranteed under Article 19(1)(*d*); 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. 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. (Paras 365 and 362)

Whitney v. *California*, 1927 SCC OnLine US SC 126 : 71 L Ed 1075 : 274 US 357 (1927); *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Hans Muller of Nurenburg* v. *Supt., Presidency Jail*, AIR 1955 SC 367 : 1955 Cri LJ 876, *considered*

Right to Privacy — Concept/Facets/Connotations

For answering the present reference, the Supreme Court is only concerned with the question whether subjects who are amenable to the laws of this country have a fundamental right to privacy against the State. 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; whether it is possible to arrive at a coherent, integrated and structured statement explaining the right to privacy. (Paras 368 and 366)

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 recognise the existence of the right to 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 there is no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution. (Para 371)

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. Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which Governments do not approve. 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. The Constitution of India protects the liberty of all subjects guaranteeing the freedom of conscience and right to freely profess, practise and propagate religion. While the right to freely "profess, practise and propagate religion" may be a facet of free

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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. (Para 372)

Concerns of privacy arise when the State seeks to intrude into the body of subjects. 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 to privacy. It is true that this issue is pending before the Supreme Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area. 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 to privacy. The text of our Constitution recognises the freedom to travel throughout the country under Article 19(1)(*d*). The Supreme Court has already recognised that such a right takes within its sweep the right to travel abroad. A person's freedom to choose the place of his residence once again is a part of his right to privacy recognised by the Constitution of India under Article 19(1)(*e*) though the predominant purpose of enumerating the abovementioned 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 of appearance and apparel are also aspects of the right to 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 to 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 to 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 biometric data regarding all the residents of this country. The abovementioned 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 to privacy. (Para 373)

Nobody 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. Nobody 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. The decision-making process regarding the freedom of association,

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freedoms of travel and residence are purely private and fall within the realm of the right to privacy. It is one of the most intimate decisions. (Para 374)

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 defended. It is part of liberty within the meaning of that expression in Article 21. (Para 375)

Bijoe Emmanuel v. *State Of Kerala*, (1986) 3 SCC 615; *Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942); *Williams* v. *Fears*, 1900 SCC OnLine US SC 211 : 45 L Ed 186 : 179 US 270 (1900), *considered*

T. Sareetha v. *T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 : AIR 1983 AP 356; *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90, *referred to*

Right to privacy — Limitations

No legal right can be absolute. Every right has limitations. 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). (Para 377)

To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry; 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 that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen. (Para 378)

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 Article 21 is bleak. Without discounting that possibility, Article 21 is the bedrock of 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. (Para 379)

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. *Gobind*, (1975) 2 SCC 148 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"

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Per Chelameswar, J. (concurring) *(contd.)*

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 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 to privacy is to be found. (Para 380)

E.P. Royappa v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165; *United States* v. *Carolene Products Co.*, 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938), *considered*

Per Bobde, J. (concurring)

Right to privacy — Content

Privacy is the condition or state of being free from public attention to intrusion into or interference with one's acts or decisions. The right to be in this condition has been described as "the right to be let alone". 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. (Para 402)

Pavesich v. *New England Life Insurance Co.*, 50 SE 68 : 122 Ga 190 (1905) (Supreme Court of Georgia), *considered*

Black's Law Dictionary (Bryan Garner Edition) 3783 (2004); Samuel D. Warren and Louis D. Brandeis, "The Right To Privacy", 4 HARV L REV 193 (1890), *referred to*

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 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 authorisation for search of a person even where there is suspicion. 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. (Para 403)

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Per Bobde, J. (concurring) *(contd.)*

Narcotic Drugs and Psychotropic Substances Act, 1985, Section 42, *referred to*

Even in the ancient and religious texts of India, a well-developed sense of privacy is evident. 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 (Section 132). (Para 404)

Kautilya's Arthashastra 180-90 (R. Shamasastri, trans. 1915); A.A. Maududi, *Human Rights in Islam* (1982) at p. 27; Thessalonians 4:11 The *Bible*; James 5:16 The *Bible*, *referred to*

Privacy, that is to say, the condition arrived at after excluding other persons, is a basic prerequisite 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. 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. (Paras 405 and 406)

Right to privacy's connection with dignity and liberty

Privacy exists as a verifiable fact in all civilised 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. (Para 407)

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. However, 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 recognising a right and treating it as fundamental where there are strong constitutional grounds on which to do so. (Para 399)

"Life" must mean something more than mere animal existence. This view of Article 21 is connected to the constitutional value of dignity. Liberty is closely connected to dignity. Their relationship is 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. Privacy is, therefore, necessary in both its mental and physical aspects as an enabler of guaranteed freedoms. (Para 410)

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Per Bobde, J. (concurring) *(contd.)*

It is difficult to see how dignity—whose constitutional significance is acknowledged both by the Preamble and by the Supreme 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 to 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. (Para 411)

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. The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. (Paras 428.2 and 428.1)

Privacy and various express fundamental rights and freedoms

The right to 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 practise 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. (Para 412)

Ex facie, privacy is essential to the exercise of freedom of conscience and the right to profess, practise 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 recognises the right of a student attending an educational institution recognised 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. (Para 413)

The right to 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. (Para 414)

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Per Bobde, J. (concurring) *(contd.)*

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. (Para 415)

Test of privacy

One way of determining what a core constitutional idea is, could be by considering its opposite, which shows what it is not. Accordingly, privacy may be understood as the antonym of publicity. (Para 422)

Deoki Nandan v. *Murlidhar*, AIR 1957 SC 133 : 1956 SCR 756, *considered*

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. (Para 423)

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 signalling 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 right bearer's actions, or otherwise. (Para 424)

Such a formulation would exclude three recurring red herrings in the respondents' arguments before the Court. 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 to hold that private information must be information that is inaccessible to all others. (Para 425)

Review of privacy violations

The relationship between the right to 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

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Per Bobde, J. (concurring) *(contd.)*

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 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". 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 *Rustom Cavasjee Cooper case* (Paras 426 and 427)

Rustom Cavasjee Cooper v. *Union of India*, (1970) 1 SCC 248, *relied on*

Maneka Gandhi v. *Union of India*, (1978) 1 SCC 248, *affirmed*

Common Law Right

It is difficult to accept the submission that the right to privacy may at best be a common law right, but not a fundamental right guaranteed by the Constitution. Privacy 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. 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. Where a natural law right could not have been enforced at law, the common law right is evidently an instrument by which invasions into the valued interest in question by one's fellow man can be addressed. (Paras 391 to 393)

Semayne case, (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194, *considered*

P.J. Fitzgerald: *Salmond on Jurisprudence* (12th Edn., 1966) p. 217; Roscoe Pound: *The Spirit of the Common Law* (1921) p. 88; *Id*, at p. 92, *referred to*

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. 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 is that individuals governed by Constitution 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. The 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. (Paras 394 and 395)

The Court has already recognised the capacity of Constitutions to be the means by which to declare recognised natural rights as applicable qua the State, and

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Per Bobde, J. (concurring) *(contd.)*

of constitutional courts to enforce these declarations. The Supreme Court also recognises the true nature of the relation between the citizen and the State as well as the true character and utility of Part III. Accordingly, the objective of Part III is to place citizens at centre stage and make the State accountable to them. (Para 396)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *relied on*

PUCL v. *Union of India*, (2005) 2 SCC 436; *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1 : 4 SCEC 453, *affirmed*

Therefore, the assumption that a right must either be a common law right or a fundamental right is erroneous. 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 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 recognised as a common law right and a fundamental right. Where the interference with a recognised interest is by the State or any other like entity recognised 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. 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. 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. (Paras 397, 398 and 428.3)

Not just a derivative right but logically presupposed

There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. 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 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 a right or condition, logically presupposed by rights expressly recorded in the constitutional text, if they are to make sense. 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. (Para 416)

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645, *affirmed* and *followed*

Satwant Singh Sawhney v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Sunil Batra* v. *UT of Delhi*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Charles Sobraj* v. *Supt., Central Jail*, (1978) 4 SCC 104 :

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Per Bobde, J. (concurring) *(contd.)*

1978 SCC (Cri) 542; *M.H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468; *Hussainara Khatoon (1)* v. *State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23; *Prem Shankar Shukla* v. *UT of Delhi*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815; *T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342; *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96 : 1983 SCC (Cri) 353; *Attorney General of India* v. *Lachma Devi*, 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413; *Paramanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721; *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520, *affirmed*

Not recognising character of privacy as a fundamental right is likely to erode the very substratum 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 to privacy as a fundamental right. Any derecognition or diminution in the importance of the right to privacy will weaken the fundamental rights which have been expressly conferred. (Para 417)

Restrictions on privacy right

On the basis of cases holding that there is no fundamental right to trade on liquor it is submitted 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 to privacy is a fundamental right, that how it affects the plenary powers of the State can be considered. 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. (Para 419)

Legislations protecting privacy

There is no substance in the submission that in view of existence of several statutes which protect right to privacy, it is neither necessary nor appropriate to recognize privacy as a 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. (Para 420)

Per Nariman, J. (concurring)

Preamble of the Constitution

The Preamble of the Constitution 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. "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

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Per Nariman, J. (concurring) *(contd.)*

has been borrowed from the *Declaration of the Rights of Man and of the Citizen* of 1789, which defined "liberty" in Article 4. 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 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. (Paras 522 and 524)

John Stuart Mill, *On Liberty* (1859), *referred to*

But most important of all is the cardinal value of fraternity which assures the dignity of the individual. 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 unauthorised 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 these constitutional values in full, and is to be read in consonance with these values and with the international covenants. In the ultimate analysis, the fundamental right to 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. (Para 525)

Jacques-Charles Dupont de l'Eure : "Revue Républicaine, *referred to*

The legislature has also recognised the fundamental right to 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*, AIR 1954 SC 300 and *Kharak Singh*, AIR 1963 SC 1295. (Para 531)

M.P. Sharma v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077; *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332, *overruled on this point*

Girish Ramchandra Deshpande v. *CIC*, (2013) 1 SCC 212 : (2013) 1 SCC (L&S) 150, *cited*

Not absolute right — Restrictions

However, the right to privacy is not an absolute right. 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 the Supreme Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by the Supreme 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

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Per Nariman, J. (concurring) *(contd.)*

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. (Para 526)

The fundamental right to privacy once recognised, 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. (Para 488)

Khoday Distilleries Ltd. v. *State of Karnataka*, (1995) 1 SCC 574; *Krishan Kumar Narula* v. *State of J&K*, (1967) 3 SCR 50 : AIR 1967 SC 1368; *Har Shankar* v. *Excise and Taxation Commr.*, (1975) 1 SCC 737, *referred to*

International conventions

It has always been the law of the Supreme Court that international treaties must be respected. Our Constitution contains Directive Principle 51(*c*) which says that the State endeavour to foster respect for international law and treaty obligations in the dealings of organised 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 Parliament with such legislation 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. (Paras 458, 459 and 462)

Right to privacy — Inalienability

Given the international conventions and the fact that the right to privacy inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognised and given the status of being fundamental. The international covenants and declarations to which India is a party, namely, the 1948 Declaration and the 1966 Covenant both speak 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 it is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they are "inalienable"; that they inhere in every human being by virtue of the person being a human being. 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. (Paras 532, 534.1 and 535.2)

The majority judgment in *ADM, Jabalpur* is expressly overruled. Moreover, 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

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Per Nariman, J. (concurring) *(contd.)*

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 to privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being. (Para 525)

ADM, Jabalpur v. *Shivakant Shukla*, (1976) 2 SCC 521, *overruled*

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1, *relied on*

Seervai, *Constitutional Law of India* (4th Edn., Vol. II) Appendix p. 2219, *relied on*

State of W.B. v. *Subodh Gopal Bose*, AIR 1954 SC 92 : 1954 SCR 587; *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842; *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88; *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521, *cited*

Right to privacy — Dimensions/Facets

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 recognises 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. (Para 510)

The Court 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 cannot therefore, be accepted. (Para 521)

Katz v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967); *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965); *Roe* v. *Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973); *Loving* v. *Virginia*, 1967 SCC OnLine US SC 152 : 18 L Ed 2d 1010 : 87 S Ct 1817 : 388 US 1 (1967); *Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 62 S Ct 1110 : 316 US 535 (1942); *Prince* v. *Massachusetts*, 1944 SCC OnLine US SC 27 : 88 L Ed 645 : 64 S Ct 438 : 321 US 158 (1944); *Whalen* v. *Roe*, 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977), *considered*

Due process and Constituent Assembly Debates

As regards the argument stating that the Framers of the Constitution had expressly rejected the right to privacy being made part of the fundamental rights chapter of the Constitution, while it may be correct that Constituent Assembly Debates make interesting reading only to show what exactly the Framers had in

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Per Nariman, J. (concurring) *(contd.)*

mind when they framed the Constitution of India, but 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. 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*, (1978) 1 SCC 248 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*, (2014) 9 SCC 737, the Supreme Court, at para 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. (Paras 476 and 477)

Elitist Construct

There is no substance in the argument 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 and further, 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 of all, there is no 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 are persons who in today's completely different and changed world have cellphones, and would come forward to press the fundamental right to privacy, both against the Government and against other private individuals. There is no antipathy whatsoever between the rich and the poor in this context. It seems that this argument is made through the prism of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, by which the Aadhaar card is the means to see that various beneficial schemes of the Government filter down to persons for whom such schemes are intended. This nine-Judge Bench has not been constituted to look into the constitutional validity of the Aadhaar Act, but it has been constituted to consider a much larger question, namely, that the right to 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, therefore, is rejected. (Para 478)

Vague Concept

The argument that the right to privacy is so vague and amorphous a concept that it cannot be held to be a fundamental right, has also no force. Mere absence of a definition which would encompass the many contours of the right to privacy need not deter the Court from recognising privacy interests. These interests are broadly classified into interests pertaining to the physical realm and interests pertaining to the mind. 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

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Per Nariman, J. (concurring) *(contd.)*

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 foetus; rights of same sex couples—including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education, data protection, etc. (Para 479)

Huckle v. *Money*, (1763) 2 Wils KB 205 : 95 ER 768; *Da Costa* v. *Jones*, (1778) 2 Cowp 729 : 98 ER 1331; *Burnet* v. *Coronado Oil & Gas Co.*, 1932 SCC OnLine US SC 70 : 76 L Ed 815 : 285 US 393 (1932); *Extra-Judicial Execution Victim Families Assn.* v. *Union of India*, (2017) 8 SCC 417 : (2017) 3 SCC (Cri) 622; *Ram Deo Chauhan* v. *Bani Kanta Das*, (2010) 14 SCC 209 : (2011) 3 SCC (Cri) 727, *considered*

Information already in public domain

As regards the argument that if information is already in the public domain and has been parted with, there is no privacy right, it is to be stated that the question as to "voluntary" parting with information has to be dealt with, as has been dealt with, in the judgment in *Miller*, 1976 SCC OnLine US SC 70. *Miller case* was done away with by a Congressional Act of 1978. The Supreme Court in *Canara Bank* observed that the *statute* (Right to Financial Privacy Act, 1978) 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. (Paras 480 and 481)

District Registrar and Collector v. *Canara Bank*, (2005) 1 SCC 496, *affirmed*

United States v. *Miller*, 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976), *referred to*

Privacy not expressly stated fundamental right — Derivative right

The argument 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, is not acceptable. 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. 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. 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. (Paras 482 and 483)

Stanley v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969), *relied on*

Jolly George Varghese v. *Bank of Cochin*, (1980) 2 SCC 360; *Sunil Batra* v. *UT of Delhi*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Prem Shankar Shukla* v. *UT of Delhi*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815, *affirmed*

Martin v. *City of Struthers*, 1943 SCC OnLine US SC 85 : 87 L Ed 1313 : 63 S Ct 862 : 319 US 141 (1943); *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965); *Lamont* v. *Postmaster General*, 1965 SCC OnLine US SC 106 : 14 L Ed 2d 398 : 85 S Ct 1493 : 381 US 301 (1965); *Pierce* v. *Society of Sisters*, 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 45 S Ct 571 : 39 ALR 468 : 268 US 510

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Per Nariman, J. (concurring) *(contd.)*

(1925); *Winters* v. *New York*, 1948 SCC OnLine US SC 42 : 92 L Ed 840 : 68 S Ct 665 : 333 US 507 (1948); *Roth* v. *United States*, 1957 SCC OnLine US SC 106 : 1 L Ed 2d 1498 : 354 US 476 (1957), *cited*

Personal liberty if different from civil liberty

The argument that personal liberty is different from civil liberty need not detain the Court at all for the reason that at least qua the fundamental right to privacy — that right being intimately connected with the liberty of the person would certainly fall within the expression "personal liberty". (Para 474)

Facets of privacy

The submission that every facet of privacy is not protected (e.g. taxation laws requiring furnishing of information; in relation to a census; details and documents required to be furnished for the purpose of obtaining passport, prohibitions pertaining to viewing pornography) is really putting the cart before the horse. (Para 476)

Stanley v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969), *relied on*

Reasonable expectation test

The "reasonable expectation of privacy" test laid down by the decisions of the United States Supreme Court 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*, 1976 SCC OnLine US SC 70, which is that if information is voluntarily parted with, no right to privacy exists. In *Canara Bank*, (2005) 1 SCC 496, the Supreme Court referred to *Miller* and the criticism that it has received in the country of its origin, and refused to apply it in the Indian context. Also, soon after *Miller*, the Congress enacted the Right to Financial Privacy Act, 1978, doing away with the substratum of this judgment. (Para 483)

United States v. *Miller*, 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976); *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967); *Minnesota* v. *Carter*, 1998 SCC OnLine US SC 95 : 142 L Ed 2d 373 : 119 S Ct 469 : 525 US 83 (1998); *Obergefell* v. *Hodges*, 2015 SCC OnLine US SC 6 : 192 L Ed 2d 609 : 576 US __ (2015), *referred to*

Rakas v. *Illinois*, 1978 SCC OnLine US SC 205 : 58 L Ed 2d 387 : 99 S Ct 421 : 439 US 128 (1978); *Silverman* v. *United States*, 1961 SCC OnLine US SC 38 : 5 L Ed 2d 734 : 81 S Ct 679 : 365 US 505 (1961), *cited*

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Per Nariman, J. (concurring) *(contd.)*

Legislations protecting privacy

a The submission that since several statutes already protect the privacy rights of individuals, it is unnecessary to read a fundamental right to privacy into Part III of the Constitution merits rejection. 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. Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights b that the citizens of this country may enjoy *despite the governments that they may elect*. 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 c is an infringement of the inalienable right to privacy, the Supreme 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 the Supreme Court to declare such legislation to be void as offending the fundamental right to privacy. (Paras 489 and 490)

d ***Interpretation by Supreme Court***

According to the doctrine of originalism the first inquiry to be made is whether the Founding Fathers had accepted or rejected a particular right in the Constitution. The contention that it is not open to the Supreme Court 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 as it is only Parliament in its constituent e capacity that can introduce such a right, cannot be accepted. 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 the Supreme 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 five Judges of this Court. (Para 502)

f *McCulloch* v. *Maryland*, 4 L Ed 579 : 17 US (4 Wheat) 316 (1819); *Minister of Home Affairs* v. *Fisher*, 1980 AC 319 : (1979) 2 WLR 889 : (1979) 3 All ER 21 (PC), *relied on*

Ashok Tanwar v. *State of H.P.*, (2005) 2 SCC 104; *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324; *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441; *Aruna Roy* v. *Union of India*, (2002) 7 SCC 368 : 5 SCEC 310, *affirmed*

Waiver

g The argument that if 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 several complications, is devoid of substance. 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 h restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information

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Per Nariman, J. (concurring) *(contd.)*

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 statutory purpose concerned, 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. (Para 495)

Behram Khurshid Pesikaka v. *State of Bombay*, (1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215; *Olga Tellis* v. *BMC*, (1985) 3 SCC 545; *Basheshar Nath* v. *CIT*, 1959 Supp (1) SCR 528 : AIR 1959 SC 149, *explained*

Per Sapre, J. (concurring)

Right to privacy — Natural right

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 extinguishes with the human being. (Para 557)

Privacy — Meaning

Right to privacy is not defined in law except in the dictionaries. The courts, however, by process of judicial interpretation, have assigned meaning to this right in the context of specific issues involved on case-to-case basis. The most popular meaning of "*right to privacy*" is—"*the right to be let alone*". (Paras 559 and 560)

Gobind v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *explained* and *affirmed*

Constitution of India — Expansionist interpretation

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. 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 the answer to the questions can be found in the law laid down in the decided cases of the Supreme Court alone and one may not require taking the help of the law laid down by the American courts. (Paras 553 and 554)

It is true that while interpreting our laws, the English decisions do guide the Court in reaching to a particular conclusion arising for consideration. The law reports also bear the testimony that the Supreme Court especially in its formative years has taken the help of English cases for interpreting the provisions of our Constitution and other laws. However, in the last seven decades, the Supreme Court

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Per Sapre, J. (concurring) *(contd.)*

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. 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. (Paras 555 and 556)

Preamble of the Constitution

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. 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. (Para 541)

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" carries with it moral and spiritual imports. It also implies 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-fulfilment. The incorporation of expression "*Dignity of the individual*" in the Preamble is aimed essentially to show explicit repudiation of what people of this country had inherited from the past. Dignity of the individual is always considered the prime constituent of fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined. 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. (Paras 539, 543 and 544)

One cannot conceive an individual enjoying meaningful life with dignity without the right to privacy. Indeed, it is one of those cherished rights, which every civilised society governed by rule of law always recognises in every human being and is under obligation to recognise 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. (Para 558)

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. 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

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Per Sapre, J. (concurring) *(contd.)*

has to be given due weightage while interpreting articles of Part III of the Constitution. (Paras 545 and 546)

It is, therefore, the duty of the courts and especially the Supreme 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. (Para 547)

S.S. Bola v. *B.D. Sardana*, (1997) 8 SCC 522, *affirmed* and *followed*

Right to privacy as a fundamental right

There is no 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. "Right to privacy" has multiple facets and though such right can be classified as a part of fundamental right emanating from Articles 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. The right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition. (Paras 566 and 565)

Rustom Cavasjee Cooper v. *Union of India*, (1970) 1 SCC 248, *relied on*

Maneka Gandhi v. *Union of India*, (1978) 1 SCC 248; *PUCL* v. *Union of India*, (1997) 1 SCC 301; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *'X'* v. *Hospital 'Z'*, (1998) 8 SCC 296; *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496; *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*, (2013) 16 SCC 82, *affirmed*

Hind Overseas (P) Ltd. v. *Raghunath Prasad Jhunjhunwalla*, (1976) 3 SCC 259, *referred to*

Conclusion

The "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. Similarly, 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. (Paras 567 and 568)

The Reference Court cannot travel beyond the reference made and is confined to answer only those questions that are referred. (Para 571)

Naresh Shridhar Mirajkar v. *State of Maharashtra*, (1966) 3 SCR 744 : AIR 1967 SC 1, *followed*

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Per Kaul, J. (concurring)

Privacy — Inherent basic right

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. "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. 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. 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. (Paras 575 to 577 and 582)

The right to privacy may have different aspects starting from "the right to be let alone". 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 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. 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 (Para 583)

The Right to Privacy, (1890) 4 Harv L Rev 193; Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.*referred to*

Constitution of India

In Constitutional Law "the brooding spirit of law" is justice for all, being the cherished value. In our country the spirit inspired our Founding Fathers — the Sovereign, Socialist, Secular, Democratic Republic of India was founded on her very spirit. 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. 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 *grund norm*, that it is the Supreme Legal Document in the country. (Paras 596 and 597)

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Per Kaul, J. (concurring) *(contd.)*

The Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity. The very incorporation of Article 368 as a plenary amending 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. Therefore, the *theory of original intent* itself supports the stand that the original intention of the makers of the Constitution 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. (Paras 598, 601 and 602)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *relied on*

State of W.B. v. *Anwar Ali Sarkar*, AIR 1952 SC 75 : 1952 Cri LJ 510 : 1952 SCR 284; *Union of India* v. *Naveen Jindal*, (2004) 2 SCC 510, *affirmed* and *followed*

Gompers v. *United States*, 1914 SCC OnLine US SC 153 : 58 L Ed 1115 : 233 US 604 (1914); *Abrams* v. *United States*, 1919 SCC OnLine US SC 213 : 63 L Ed 1173 : 250 US 616 (1919), *cited*

The notions of goodness, fairness, equality and dignity can never be satisfactorily defined, they can only be experienced. They are felt. They were left 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. 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. (Paras 608 and 609)

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. 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. (Paras 610 and 611)

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Per Kaul, J. (concurring) *(contd.)*

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, Articles 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. (Para 614)

National Textile Workers' Union v. *P.R. Ramakrishnan*, (1983) 1 SCC 228 : 1983 SCC (L&S) 72, *affirmed* and *followed*

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. (Para 615)

Liberty and equality

Nariman, J. and Chandrachud, J., have emphasised the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them. 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 criticise someone but not share the criticism with the world. (Paras 618 and 619)

Campbell v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL), *relied on*

R. v. *Dyment*, 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417, *cited*

Geoffrey Robertson, QC and Andrew Nicol, QC, *Media Law*, 5th Edn., p. 265, *relied on*

Restrictions

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. (Para 639)

Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation), *referred to*

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Per Kaul, J. (concurring) *(contd.)*

Privacy and technology

The right to 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. 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. (Paras 644 and 584)

It was rightly expressed on behalf of the petitioners that 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. (Para 645)

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 recognised 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 recognise this important, natural, primordial right as a fundamental right. (Para 646)

Privacy concerns against State

States are utilising 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 the States is "profiling". The European Union Regulation of 2016 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, interests, reliability, behaviour, location or movements. 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. 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. (Paras 585 and 586)

Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation), *referred to*

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Per Kaul, J. (concurring) *(contd.)*

Privacy concerns against non-State actors

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. 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 wide web". (Paras 587 and 588)

Michael L. Rustad, SannaKulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 Harv JL & Tech 349; Tom Goodwin "The Battle is for Customer Interface", <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>, *referred to*

These digital footprints and extensive data can be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions and hence, is valuable information. This is the age of "big data". 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. (Para 590)

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. (Para 591)

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. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated. (Para 592)

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. (Para 593)

Privacy — Right control dissemination of personal information

An aspect of privacy is 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

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Per Kaul, J. (concurring) *(contd.)*

relationships such as with doctors and lawyers which requires an element of candour 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. (Para 620)

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. (Para 621)

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. (Para 623)

Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>, *referred to*

There is no justification for making all truthful information available to the public. The public does not have an interest in knowing all information that is true. Truthful information that breaches privacy may also require protection. 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. 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-definition, which prevents others from interfering with the meanings and values that the public associates with her. (Paras 624 to 626)

Haelan Laboratories Inc. v. *Topps Chewing Gum Inc.*, 202 F 2d 866 (2d Cir 1953), *referred to*

Mark P. McKenna, "The Right of Publicity and Autonomous Self-Definition", 67 U PITT L REV 225 at p. 282 (2005); William L. Prosser, "Privacy", 48 CAL L REV 383 (1960); Arthur R. Miller (The University of Michigan Press, 1971), *referred to*

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. 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. (Para 629)

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Per Kaul, J. (concurring) *(contd.)*

Patricia Sánchez Abril, "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee", 49 Am Bus LJ 63 at p. 69 (2012), *referred to*

The impact of the digital age results in information on the internet being permanent. 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 entitled to re-invent themselves and reform and correct their mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis. 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. (Paras 631 and 633)

Ravi Antani, "The Resistance of Memory : Could the European Union's Right to be Forgotten Exist in the United States?", 30 Berkeley Tech LJ 1173 (2015), *referred to*

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. (Para 634)

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 to privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society. (Para 635)

Thus, the European Union Regulation of 2016 has recognised 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 a similar right is to be recognised, 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 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. (Para 636)

Data protection

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 of the European Parliament and of the Council of 27-4-2016 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

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Per Kaul, J. (concurring) *(contd.)*

ensure that 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. (Para 637)

Principle of proportionality and legitimacy

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. (Para 638)

Report of group of experts on privacy

The Planning Commission of India constituted the Group of Experts on Privacy under the Chairmanship of Justice A.P. Shah, which submitted a report on 16-10-2012. It dealt with *Technological Neutrality and Interoperability with International Standards*; *Multi-Dimensional Privacy*; *Horizontal Applicability*; *Conformity with Privacy Principles*; *Co-Regulatory Enforcement Regime*. 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 an office memorandum of the Ministry of Electronics and Information Technology dated 31-7-2017 was presented, 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! (Paras 641 and 642)

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 to privacy cannot be left to be formulated by the legislature. It is a primal natural right which is only being recognised as a fundamental right falling in Part III of the Constitution of India. (Para 643)

Thus, privacy is not just a common law right, but a fundamental right falling in Part III of the Constitution of India. Privacy is a primal, natural right which is inherent to an individual. Let the right to 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. (Paras 574 and 650)

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ZC. **Constitution of India — Arts. 21, 19, 14, 20, 25, 26, 28 & 147 and Preamble — Eight Judge Bench decision of Supreme Court in *M.P. Sharma*, AIR 1954 SC 300 — Correctness — Held, though case not directly concerned with right to privacy, but to the extent it contradicts the present verdict that it is an inherent fundamental right protected under Pt. III, it stands overruled (Paras 27, 100, 316, 337, 341, 343, 344, 385 to 388, 417.11, 456, 469, 536 and 569)**

ZD. **Constitution of India — Arts. 21, 19, 14, 20, 25, 26, 28 & 147 and Preamble — Six Judge Bench decision of Supreme Court in *Kharak Singh*, AIR 1963 SC 1295 — Correctness — Held, first part of majority judgment correctly recognised right to privacy as a fundamental right, but second part of it held to the contrary, thus giving rise to an apparent contradiction in the judgment — Majority judgment to the extent of its inconsistency with the present verdict that right to privacy is intrinsically protected fundamental right under Pt. III, it stands overruled (Paras 24, 28, 101, 317, 340 to 344, 379, 386, 387, 475, 536 and 569)**

M.P. Sharma v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077; *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332, *overruled on this point*

A.K. Gopalan v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88, *held, overruled on this point*

Rustom Cavasjee Cooper v. *Union of India*, (1970) 1 SCC 248, *relied on*

Maneka Gandhi v. *Union of India*, (1978) 1 SCC 248; *Satwant Singh Sawhney* v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836; *Olga Tellis* v. *BMC*, (1985) 3 SCC 545; *Paramanand Katara* v. *Union of India*, (1989) 4 SCC 286 : 1989 SCC (Cri) 721; *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *affirmed*

Boyd v. *United States*, 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886); *Wolf* v. *Colorado*, 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949); *P.R. Metrani* v. *CIT*, (2007) 1 SCC 789; *Directorate of Revenue* v. *Mohd. Nisar Holia*, (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415; *Anuj Garg* v. *Hotel Assn. of India*, (2008) 3 SCC 1; *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33; *State of Maharashtra* v. *Bharat Shanti Lal Shah*, (2008) 13 SCC 5; *Suchita Srivastava* v. *UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570; *UT of Chandigarh* v. *Nemo*, 2009 SCC OnLine P&H 6154 : (2009) 3 RCR (Cri) 676; *UT of Chandigarh* v. *Nemo*, 2009 SCC OnLine P&H 6879; *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*, (2009) 9 SCC 551 : (2010) 1 SCC (Cri) 47; *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1; *Bhabani Prasad Jena* v. *Orissa State Commission for Women*, (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053; *Amar Singh* v. *Union of India*, (2011) 7 SCC 69 : (2011) 3 SCC (Civ) 560; *Ram Jethmalani* v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310; *Hindustan Times* v. *High Court of Allahabad*, (2011) 13 SCC 155; *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810; *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi*, (2012) 13 SCC 61 : (2014) 2 SCC (Civ) 131; *Saiyed Hussain Abbas Rizwi* v. *State Information Commission*, 2011 SCC OnLine Pat 1247 : (2011) 2 PLJR 663; *Lillu* v. *State of Haryana*, (2013) 14 SCC 643 : (2014) 4 SCC (Cri) 311, *referred to*

Semayne case, (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194, *cited*

ZE. **Constitution of India — Arts. 21 and 14 — Right to privacy — Cannot be denied even if only a miniscule fraction of country's population is affected by violation of such right — Such de minimis hypotheses adopted in *Suresh Kumar Koushal*, (2014) 1 SCC 1, not acceptable — Doctrines and Maxims — De minimis hypothesis**

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Held :

Per Chandrachud, J. (for Khehar, C.J., Agrawal, J., himself and Nazeer, J.)

In *Suresh Kumar Koushal*, (2014) 1 SCC 1, the proceedings before the Supreme Court arose from a judgment of the Delhi High Court holding that Section 377 of the 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. The Supreme Court, however, found fault with the basis of the judgment of the High Court on the ground that only *a miniscule fraction of the country's population constitutes 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. Thus the decision in *Suresh Kumar Koushal case* 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 case* rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, the manner in which *Koushal case* has dealt with the privacy-dignity based claims of LGBT persons on this aspect is not acceptable. Since the challenge to Section 377 is pending consideration before a larger Bench of the Supreme Court, the constitutional validity is left to be decided in an appropriate proceeding. (Paras 142 to 147)

Suresh Kumar Koushal v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1, *doubted*

Indira Nehru Gandhi v. *Raj Narain*, 1975 Supp SCC 1, *referred to*

Per Kaul, J. (concurring)

Dr Chandrachud, J. has rightly held that the right to 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 upon to take what may be categorised as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy. (Para 636)

Mosley v. *News Group Papers Ltd.*, 2008 EWHC 1777 (QB), *considered*

Suresh Kumar Koushal v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1, *doubted*

Naz Foundation v. *State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94, *referred to*

Von Hannover v. *Germany*, (2004) 40 EHRR 1, *cited*

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231. 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938), *United States* v. *Carolene Products Co.* 532*a-b*
232. 1937 SCC OnLine US SC 79 : 81 L Ed 893 : 301 US 1 (1937), *National Labor Relations Board* v. *Jones & Laughlin Steel Corpn.* 486*d-e* *a*
233. 1937 SCC OnLine US SC 58 : 81 L Ed 703 : 57 S Ct 578 : 300 US 379 (1937), *West Coast Hotel Co.* v. *Parrish* 486*d-e*
234. 1932 SCC OnLine US SC 70 : 76 L Ed 815 : 285 US 393 (1932), *Burnet* v. *Coronado Oil & Gas Co.* 557*b-c*
235. 1932 SCC OnLine US SC 63 : 76 L Ed 747 : 52 S Ct 371 : 285 US 262 (1932), *New State Ice Co.* v. *Liebmann* 486*d-e* *b*
236. 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928), *Olmstead* v. *United States* 370*b-c*, 383*e-f*, 434*c*, 435*g*, 436*d*, 588*b*, 588*f*, 604*g-h*
237. 1927 SCC OnLine US SC 126 : 71 L Ed 1075 : 274 US 357 (1927), *Whitney* v. *California* 524*f*
238. 1927 SCC OnLine US SC 105 : 71 L Ed 1000 : 274 US 200 (1927), *Buck* v. *Bell* 419*e* *c*
239. 1927 SCC OnLine US SC 63 : 71 L Ed 718 : 47 S Ct 426 : 273 US 418 (1927), *Tyson & Bro.* v. *Banton* 486*d-e*
240. 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 45 S Ct 571 : 39 ALR 468 : 268 US 510 (1925), *Pierce* v. *Society of Sisters* 434*a-b*, 434*b-c*, 578*a-b*, 589*e-f*
241. 1923 SCC OnLine US SC 150 : 67 L Ed 1042 : 262 US 390 (1923), *Meyer* v. *Nebraska* 433*e*, 434*b* *d*
242. 1923 SCC OnLine US SC 105 : 67 L Ed 785 : 43 S Ct 22 : 261 US 525 (1923), *Adkins* v. *Children's Hospital* 486*d-e*
243. 1919 SCC OnLine US SC 213 : 63 L Ed 1173 : 250 US 616 (1919), *Abrams* v. *United States* 623*f-g*
244. 1914 SCC OnLine US SC 153 : 58 L Ed 1115 : 233 US 604 (1914), *Gompers* v. *United States* 623*a-b*
245. 1908 SCC OnLine US SC 24 : 52 L Ed 436 : 28 S Ct 277 : 208 US 161 (1908), *Adair* v. *United States* 486*d-e* *e*
246. 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905), *Lochner* v. *New York* 486*b-c*
247. 50 SE 68 : 122 Ga 190 (1905) (Supreme Court of Georgia), *Pavesich* v. *New England Life Insurance Co.* 540*a*
248. 1900 SCC OnLine US SC 211 : 45 L Ed 186 : 179 US 270 (1900), *Williams* v. *Fears* 530*c-d* *f*
249. 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886), *Boyd* v. *United States* 349*f-g*, 383*e-f*, 433*a-b*, 511*c-d*, 512*a*
250. 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877), *Munn* v. *Illinois* 378*d*, 384*a-b*, 543*d*, 543*f*, 571*b-c*
251. (1849) 1 Mac & G 25 : 41 ER 1171, *Albert* v. *Strange* 426*d*, 426*e-f* *g*
252. 4 L Ed 579 : 17 US (4 Wheat) 316 (1819), *McCulloch* v. *Maryland* 583*g*, 584*f-g*, 584*g-h*
253. (1778) 2 Cowp 729 : 98 ER 1331, *Da Costa* v. *Jones* 555*e-f*
254. (1765) 19 St Tr 1029 : 95 ER 807, *Entick* v. *Carrington* 426*b-c*, 555*e*
255. (1763) 2 Wils KB 205 : 95 ER 768, *Huckle* v. *Money* 555*c-d*
256. (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 : 77 ER 194, *Semayne case* 352*d-e*, 352*e*, 426*a-b*, 514*a-b*, 535*a-b*, 535*b*, 537*b-c*, 537*c-d*, 555*a*, 555*b* *h*

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I. Mr Kapil Sibal, Senior Advocate, for the petitioners

1. The present submissions are being filed for the limited purpose of assisting this Hon'ble Court on the question of whether "the right to privacy" is a fundamental right under Part III of the Constitution. The instant submissions do not concern the merits of the main matters and the validity of the Aadhar legislation. These submissions address the questions raised in the order dated 18-7-2017[1], the relevant portion of which reads as under:

> "In our opinion to give a quietus to the kind of controversy raised in this batch of cases, once and for all, it is better that the ratio decidendi of M.P. Sharma Kharak Singh is scrutinised 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…
>
> 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"

2. The instant submissions are broadly divided into two parts:

2.1. Part I deals with the legal and practical aspects relating to the right to privacy in today's context; and

2.2. Part II deals with decisions of this Hon'ble Court on the right to privacy.

1 *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 641

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PART I

Delineating the right to privacy in today's context

3. At the outset, it may be noted that the challenges confronting both citizens and State today are quintessentially different from those addressed by the Supreme Court in *M.P. Sharma* v. *Satish Chandra*[2] and *Kharak Singh* v. *State of U.P.*[3] The aforesaid decisions cannot possibly be relevant to appreciate the contours of the right to privacy in the present societal context where advances in the technology and communication have transformed the relationship between stakeholders inter se and in particular the relationship between the State and its citizens. This Hon'ble Court should, therefore, in the context of changed circumstances address the issue of privacy afresh and ought not to consider the issue of privacy from the prism of an era where issues confronting temporary society did not exist.

4. The right to privacy as an inalienable natural right is based on the classic premise of the individual's wish to be alone[4]. However, the contours of the right needs to be understood with changing times. Rapid advances in science and technology pose considerable challenges in delineating the exact contours of the right.

5. Thus, a simplistic definition of the right to privacy as "*to be let alone*" is under-inclusive. Privacy is a right which protects the inner sphere of the individual from interference from State and non-State actors and allows the individual to make autonomous life choices regarding the construction of her identity, not only in seclusion from others but in the personal, familial and social contexts. Privacy expands or contracts depending on the way the three basic variables of subject-matter, relations, and space present themselves in the context of a concrete case.[5]

6. Thus, privacy relates to one's physical being, one's thoughts, and inter-personal relationships, private communication, information and data which one does not wish to be shared and be put in the public domain.

7. With advances in technology the State in the 21st century is far more powerful than it ever was, and is capable of entering a citizens' house without

2 1954 SCR 1077 : AIR 1954 SC 300 : 1954 Cri LJ 865

3 (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

4 Samuel Warren and Louis D. Brandeis, See 4 Harvard Law Rev 193. "*What was truly creative in the article was their Insistence that privacy, the right to be let alone—was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests.*"

"Once a civilization has been made the distinction between the "outer" and the "inner" man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between rights inherent and inalienable, and rights that are in the power of the government to give and take away, between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called — the idea of a private sphere in which man may become and remain himself."

5 *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 1st Edn., 2012), p. 974.

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knocking at his/her door. Evolution of technology has facilitated easy intrusion into the life of individuals by the State and non-State actors.

8. To address the issue of the right to privacy, we must be cognizant of the fact that in accessing technology, a citizen willy-nillly shares a lot of his data. This applies to mobile phones, smart phones[6], tablets, smart TVs, taking a ride with app-based cabs, giving information through government mandate to banks, for public distribution networks, etc.

9. The concept of privacy therefore has to be viewed in light of two qualitative relationships: one between the citizen and the State; the other between citizens and non-State actors[7]. Issues of privacy in respect of both have to be dealt with separately. The first has constitutional implications and the second relates to confidentiality. Thus, the right to privacy has both horizontal and vertical attributes.

10. The State may at times, require access to personal information for public good. In this context, the citizen may be obliged to give to such information for enhancing citizens' entitlements, access to services, prevention or detection of crime, national investigation and prosecution of criminal offences.

11. In respect of data shared with the State on account of a legal mandate or otherwise, the issue of privacy is directly linked with fundamental rights enshrined in the Constitution. If for example, an individual's movements throughout the country are tracked, even though he has a fundamental right to move freely throughout the territory of India, State interference by any means

6 In *Riley* v. *California*, 134 S Ct 2473 (2014), the Supreme Court of the United States unanimously held that the warrantless search of the cellphone of an accused was not a reasonable search:

> One of the most notable distinguishing features of modern cell phones is their immense storage capacity…
>
> … storage capacity of cellphones has several interrelated consequences for privacy. First, a cellphone collects in one place many distinct types of information — an address, a note, a prescription, a bank statement, a video — that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labelled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier…
>
> … Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception."

7 In *United States* v. *Jones*, 132 S Ct 945 (2012), Sotomayor, J.'s concurring opinion, while holding that extended GPS monitoring of a suspect by the law enforcement agencies violated his right to privacy, observed that "*it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties*" [*Smith* v. *Maryland*, 99 S Ct 2577 : 442 US 735 (1979); *Couch* v. *United States*, 409 US 322 (1973); and *United States* v. *Miller*, 96 S Ct 1619 : 425 US 435 (1976)]

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whatsoever including through technology would directly impact the citizen's right to privacy[8]. This is also true if the State through technology accesses conversations of individuals sitting in their homes, in respect of which every individual has a legitimate expectation of privacy. Consequently, the right to privacy is inherent in the right to life and personal liberty enshrined in Article 21 of the Constitution.[9]

12. The second aspect relating to the right to privacy in the context of State action relates to data, which is shared either by law or otherwise with

8 In *Kyllo* v. *United States*, 121 S Ct 2038 (2001) — The US Supreme Court held that the thermal imaging of the house of a persons suspected of growing marijuana was a violation of his right to privacy:

"The *Katz*, 389 US 347 (1967) 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 edn. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S Ct Rev 173, 188; *Carter*, 525 US 83 at 97 (1998) : 119 S Ct 469 (Scalia, J., concurring). But see *Rakas*, 439 US 128 at 143-144, n. 12 (1978) : 99 S Ct 421. While it may be difficult to refine *Katz*, 389 US 347 (1967) when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of hornes —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*, 81 S Ct 679 : 365 US 505 at p. 512 (1961), *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. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search*

Limiting the prohibition of thermal imaging to "intimate details" would 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," *Oliver* v. *United States*, 80 L Ed 2d 214 : 104 S Ct 1735 : 466 US 170 at p. 181 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which *39 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."

9 It is interesting that Article 14(1) of the Constitution of the Islamic Republic of Pakistan guarantees the right to privacy as a fundamental right:

"Inviolability of dignity of man etc.

(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable."

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the State. Such data is shared for specific purposes. For instance, the data shared for getting a passport is for the specific purpose of exercising the fundamental right of citizens to travel. If any other organ of the State accesses that data and breaches confidentiality between citizens and such authority, that per se would be an invasion of the right to privacy. It is also true of data relating to a person's physical attributes shared with a government hospital. Access to such data by another government agency, to which the citizen has not consented, would also infringe the citizen's right to privacy.

13. It is submitted that though the right to privacy is a fundamental right, the same is not absolute. However, the ability of the State to assume or exercise any power that would impinge upon the right to privacy is limited. Where the State infringes the right to privacy, it should atleast meet the following tests, which limit the discretion of the State[10]:

(*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.

14. These are some of the safeguards to protect the privacy of citizens. Whether a person's right to privacy has been infringed by the State will have to be determined in light of limitations on the discretionary exercise of power by the State, as enunciated above. That determination will ultimately depend on the issues that arise in the facts and circumstances of each case.

15. The relationship between citizens and non-State actors qua which data is willingly provided by the citizen for enhancing the citizen's own experience is subject to confidentiality to the extent confidentiality can be maintained. There may be platforms where such confidentiality cannot be maintained. In such cases, where there is a dilution of the right to confidentiality, the citizen should be made aware that when sharing such data, there may be a possibility of it being further shared. Knowledge of such

10 As held by the European Court of Human Rights in *S. & Marper* v. *United Kingdom*, 2008 ECHR 1581:

> 101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient". While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see *Coster* v. *United Kingdom* [GC], No. 24876/94, § 104, 18 January 2001 with (further references).

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possibility would enable an informed exercise of the right to confidentiality by citizens.

16. The right to privacy also enjoins the State to put in place a robust data protection law, that obligates non-State actors to ensure that data shared by citizens is secure and that the breach of any confidentiality would be visited with legal consequences. The principles underlying such data protection law should cover the following amongst others:

(*i*) That the entity or individual housing confidential information will need to put in place an open and transparent system for management of personal information including putting in place a privacy policy;

(*ii*) Collection of solicited personal information and receipt of unsolicited personal information including giving notice about the collection of information.

(*iii*) How personal information can be used and disclosed (including overseas).

(*iv*) Maintaining the quality of personal information secured.

(*v*) The right of individuals to access and correct their personal information.

17. Instances of statutes that protect privacy in the context of data shared by citizens with non-State actors can be found in different jurisdictions[11].

PART II

Case law analysis of the right to privacy as fundamental right under Article 21

18. It is respectfully submitted that right to privacy is a quintessential right flowing out of the bouquet of rights under enshrined under Article 21.

19. The judgments in *M.P. Sharma* v. *Satish Chandra*[2], (8 Hon'ble Judges) and *Kharak Singh* v. *State of U.P.*[3], (6 Hon'ble Judges) which had made certain observations that right to privacy was not a "guaranteed right" under Part III were premised on an understanding of Part III as per the law laid down in *A.K. Gopalan*[12].

11 *USA*: Financial Modernization Act, 15 U.S.C. s. 6801-6809 (1999) — requires financial institutions to have a privacy policy; The Cable Communications Policy Act, 47 U.S.C. s. 551 (1984) — regulates cable companies and incorporates specific privacy measures; Videotape Privacy Protection Act, 18 U.S.C. s. 2710 (1988) — prohibits video stores disclosure of customer records; Telecommunications Act, 47 U.S.C. s. 609 (1996) — privacy measures to limit marketing by telephone companies.

Canada: Federal statute — The Personal Information Protection and Electronic Documents Act, 2000 governing the private sector; Provincial laws governing private entities particularly in the health sector.

France: Loi Informatique Et Libertes Act N° 78-17 of 6-1-1978 — regulates processing of personal data by public and private entities to ensure that there is no violation inter alia of human rights, privacy or individual or public liberties.

12 *A.K. Gopalan* v. *State of Madras*, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 1 Cri LJ 1383.

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20. *A.K. Gopalan*[12] was specifically overruled in *Rustom Cavasjee. Cooper* v. *Union of India*[13] (11 Hon'ble Judges) and thereafter further clarified to be so in *Maneka Gandhi* v. *Union of India*[14] (7 Hon'ble Judges).

21. Thereafter, consistently for almost four and half decades, this Hon'ble Court has in a catena of judgments held that *A.K Gopalan*[12] is bad law[15]. It is too late in the day to urge that the distinctive rights test of Gopalan ought to be applied.

22. More importantly, once *Gopalan*[12] was held to be bad law by an eleven-Judge Bench in *Rustom Cavasjee Cooper*[13], smaller Benches of this Hon'ble Court have consistently and rightly that the observations in *M.P. Sharma*[2] and the majority judgment in *Kharak Singh*[3] on the right to privacy were not good law.

23. This Court has applied the doctrine of implied overruling in a catena of decisions and has held once the decision of the smaller Bench has been overruled by a larger Bench; the decisions following the decision of the smaller Bench will not be considered the good law.[16]

24. In any event, it is submitted that the reliance on the observations in *M.P. Sharma*[2] to hold that the there is no fundamental right to privacy is completely misconceived as the observations of this Court on privacy were made in the context of Article 20(3) and the power of search and seizure. This Court did not examine the extent and cantours of Article 21. Further, the said decision was rendered when *A.K. Gopalan*[12] was the law of land which was premised on the basis of distinctiveness of each of fundamental rights.

25. The judgment in *Kharak Singh*[3] (per the majority of four Judges) relied upon *Gopalan*[12] (p. 345). The majority struck down domiciliary visits under clause (*b*) of Regulation 236 as violative of Article 21. However, clauses (*c*), (*d*), and (*e*) which dealt with periodic enquiries by officers not below the rank of a Sub-Inspector, reporting by constables and chowkidars of movement and verification of movement and absences was held to be not covered under Part III. In that context, it was observed that the right to privacy is not a "guaranteed" right under the Constitution.

26. However, the minority view of Subba Rao, J. relying upon judgment in *Wolf* v. *Colorado*[17], rightly observed that:

> "... Further, the right to personal liberty takes only a right to be free from restrictions placed on movements, but also free from encroachments

13 (1970) 1 SCC 248

14 (1978) 1 SCC 248

15 See *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1, paras 30, 56, 57, 59, 61 & 172; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, para 20 : (2007) 1 SCC (L&S) 1013; *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263, paras 209, 225 : (2010) 3 SCC (Cri) 1; *Mohd. Arif* v. *Supreme Court of India*, (2014) 9 SCC 737, para 26 : (2014) 5 SCC (Cri) 408.

16 See *C.N. Rudramurthy* v. *K. Barkathulla Khan*, (1998) 8 SCC 275, para 6; *Union of India* v. *Nirala Yadav*, (2014) 9 SCC 457, paras 28, 44-46 : (2014) 5 SCC (Cri) 212.

17 1949 SCC Online US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)

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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 rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf* v. *Colorado*[17], 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 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, 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 Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution". (page 359)

27. In *Gobind* v. *State of M.P.*[18] (three Judges), Mathew, J. in unequivocal terms after noticing *Kharak Singh*[3], holds that the right to privacy is implicit in the concept of individual autonomy and liberty. However, the Court categorically states that it is not an absolute right and can be subjected to restrictions based on compelling public interest. (see paras 19 to 31). The Court observed that the contours of the right will have to go through a process of case-by-case developments. this context para 28 is relevant and reads as follows:

> "*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 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 which one can characterize as a fundamental right, we do not think that the right is absolute."

28. It is relevant to note that *Gobind*[18] was post *Rustom Cavasjee Cooper*[13] and therefore the Court rightly departed from the view in *M.P. Sharma*[2] and *Kharak Singh*[3] which impliedly stood overruled as far as the observations made on the to privacy are concerned.

29. This Hon'ble Court in *Maneka Gandhi* v. *Union of India*[14], clearly and in unequivocal terms held that *Gopalan*[12] stood overruled by *Rustom Cavasjee Cooper*[13]. The minority view in *Kharak Singh*[3] was held to be the

18 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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correct view. The Court in this regard held there can be no doubt that in view of the decision of this Hon'ble Court in *Rustom Cavasjee Cooper*[13], the minority view must be regarded as correct and the majority view must be held to have been overruled (*see* para 5 of the judgment).

30. Accordingly, the approval of minority view of Subba Rao, J. in *Kharak Singh*[3] by *Maneka Gandhi*[14] set the matter at rest on the status of the right to privacy as a fundamental right. It is therefore incorrect to contend that the issue as to the status of the right to privacy is res integra.

31. This Hon'ble Court has thereafter in almost 24 judgments (two Judges and three Judges as well as five Judges) has consistently held that right to privacy was a facet of personal liberty. In this regard, following may be seen:

31.1. In *State of Maharashtra* v. *Madhukar Narayan Mardikar*[19], the Division Bench held as follows:

> "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes." (see para 9)

31.2. In *R. Rajagopal* v. *State of T.N.*[20], the Division Bench held as follows:

> "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. (see para 26 (1))

31.3. In *People's Union for Civil Liberties (PUCL)* v. *Union of India*[21], the Division Bench held as follows:

> "It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but *at the same time citizen's right to privacy has to be protected from being abused by the authorities* of the day". (see para 1)
>
> "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." (see para 17)

31.4. In *Mr 'X'* v. *Hospital 'Z'*[22], the Division Bench held as follows:

> "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

19 (1991) 1 SCC 57 : 1991 SCC (Cri) 1 : 1994 SCC (L&S) 761
20 (1994) 6 SCC 632
21 (1997) 1 SCC 301
22 (1998) 8 SCC 296

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prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others." (see para 28)

31.5. In *Sharda* v. *Dharmpal*[23], a Bench of 3 Hon'ble Judges held as follows:

"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.*[20] and *People's Union for Civil Liberties* v. *Union of India*[21]. In some cases *the right has been held to amalgam of various rights*. (see para 56)

"But the right to privacy in terms of Article 21 of the Constitution is *not an absolute right*." (see para 57)

31.6. In *District Registrar and Collector* v. *Canara Bank*[24], Division Bench held as follows:

"We have referred in detail to the reasons given by Mathew, J. in *Gobind*[18] 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*." (see para 39)

"A two-Judge Bench in *R. Rajagopal* v. *State of T.N.*[20] held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "*It is the right to be let alone*." Every citizen has a *right to safeguard the privacy of his own*. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The *right to privacy has since been widely accepted as implied in our Constitution*, in other cases, namely, *People's Union for Civil Liberties* v. *Union of India*[21], *Mr 'X'* v. *Hospital 'Z'*[22], *People's Union for Civil Liberties* v. *Union of India*[25] and *Sharda* v. *Dharmpal*[23]." (see para 40)

31.7. In *Directorate of Revenue* v. *Mohd. Nisar Holia*[26], the Division Bench held as follows:

"An authority cannot be given an untrammelled *power to infringe the right of privacy* of any person." (see para 14)

"A person, if he does not break a law would be *entitled to enjoy his life and* liberty *which would include the right to not to be disturbed.* A *right to be let alone is recognised to be a right which would fall under Article 21* of the Constitution of India." (see para 15)

23 (2003) 4 SCC 493
24 (2005) 1 SCC 496
25 (2003) 4 SCC 399
26 (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415

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31.8. In *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*[27], the Division Bench held as follows:

> "*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.*[20] (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". (*see para 27*)

31.9. In *State of Maharashtra* v. *Bharat Shanti Lal Shah*[28], the Division Bench held as follows:

> "The right to privacy has been developed by the Supreme Court over a period of time and with the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21. It was stated in *Gobind* v. *State of M.P.*[18] that right to privacy is a "right to be let alone" and a citizen has a right "to safeguard privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters". The term privacy has not been defined and it was in *People's Union for Civil Liberties (PUCL)* v. *Union of India*[21], that *as a concept it may be too broad and moralistic to define it judicially and whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case*." (see para 57)

31.10. In *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*[29], the Division Bench held as follows:

> "Surveillance per se under the provisions of the Act may not violate individual or private rights including the right to privacy. Right to privacy is not enumerated as a fundamental right either in terms of Article 21 of Constitution of India or otherwise. It, however, by reason of an elaborate interpretation by Court in *Kharak Singh* v. *State of U.P.*[3] was *held to be an essential ingredient of "personal liberty"*." (see para 102)

31.11. In *Bhabani Prasad Jena* v. *Orissa State Commission for Women*[30], the Division Bench held as follows:

> "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*

27 (2008) 5 SCC 33
28 (2008) 13 SCC 5
29 (2009) 9 SCC 551 : (2010) 1 SCC (Cri) 47
30 (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053

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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." (see para 21)

31.12. In *Selvi* v. *State of Karnataka*[31], a Bench of 3 Hon'ble Judges noticed that the judgment in *Kharak Singh*[3] was endorsed by *Maneka Gandhi*[14] and subsequently followed in *Gobind*[18]. In para 209 it was held as below:

"*209*. Following the judicial expansion of the idea of "personal liberty", the status of the "right to privacy" as a component of Article 21 has been recognised and reinforced." held as follows:

31.13. In *Amar Singh* v. *Union of India*[32], the Division Bench held as follows:

"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." (see para 39)

31.14. In *Ram Jethmalani* v. *Union of India*[33], the Division Bench held as follows:

"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 monies is 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

31 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1
32 (2011) 7 SCC 69 : (2011) 3 SCC (Civ) 560
33 (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310

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creation of another zone of abrogation of constitutional values." (see para 83)

31.15. In *Hindustan Times* v. *High Court of Allahabad*[34], this Hon'ble Court held that the power of the media to provide the readers and the public in general with information should reconcile with the persons fundamental right to privacy. The Division Bench held as follows:

> "The unbridled power of the media can become dangerous if checks and balances are not inherent 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. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Prejudging the issues and rushing to conclusions must be avoided." (see para 6)

31.16. In *Ramlila Maidan Incident, In re*[35], the Division Bench held as follows:

> "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 absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right. [Vide *Malak Singh* v. *State of P&H*[36], *State of Maharashtra* v. *Madhukar Narayan Mardikar*[19], *R. Rajagopal* v. *State of T.N.*[20], *People's Union for Civil Liberties* v. *Union of India*[21], *Mr 'X'* v. *Hospital 'Z'*[22], *Sharda* v. *Dharmpal*[23], *People's Union for Civil Liberties* v. *Union of India*[25], *District Registrar and Collector* v. *Canara Bank*[24], *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*[29] and *Selvi* v. *State of Karnataka*[31].]" (see para 312)

31.17. In *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*[37], the Constitution Bench of this Hon'ble Court approved the minority judgment of Subba Rao, J. in para 24 and relying upon *Blackstone's Commentaries on the Laws of England* observed in para 26 as follows:

> "Personal liberty" includes "the power to locomotion of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of

34 (2011) 13 SCC 155

35 (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810

36 (1981) 1 SCC 420 : 1981 SCC (Cri) 169

37 (2012) 10 SCC 603 : (2013) 1 SCC (Civ) 173 : (2013) 2 SCC (Cri) 202 : (2013) 1 SCC (L&S) 76

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law." In *A.K. Gopalan case*[12], it is described to mean liberty relating to or concerning the person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a night to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilised society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilisation 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 groves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, right to personal liberty takes in not only a right 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.

... 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 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.

... namely, whether the petitioner's fundamental right under Article 19(1)(*d*) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint.' This argument ignores the adverb "freely" in clause (*d*). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom mere movement unobstructed by physical restrictions cannot itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinising gaze of the policemen be

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described as a free movement? The whole country is his jail. The freedom of movement in clause (*d*) therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and cannot act freely as he would like to do." (see para 26)

31.18. In *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi*[38], the Division Bench held as follows:

"Another right of a citizen protected under the Constitution is the right to privacy. This right is enshrined within the spirit of Article 21 of the Constitution. Thus, *the right to information has to be balanced with the right to privacy within the framework of law*." (see para 10)

"*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 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." (see para 23)

31.19. In *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[39], a Division Bench of this Hon'ble Court held that the right to privacy was not an absolute right and can be regulated, restricted and curtailed in larger public interest. In this regard it was held as follows:

"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,

38 (2012) 13 SCC 61 : (2014) 2 SCC (Civ) 131
39 (2013) 16 SCC 82

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is pending. In several judgments including *Kharak Singh* v. *State of U.P.*[3], *R. Rajagopal* v. *State of T.N.*[20], *People's Union for Civil Liberties* v. *Union of India*[21] and *State of Maharashtra* v. *Bharat Shanti Lal Shah*[28] this Court has recognised the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India." (see para 57)

"The right to information and right to privacy are, therefore, not absolute rights, both the rights, one of which falls under Article 19(1)(*a*) and the other under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. *Absolute or uncontrolled individual rights do not and cannot exist in any modern State*. Citizens' right to get information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act. First of all, the scope and ambit of the expression "public authority" has been restricted by a statutory definition under Section 2(*h*) limiting it to the categories mentioned therein which exhaust itself, unless the context otherwise requires. Citizens, as already indicated by us, have a right to get information, but can have access only to the information "held" and under the "control of public authorities", with limitations. If the information is not statutorily accessible by a public authority, as defined in Section 2(*h*) of the Act, evidently, those information will not be under the "control of the public authority". Resultantly, it will not be possible for the citizens to secure access to those information which are not under the control of the public authority. *The citizens, in that event, can always claim a right to privacy, the right of a citizen to access information should be respected, so also a citizen's right to privacy*." (see para 61)

31.20. In *National Legal Services Authority* v. *Union of India*[40], a Division Bench of this Hon'ble Court while upholding the fundamental rights of the transgender community held as follows:

"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 India and the State is bound to protect and recognise those rights." (see para 72)

40 (2014) 5 SCC 438

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31.21. In *Manoj Narula* v. *Union of India*[41], a Constitution Bench in para 69 held that Article 21 has many facets and relying upon *R. Rajagopal*[20] it was held that the right to privacy is inferred from Article 21. In this regard it was observed that:

> "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.*[20], right to privacy has been inferred from Article 21. Similarly, in *Joginder Kumar* v. *State of U.P.*[42], 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*[43], has observed that freedom of speech and expression includes freedom of propagation of ideas." (See para 69)

31.22. In *ABC* v. *State (NCT of Delhi)*[44], the Division Bench held as follows:

> "It is imperative that the rights of the mother must also be given due consideration. As Ms Malhotra, learned Senior Counsel for the appellant, has eloquently argued, *the appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child*." (see para 20)

31.23. This Hon'ble Court in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[45], (Lokur, J.), held that the 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. In this regard, the Constitution Bench held as follows:

> "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 anyone can have access to information that is available with NJAC. *This is a rather sweeping generalisation 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, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance." (see para 953)

41 (2014) 9 SCC 1
42 (1994) 4 SCC 260 : 1994 SCC (Cri) 1172
43 AIR 1950 SC 124 : (1950) 51 Cri LJ 1514
44 (2015) 10 SCC 1 : (2016) 1 SCC (Civ) 1 : 7 SCEC 383
45 (2016) 5 SCC 1

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Summary of Arguments

I. Mr Kapil Sibal, Senior Advocate, for the petitioners *(contd.)*

31.24. *Asha Ranjan* v. *State of Bihar*[46], the Division Bench held as follows:

> "In this context, it is also appropriate to refer to certain other decisions where the Court has dealt with the concept of competing rights. We are disposed to think that dictum laid therein has to be appositely appreciated. In *Mr 'X'* v. *Hospital 'Z'*[22], the issue arose with regard to right to privacy as implicit in the right to life and liberty as guaranteed to the citizens under Article 21 of the Constitution and the right of another to lead a healthy life. Dealing with the said controversy, the Court held that as a human being, *Ms 'Y'* must also enjoy, as she obviously is entitled to all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21, which guarantees "right to life" to every citizen of this country. The Court further held that *where there is a clash of two fundamental rights, namely, the appellant's right to privacy as part of right to life and Ms Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive*." (see para 56)

32. Thus, the status of the right to privacy as a fundamental right has been settled by a catena of judgments, not only of two and three judges, but also by Constitution Benches as well. Thus, *A.K. Gopalan*[12] being held as bad law by an eleven-Judge Bench in *Rustom Cavasjee Cooper*[13] the foundation and the basis of *M.P. Sharma*[2] and *Kharak Singh*[3], which were premised on *Gopalan*[12], by necessary implication could not be good law and therefore the subsequent Benches have rightly disregarded the same and held that the right to privacy is a fundamental right emanating from Article 21.

33. In view of the above, it is submitted that these judgments which have rightly held the field should not be unsettled as Lord Coke aptly described that "*those things which have been so often adjudged ought to rest in peace*"[47].

34. Even otherwise, as pointed out hereinabove, the right to privacy has to be delineated and understood in the context of the current advances made by society in the field of technology and communications and not merely from the paradigm of issues of search and seizure arising in *M.P. Sharma*[2] or personal surveillance issues in *Kharak Singh*[3].

46 (2017) 4 SCC 397 : (2017) 2 SCC (Cri) 376

47 *Shankar Raju* v. *Union of India*, (2011) 2 SCC 132, see para 10 : (2011) 1 SCC (L&S) 161

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Summary of Arguments

II. Mr Gopal Subramanium, Senior Advocate, for the petitioners

1. It is submitted that the decisions in *M.P. Sharma* v. *Satish Chandra*[1] and *Kharak Singh* v. *State of U.P.*[2] to the extent they interpret fundamental rights on a distinctive basis (as recognised in *A.K. Gopalan* v. *State of Madras*[3]) are no longer good law. In view of the fact that *A.K. Gopalan case*[3] stands overruled in *Rustom Cavasjee Cooper* v. *Union of India*[4] it follows a fortiori that neither of the above decisions are effective.

2. It is submitted that the ratio of the judgment in *M.P. Sharma*[1] merely observed that there is no right to privacy located in Article 20(3) of the Constitution; it did not extinguish a general right to privacy. This arose in the context of searches in a criminal investigation and whether the same amounted to a violation of the right in Article 20(3). Thus, it cannot be said that the decision in *M.P. Sharma*[1] is an authority for the proposition that there is no fundamental right to privacy in the Constitution. The observations in *M.P. Sharma*[1] being relied upon by the respondents must be read in the context in which they were made:

> "17. … 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 protection under Article 20(3) would be defeated by the statutory provisions for searches. It is to be remembered that searches of the kind we are concerned with are under the authority of a Magistrate (excepting in the limited class of cases falling under Section 165 of the Criminal Procedure Code). Therefore, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed. We are not unaware that in the present set up of the Magistracy in this country, it is not infrequently that the exercise of this judicial function is liable to serious error, as is alleged in the present case. But the existence of scope for such occasional error is no ground to assume circumvention of the constitutional guarantee."

1 AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
3 AIR 1950 SC 27 : (1950) 51 Cri LJ 1383 : 1950 SCR 88
4 (1970) 1 SCC 248

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II. Mr Gopal Subramanium, Senior Advocate, for the petitioners *(contd.)*

3. The dissenting judgment of Subba Rao, J. in *Kharak Singh*[2] states clearly that:

3.1. The question was, in the absence of any law, what was the fundamental right of the petitioner that was infringed?

3.2. Clauses (*a*) to (*f*) of Regulation 236 contained in Chapter 22 of the U.P. Police Regulations were measures adopted for the purpose of supervision or close observation of his movements and therefore parts of surveillance. The question was whether such a surveillance infringed any of the petitioner's fundamental rights.

3.3. Even though fundamental rights may be distinct, they could yet be overlapping. The fundamental right of life and personal liberties have *many attributes* and some of them are part of Article 19.

3.4. If an action violated Article 19(1) of the Constitution, it could be argued that there was a law to sustain that action "*but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(B) so far as the attributes covered by Article 19(1) are concerned*".

3.5. The expression "life" in Article 21 meant more than mere "animal existence". The expression "liberty" is given a very wide meaning in the USA. It takes in *all the freedoms*.

3.6. In *A.K. Gopalan*[3], liberty was described to mean liberty concerning the person or body of the individual. Subba Rao, J. observed that the right to personal liberty takes in not only a right to be free from restrictions placed on his movement but also free from encroachments on his private life. He further continues to say that while it is true that our Constitution does not expressly declare 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/her 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*". He observed:

> "28. ... 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. It so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."

4. In fact, in some sense Subba Rao, J. also noticed that privacy was a facet of Article 19(1)(*d*):

> "29. ... The freedom of movement in clause (d) therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control.

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II. Mr Gopal Subramanium, Senior Advocate, for the petitioners *(contd.)*

The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Article 19(1)(d) of the Constitution"

5. *A.K. Gopalan*[3] proceeded both on the distinctiveness of each of the fundamental rights; that "procedure established by law" under Article 21 was not used approximately to mean "due process of law" as interpreted by the Supreme Court of the United States. In *A.K. Gopalan*[3], it was held that:

"17. In my opinion, this line of approach is not proper and indeed is misleading. As regards the American Constitution its general structure is noticed in these words in The Government of the United States by Munro (5th Edn.) at p. 53: "The architects of 1787 built only the basement. Their descendants have kept adding walls and windows, wings and gables, pillars and porches to make a rambling structure which is not yet finished. Or, to change the metaphor, it has a fabric which, to use the words of James Russell Lowell, is still being 'woven on the roaring loom of time'. That is what the framers of the original Constitution intended it to be. Never was it in their mind to work out a final scheme for the Government of the country and stereotype it for all time. They sought merely to provide a starting point". The same aspect is emphasized in Professor Willis's book on Constitutional Law and Cooley's Constitutional Limitations. In contrast to the American Constitution, the Indian Constitution is a very detailed one. The Constitution itself provides in minute details the legislative powers of Parliament and the State Legislatures. The same feature is noticeable in the case of the judiciary, finance, trade, commerce and services. It is thus quite detailed and the whole of it has to be read with the same sanctity, without giving undue weight to Part III or Article 246, except to the extent one is legitimately and clearly limited by the other."

6. The Court held that Article 19(1)(*d*) was distinct of personal liberty under Article 21 and the freedom to move freely in Article 19(1)(*d*) was not a facet of Article 21 and since a detention was duly authorised under the impugned law, the requirement of reasonableness for examining such action under Article 19(1)(*d*) did not arise. Further, the contention to correlate Articles 19 and SI was rejected.

7. It may be noted in fairness that in *A.K. Gopalan*[3] the following words occur in para 122, which contain footprints of future evolution:

"122. 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

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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. Madison (who played a prominent part in framing the First Amendment of the American Constitution) pointing out the distinction, due to historical reasons, between the American and the British ways of securing "*the great and essential rights of the people*", observed "Here they are secured not by laws paramount to prerogative but by Constitutions paramount to laws:" Report on the Virginia Resolutions, quoted in *Near* v. *Minnesota*[5]. This has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the *high purpose and spirit of the preamble as well as the constitutional significance of a declaration of fundamental rights* should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit, no less than its intendment should be collected primarily from the natural meaning of the words used."

(emphasis supplied)

8. It is submitted however that although the learned Judges in *A.K. Gopalan*[3] understood the values of the Preamble of the Constitution to be relevant, yet they were constrained to hold that the fundamental rights were distinctive in character. The interpretation was informed by formalism.

9. In *R.C. Cooper*[4], it is respectfully submitted that the issues relating to interrelation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. A reference was made to the decision in *A.K. Gopalan*[3]. This Hon'ble Court held in para 45 as under:

"45. Early in the history of this Court the question of inter-relation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. In *A.K. Gopalan* v. *State of Madras*[3], a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act, 4 of 1950 applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of the Court (Kania, C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.), held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19(1)(*d*) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed

5 1931 SCC OnLine US 151 : 75 L Ed 1357 : 283 US 697 (1931)

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thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than acceding to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to protection of distinct rights."

10. In particular, Shah J. analysed how each one of the learned Judges referred to an examination of legislation *to be directly in respect of one of the rights mentioned in the sub-clauses*. In fact the observation of Sastri, J. that the fundamental or personal freedoms rested only in Article 19 while Articles 20 to 22 secure constitutional guarantees was also noticed. The view of Mahajan, J. that Article 22 was self-contained in respect of the laws on the subject of preventive detention was noticed. Similarly, the observation of Mukherjea, J. that there was no conflict between Article 19(l)(*d*) and Article 22 because the former did not contemplate freedom from detention either punitive or preventive but speaks of a different aspect of civil liberties. In the view of Mukherjea, J., Articles 20 to 22 provided for the entire protection both in relation to deprivation of life and personal liberty with regard to substantive as well as procedural law. (See para 46, *R.C. Cooper*[4]).

11. It is respectfully submitted that Shah, J. enunciated the theory of "direct effect upon individual freedom". It was held:

"49. We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: *it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief*. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.

50. We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. *Each freedom has different dimensions or facets.* ...." (emphasis supplied)

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12. Thus, *A.K. Gopalan*[3] was overruled by *R.C. Cooper*[4] in the following words:

> "55. … In our judgment, the assumption in *A.K. Gopalan case*[3] that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored *cannot be accepted* as correct."

13. It is respectfully submitted in the light of the above, the majority opinion in *Kharak Singh*[2] delivered by Rajagopala Ayyangar, J. has proceeded upon the basis that express constitutional guarantee like the Fourth Amendment being absent. Hence, it was not possible to read in Article 19(l)(*d*) any such right of privacy since the right to privacy in the US was derived from the Fourth Amendment (set out below):

> "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."

14. Hence, Rajagopala Ayyangar, J. fell back on the theory of common law to hold that the common law embodied in a binding principle transcends mere protection of property rights *and expounds a concept of personal liberty*. It may also be noted that to the extent Rajagopala Ayyangar, J. (i.e. majority) held that:

> "We feel unable to hold that the term [personal liberty] was intended to bear only this narrow interpretation but on the other hand consider 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 deal with in the several clauses of Article 19(1)."

15. Hence, the majority held that Article 21 could not in any event influence Article 19(l)(*d*). The majority further held that:

> "The right of privacy is not a guaranteed right under our Constitution, and therefore the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and *is not an infringement of a fundamental right guaranteed in Part III*..."
>
> (emphasis supplied)

16. According to the judgment of Subba Rao, J. the following consequences will emerge:

(*a*) The expression liberty is not a residuary expression.

(*b*) It is a substantive expression;

(*c*) It contemplates right to privacy;

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(*d*) If it is to be read as informed by Preambular values of dignity, liberty and freedom — which expressions are contained in the Preamble. There can be no manner of doubt that right to privacy is an established fundamental right under the Constitution.

17. It is respectfully submitted that in *Gobind* v. *State of M.P.*[6], SCC at p. 154, the Court noticed the decision of *Griswold* v. *Connecticut*[7], US at p. 510 and noted that:

> "In an opinion by Douglas, J., expressing view of five members of the Court, it was held that the statute was invalid as an unconstitutional invasion of the right of privacy of married persons. He said that the right of freedom of speech press includes not only the right to utter or to print but also the right to distribute, the right to receive, the right to read and that without those peripheral rights the specific right would be less secure and that likewise, the other specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance, that the various guarantees create zones of privacy, and that protection against all governmental invasion "of the sanctity of a man's home and the privacies of life" was fundamental. He further said that the inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' *and that 'privacy is a fundamental personal right, emanating from the totality of the Constitutional scheme under which we (Americans) live'*." " (emphasis supplied)

18. This Hon'ble Court also noticed the decision of *Roe* v. *Wade*[8], where the litigant wanted to exercise the right to abortion and the Court recognised "that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution".

19. The judgment in *Gobind*[6] clearly noticed that right to privacy contained multiple aspects, such as: (See paras 21 to 25, *Gobind*[6])

a. Spatial privacy;

b. Informational privacy;

c. Decisional autonomy; and,

d. Full development of personality;

20. It may be said that in *Gobind*[6] Mathew, J. realised that the law relating to privacy was still in a state of evolution which is why he clearly noted that:

> "...28. The right to privacy in any event will necessarily have to go through a process of case-by-case development."

6 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

7 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965)

8 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)

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21. Mathew, J. referred to Arts. 8(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Hence, the regulations authorising surveillance were necessarily read down.

22. It is submitted that in *Maneka Gandhi* v. *Union of India*[9], the issue was fully settled. It was clearly held that:

(*a*) *A.K. Gopalan*[3] stands overruled by *R.C. Cooper*[4].

(*b*) Therefore, there is an indivisible connection between all the fundamental rights, and any law creating restrictions on rights must be in conformity with Articles 14, 19 and 21 of the Constitution.

(*c*) The law must satisfy the test of substantive as well as procedural due process.

(*d*) In particular, Bhagwati, J. affirmed the minority view expressed by Subba Rao, J. in *Kharak Singh*[2]:

> "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*[3], 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 Articles 19 and 21. *It was in Kharak Singh* v. *State of U.P.*[2] *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*

9 (1978) 1 SCC 248

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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 Rustom Cowasjee Cooper* v. *Union of India*[10] *the minority view must be regarded as correct and the majority view must be held to have been overruled***.

(emphasis supplied)

23. Further, in para 96, Krishna Iyer, J., in his inimitable style stated as under:

"96. A thorny problem debated recurrently at the bar, turning on Article 19, demands some juristic response although avoidance of overlap persuades me to drop all other questions canvassed before us. The Gopalan verdict, with the cocooning of Article 22 into a self-contained code, has suffered suppression at the hands of *R.C. Cooper*[4]. By way of aside, the fluctuating fortunes of fundamental rights, when the proletarist and the proprietarist have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of subconscious forces in judicial noesis when the cycloramic review starts from Gopalan, moves on to *Kerala Education Bill, 1957, In re*[11] and then on to *All-India Bank Employees' Assn.*[12], next to *Sakal Papers*[13], crowning in *Cooper*[4] and followed by *Bennett Coleman*[14] and *Sambhu Nath Sarkar*[15]. Be that as it may, the law is now settled, as I apprehend it, that no article in Part HI is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition

10 (1970) 2 SCC 298

11 AIR 1958 SC 956

12 *All-India Bank Employees' Assn.* v. *National Industrial Tribunal*, AIR 1962 SC 171 : (1962) 3 SCR 269

13 *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842

14 *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788

15 *Sambhu Nath Sarkar* v. *State of W.B.*, (1973) 1 SCC 856 : 1973 SCC (Cri) 618

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is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached." a

24. In *Kesavananda Bharati* v. *State of Kerala*[16], Sikri, C.J. noticed:

(*a*) The Preamble is a part of the Indian Constitution.

(*b*) The Preamble constitutes India into a sovereign democratic republic and to secure to all its citizens and guarantees

"... *JUSTICE* social, economic and political; b

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...."

(*c*) "The Preamble of our Constitution, is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble...."'. c

(*d*) The Universal Declaration of Human Rights, 1948 was considered and it was held as follows:

"148-49. I may here mention that while our fundamental rights and directive principles were being fashioned and approved of by the Constituent Assembly on 10-12-1948, the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of human rights." d

(*e*) Regard may be had to the following recital in the Universal Declaration of Human Rights, 1948 "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in *fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and* have determined to promote social progress and better standards of life in larger freedom". e

(*f*) Further, that certain inalienable right ought to be guaranteed, and held: f

"150. In the Preamble to the International Covenant on Economic and Social and Cultural Bights, 1966, inalienability of rights is indicated in the first para as follows:

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." " g

25. The fundamental proposition that was held in *Kesavananda*[16] was that certain rights are basic and inalienable. h

16 (1973) 4 SCC 225

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26. While describing the Basic Structure, Sikri, C.J. remarked:

"292. 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 maybe 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.

293. *The above structure is built on the basic foundation i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.*"

(emphasis supplied)

27. Sikri, C.J. held that some rights were natural and inalienable and he cited a large number of decisions to describe what could be natural and inalienable rights. The liberty of the person and his essential freedoms for whom the Constitution is intended and from which the State is injuncted from interfering, and must be viewed as a part of the Basic Structure. In this respect Sikri, C.J. held as under:

"299. I am unable to hold that these provisions show that some rights are not *natural* or *inalienable* rights. As a matter of fact, India was a party to the Universal Declaration of Rights which I have already referred to and that Declaration describes some fundamental rights as inalienable."

28. It is submitted that the right to privacy invariably means the inviolability of the person. The expression "person" includes the body as well as the inviolate personality. It is submitted that privacy really is intended to indicate the realm of inviolable sanctuary that most of us sense in our beings. It refers to spatial sanctity, freedom in decisional autonomy, informational privacy as well as the ability to freely develop one's personality and exercise discretion and judgment. It may be noted that both in *Abington School District* v. *Schempp*[17], US and *Fisher* v. *United States*[18], US at pp. 416, the expression on inviolability uses spatial imagery of the castle or the sanctuary to convey the appropriate inaccessibility of the person, the inviolable citadel

17 1963 SCC OnLine US SC 154 : 10 L Ed 2d 844 : 374 US 203 (1963)
18 1976 SCC OnLine US SC 69 : 48 L Ed 2d 39 : 425 US 391 (1976)

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of a person's heart and mind, or the inner sanctum of individual feeling and thought. The usage of the term "personhood" in privacy jurisprudence is attributed to Professor Freund, who in 1975 made the following observations:

> "The theme of personhood is... emerging. It has been groping, I think, for a rubric. Sometimes it is called privacy, inaptly it would seem to me; autonomy perhaps, though that seems too dangerously broad. But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood."[19]

29. In the context of the Indian Constitution, three articles i.e. Articles 14, 19 and 21—form its sanctum sanctorum. Identifying the special status of these three articles, the Hon'ble Supreme Court in *Minerva Mills Ltd.* v. *Union of India*[20] observed:

> "74. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 81. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the *dignity of the individual*." (emphasis supplied)

30. Laurence Tribe, in order to show the underlying purpose of the right to privacy and why it is one of the foundational elements of a democratic nation, wrote in his book[21] as under:

> "Finally, the right to privacy is a requirement of democracy. When none of us can be certain what the state knows about us or how it might use that information, the relationship between the governed and the Government is fundamentally altered. The State's unlimited access to whatever information it wishes to obtain about each citizen can create a profound power imbalance and feeling of vulnerability. As Justice Robert Jackson once wrote of searches and seizures, "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart." This is especially true when the State develops the ability to combine many small pieces of data into a full picture of our lives. Even if we trust the State not to abuse the information and search only for true threats, the risk that our vast intelligence bureaucracy will make an egregious error is unavoidable. Entirely innocent personal information can be abused, leaked, distorted,

19 "Personhood: The Right to be Left Alone" 1976 Duke LJ 699 at p. 702.

20 (1980) 3 SCC 625

21 Tribe, Laurence, and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution*, (Henry Holt and Company, 2014).

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and put to mischievous use in unpredictable ways. Without protection of privacy, democratic life could suffer a dangerous chill."

31. Roscoe Pound, while expounding on natural rights, observed that "the law does not create them, it only recognises them."[22] He farther observed:

> "Individual interests which it is conceived the law ought to secure are usually called "natural rights" because they are not the creatures of the State and it is held that the pressure of these interests has brought about the State. In the stage of equity or natural law, when what ought to be law is made the test of what is, it is natural to confuse the interests which the law does secure, the interests it ought to secure, and the means of securing them under the one name of "rights". Those which are secured and the means ; whereby they are secured are called legal rights; those which ought to be secured are called natural rights."

32. Privacy is a part of personhood and is therefore a natural right. This is why the natural right is not conferred but only recognised by the Constitution.

33. In *I.R. Coelho* v. *State of T.N.*[23] the Court observed:

> "56. The fundamentalness of fundamental rights has thus to he examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. This transition from a set of independent, narrow rights to broad checks on State power is demonstrated by a series of cases that have been decided by this Court. In *State of Bombay* v. *Bhanji Munji*[24], relying on the ratio of *Gopalan*[3], it was held that Article 31 was independent of Article 19(l)(*f*). However, it was in *Rustom Cavasjee Cooper* v. *Union of India*[4] (popularly known as

22 "Interests of Personality", Vol. XXVHI, No. 4, February 1915.

23 (2007) 2 SCC 1

24 AIR 1955 SC 41 : (1955) 1 SCR 777

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Bank Nationalisation case) that the viewpoint of *Gopalan*[3] was seriously disapproved… While examining this question the Court stated that the actual effect of the law on the right guaranteed must be taken into account. This ratio was applied in *Bank Nationalisation case*[4]. The Court examined the relation between Article 19(l)(f) and Article 13 and held that they were not mutually exclusive. The ratio of *Gopalan*[3] was not approved.

60. It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. Thus post-*Maneka Gandhi case*[9] it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of State power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

61. The approach in the interpretation of fundamental rights has been evidenced in a recent case *M. Nagaraj* v. *Union of India*[25] in which the Court noted: (SCC pp. 241-42, para 20)

> "*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... 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*[3]. Article 21 of the Constitution provides that no person shall be deprived of Ms 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

25 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

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by law made by 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*[3] and held in its landmark judgment in *Maneka Gandhi* v. *Union of India*[9] 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.*" " (emphasis supplied)

34. In *Selvi* v. *State of Karnataka*[26], the Court reaffirmed the position laid down in *Maneka*[9] *case* and clarified that the decision of Bhagwati, J. in *Maneka*[9] had effectively made it clear that the minority opinion of Subba Rao, J. was the correct exposition of law. In fact, it may not be out of place to suggest that the understanding of *M.P. Sharma*[1] and *Kharak Singh*[2] being urged by the Attorney General is no longer tenable in view of the decision in *Selvi*[26] having firmly closed the door on such an argument and having held that there is a fundamental right to privacy notwithstanding the decisions in *M.P. Sharma*[1] and *Kharak Singh*[2]. The Court made the following observations:

"205. In *M.P. Sharma*[1] 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.

206. Similar issues were discussed in *Kharak Singh* v. *State of U.P.*[2], where the Court considered the validity of the Police Regulations that authorised police personnel to maintain lists of "history-sheeters" in addition to conducting surveillance activities, domiciliary visits and periodic inquiries about such persons. The intention was to monitor persons suspected or charged with offences in the past, with the aim of preventing criminal acts in the future. At the time, there was no statutory basis for these Regulations and they had been framed in the exercise of administrative functions. The majority opinion (Ayyangar, J.) held that

26 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1

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these Regulations did not violate "personal liberty", except for those which permitted domiciliary visits. The other restraints such as surveillance activities and periodic inquiries about "history-sheeters" were justified by observing: (AIR p. 1303, para 20)

> "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."

207. Ayyangar, J. distinguished between surveillance activities conducted in the routine exercise of police powers and the specific act of unauthorised intrusion into a person's home which violated "personal liberty". However, the minority opinion (Subba Rao, J.) in *Kharak Singh*[2] took a different approach by recognising the interrelationship between Articles 21 and 19, thereby requiring the State to demonstrate the "reasonableness" of placing such restrictions on "personal liberty". (This approach was later endorsed by Bhagwati, J. in *Maneka Gandhi* v. *Union of India*[9], see AIR p. 622.) Subba Rao, J. held that the right to privacy "is an essential ingredient of personal liberty" and that the right to "personal liberty" is "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". (AIR at p. 1306, para 31)…

209. Following the judicial expansion of the idea of "personal liberty", the status of the "right to privacy" as a component of Article 21 has been recognised and reinforced…"

35. Rohinton Nariman, J. in *Mohd. Arif* v. *Supreme Court of India*[27], in a concise and lucid summary identified the change from the *Gopalan*[3] era to the *Maneka Gandhi*[9] era in the following passages:

> "25. In *Kharak Singh* v. *State of U.P.*[2], *Gopalan*[3]'s reading of fundamental rights in watertight compartments was reiterated by the majority. However, they went one step further to say that "personal liberty" in Article 21 takes in and comprises the residue after all the rights granted by Article 19.
>
> Justices Subba Rao and Shah disagreed. They held:
>
> "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

27 (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408

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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(l)(*d*) and Article 21 are infringed by the State." (at pages 356-357)

26. The minority judgment of Subba Rao and Shah, JJ. eventually became law in *Rustom Cavasjee Cooper*[4], where the 11-Judge Bench finally discarded *Gopalan*[3] view and held that various fundamental rights contained in different articles are not mutually exclusive: (SCC p. 289, para 53)

> "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(l)(f) and 31(B) are mutually exclusive."

27. The stage was now set for the judgment in *Maneka Gandhi*[9]. Several judgments were delivered, and the upshot of all of 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. 646-48: SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74, 687: SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J.]

36. In view of the above submissions, it is respectfully submitted that the right to privacy is recognised as a fundamental right under Article 21 of the Constitution. It is also submitted that this has been the settled position of law since the overturning of the decision in *A.K. Gopalan*[3] by way of judgments in *R.C. Cooper*[4] and *Maneka Gandhi*[9]. The concept of privacy is embedded in liberty as well as honour of a person.[28]

28 Whitman, James Q. "The Two Western Cultures of Privacy: Dignity versus Liberty", (2003) 113 Yale LJ 1151.

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III. Mr Shyam Divan, Senior Advocate, for the petitioners

1. These submissions are filed on behalf of the writ petitioners in the following petitions:

1.1. Writ Petition (Civil) No. 829 of 2013 — '*SG Vombatkere* v. *Union of India*' — challenging the Aadhaar programme initiated under a Notification dated 28-1-2009.

1.2. Writ Petition (Civil) No. 797 of 2016 — '*SG Vombatkere* v. *Union of India*' — challenging the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 ("the Aadhaar Act").

1.3. Writ Petition (Civil) No. 342 of 2017 — '*Shantha Sinha* v. *Union of India*' — challenging the Aadhaar Act and the notifications issued under Section 7 of the Aadhaar Act.

2. By an order dated 11-8-2015[1], a three-Judge Bench of this Hon'ble Court referred the petitions challenging the Aadhaar programme (including WP (Civil) No. 829 of 2013) to a Bench of appropriate strength, inter alia, to scrutinise the ratio decidendi in *M.P. Sharma* v. *Satish Chandra*[2] (eight-Judge) and *Kharak Singh* v. *State of U.P.*[3] (six-Judge) and the jurisprudential correctness of the subsequent decisions of the Supreme Court where the right to privacy is asserted or referred.

3. The Aadhaar Act, 2016 was enacted on 26-3-2016. Writ Petition (Civil) No. 797 of 2016 and Writ Petition (Civil) No. 342 of 2017 challenge the Aadhaar Act.

4. Rule nisi was issued in these two writ petitions on 28-10-2016[4] and 9-5-2017[5] respectively. By the same orders, these writ petitions were tagged with the batch of matters referred to a larger Bench.

I. *Scope of hearing*

5. The matter is placed before this five-Judge Bench to consider whether Part III of the Constitution of India protects the right to privacy as contended by the petitioners on the strength of over 30 judgments of this Court or whether this issue needs to be authoritatively determined by a Bench comprising more than 5 Judges.

6. The petitioners submit that the present Bench of 5 Judges can authoritatively affirm that the right to privacy is guaranteed under Part III of the Constitution and there is no necessity to refer the case to a larger Bench.

1 *K.S. Puttaswamy* v. *Union of India*, (2015) 8 SCC 735

2 1954 SCR 1077 : AIR 1954 SC 300

3 (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

4 *S.G. Vombatkere* v. *Union of India*, (2017) 7 SCC 59, 90 (footnote 10)

5 *Shantha Sinha* v. *Union of India*, WP (C) No. 342 of 2017, order dated 9-5-2017 (SC)

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II. ***Global perspective on the right to privacy***

7. The right to privacy is an internationally recognised human right and is protected in almost all liberal democracies either constitutionally or statutorily. The United Nations has emphasised that States must respect international human rights obligations regarding the right to privacy.

8. A human right is enjoyed by every human being by virtue of his or her existence. It depends on no instrument or charter. A human right is enjoyed by a person by being alive. The human right to privacy in India is protective under Articles 14, 19 and 21 of the Constitution of India whether the right to privacy is violated in a particular case, depends on the fact of that case.

9. The Report of the United Nations Special Rapporteur (Joseph A. Cannataci) on the Right to Privacy dated 8-3-2016 states that Article 12 of the Universal Declaration of Human Rights, 1948 ("the UDHR") and Article 17 of the International Covenant on Civil and Political Rights, 1966 ("the *ICCPR*") constitute the basis of the right to privacy in international human rights law. Taken together with a number of other international and national legal instruments including constitutions and legislation, there exists worldwide, a considerable legal framework for the protection and promotion of privacy.

III. ***The existence of a 'Right to Privacy' is not disputed***

10. The existence of a "right to privacy" particularly in the context of the Aadhaar programme and the Aadhaar Act, is *not* a disputed issue between the parties. The Aadhaar Act itself acknowledges the existence of this right as is evident from the following:

10.1. Chapter VI of the Aadhaar Act purports to provide a mechanism for the protection of identity information and authentication records collected under the Aadhaar Act and restrictions on the sharing of such information.

10.2. Section 30 of the Aadhaar Act provides that biometric information (photographs, fingerprints and iris scans) collected and stored under the Aadhaar Act will be deemed to be "*sensitive personal information*".

10.3. Sections 37 to 40 of the Aadhaar Act provide penalties for unauthorised disclosure and use of identity information.

10.4. The Statement of Objects and Reasons in respect of the Aadhaar Bill, inter alia, provides:

> "*The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016* inter alia, *provides for* establishment of Unique Identification Authority of India, issuance of Aadhaar number to individuals, maintenance and updating of information in the Central Identities Data Repository, *issues pertaining to security, privacy and confidentiality of information* as well as offences and penalties for contravention of relevant statutory provisions." (emphasis supplied)

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11. Further, as recorded in para 50 of the judgment of the Supreme Court dated 9-6-2017 in *Binoy Viswam* v. *Union of India*[6] relating to the linking of PAN cards and Aadhaar numbers, the Union's contention was that the right to privacy is not absolute.

12. In view of the aforesaid, there is no controversy between the parties that a right to privacy exists, but only whether it is protected under Part III of the Constitution of India.

IV. ***Recognition of the Right to Privacy under Part III***

13. While numerous Supreme Court judgments recognise diverse facets of what broadly falls under the right to privacy, since 1975 there is an unbroken line of decisions that expressly recognises the existence of a right to privacy as being protected under Part III of the Constitution, more specifically Article 21.

14. In *Gobind* v. *State of M.P.*[7] [3 Judge] the Court held:

> "*14. Subba Rao, J. writing for the minority* [in *Kharak Singh*[3]], was of the opinion that *the word "liberty" in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty*, that in the last resort, a person's house, where he lives with his family, is his "castle", that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that *all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution*...."
>
> *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 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*." (emphasis supplied)

6 (2017) 7 SCC 59

7 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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Summary of Arguments

III. Mr Shyam Divan, Senior Advocate, for the petitioners *(contd.)*

15. In *R. Rajagopal* v. *State of T.N.*[8] [2 Judge] the Court explained the contours of the right to privacy:

> "*9. The right to privacy* as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. *This right has two aspects which are but two faces of the same coin — (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion.* The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising—or non-advertising—purposes or for that matter, his life story is written—whether laudatory or otherwise—and published without his consent as explained hereinafter. *In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how. Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21.*
>
> * * *
>
> *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…." (emphasis supplied)

16. In *PUCL* v. *Union of India*[9] [2 Judge] the Court held:

> "*14. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh case*[3] (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.*
>
> * * *
>
> *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

8 (1994) 6 SCC 632
9 (1997) 1 SCC 301

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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 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."

(emphasis supplied)

17. In *Mr 'X'* v. *Hospital 'Z'*[10] [2 Judge] the Supreme Court discussed the right to privacy:

"*21. 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.*[3] that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in *Gobind* v. *State of M.P.*[7] in which the origin of "right to privacy" was traced and a number of American decisions, including *Munn* v. *Illinois*[11], *Wolf* v. *Colorado*[12] and various articles were considered and it was laid down ultimately, as under: (SCC p. 157, para 31)

* * *

26. As one of the basic human rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

* * *

28. 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

10 (1998) 8 SCC 296

11 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)

12 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)

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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."

(emphasis supplied)

18. *Ram Jethmalani* v. *Union of India*[13] [2 Judge] the Court held:

"*83. 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 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.

84. 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."

(emphasis supplied)

19. There are several subsequent judgments of the Supreme Court that have explained various facets of the right to privacy including autonomy, dignity, informational privacy, privacy and the right to know and privacy and confidentiality. A list of these judgments is set out in a table at *p. 66/Vol. I/Petitioners' Compilation*.

13 (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310

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III. Mr Shyam Divan, Senior Advocate, for the petitioners *(contd.)*

V. ***Milestones in the evolution of Part III***

20. The evolution and the expansion of the rights guaranteed under Part III of the Constitution can be traced through the following judgments:

(*i*) *A.K. Gopalan* v. *State of Madras*[14] (6 Judge) — decided on 19-5-1950 (*p. 53 /Vol. I/Petitioners' Compilation*)

(*ii*) *M.P. Sharma* v. *Satish Chandra*[2] (8 Judge) — decided on 15-3-1954 (*p. 72/Vol. I/Petitioners' Compilation*)

(*iii*) *Kharak Singh* v. *State of U.P.*[3] (6 Judge) — decided on 18-12-1962 (*p. 93/Vol. I/Petitioners' Compilation*)

(*iv*) *Rustom Cavasjee Cooper* v. *Union of India*[15] (11 Judge) — decided on 10-2-1970 (*p. 55/Vol. I/Petitioners' Compilation*)

(*v*) *Maneka Gandhi* v. *Union of India*[16] (7 Judge) — decided on 25-1-1978 (*p. 57/Vol. I/Petitioners' Compilation*)

(*vi*) *I.R. Coelho* v. *State of T.N.*[17] (9 Judge) — decided on 11-1-2007 (*p. 62/Vol. I /Petitioners' Compilation*)

(*vii*) *Mohd. Arif* v. *Supreme Court of India*[18] (5 Judge) — decided on 2-9-2014 (*p. 63 /Vol. I /Petitioners' Compilation*)

VI. ***No conflict between M.P. Sharma*[2]*, Kharak Singh*[3] *and the subsequent Supreme Court decisions***

A. *M.P. Sharma*[2]

21. The discussion on the fundamental right to privacy in *M.P. Sharma*[2] was restricted in context inasmuch as it related to the State's power to conduct search and seizure vis-à-vis Article 20(3) and Article 19(1)(*f*) of the Constitution of India.

22. The eight-Judge Bench did not consider or rule upon the existence of the right to privacy under Article 21 and Article 19(1)(*a*) of the Constitution of India. Examining the American Fourth Amendment, the Supreme Court merely observed that there was no fundamental right to privacy "*analogous to the American Fourth Amendment*".

B. *Kharak Singh*[3]

23. The majority judgment of Ayyanagar, J. in *Kharak Singh*[3] struck down Regulation 236(*b*) of the U.P. Police Regulations concerning domiciliary visits at night as violating Article 21, expressly recognising the notion of privacy in the context of

> "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 any theory of freedom which has ceased to be of value." (*p. 349*).

14 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383
15 (1970) 1 SCC 248
16 (1978) 1 SCC 248
17 (2007) 2 SCC 1
18 (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408

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III. Mr Shyam Divan, Senior Advocate, for the petitioners *(contd.)*

24. The ratio of the majority judgment in *Kharak Singh*[3] is explained by a five-Judge Bench of the Supreme Court in *State of W.B.* v. *Committee for Protection of Democratic Rights*[19] (SCC at para 60):

> "It is trite that the words "life" and "personal liberty" are used in the article as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of a person's animal existence. (See *Kharak Singh* v. *State of U.P.*[3])"

25. Further, the minority judgment of Subba Rao and Shah, JJ. in *Kharak Singh*[3] held:

> "Indeed, nothing is more deleterious to 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."

26. The following subsequent decisions of the Supreme Court have expressly held that the minority view in *Kharak Singh*[3] must be regarded as correct:

(*i*) *Rustom Cavasjee Cooper* v. *Union of India*[15], 11 Judge (*p. 55/Vol. I/Petitioners' Compilation*)

(*ii*) *Maneka Gandhi* v. *Union of India*[16], 7 Judge (*p. 57/Vol.I/Petitioners' Compilation*)

> "*5.* … There can be no doubt that in view of the decision of this Court in *R.C. Cooper* v. *Union of India*[20] the minority view must be regarded as correct and the majority view must be held to have been overruled."

(*iii*) *Mohd. Arif* v. *Supreme Court of India*[18], 5 Judge (*p. 63/Vol. I/Petitioners' Compilation*)

> "*26.* ... The minority judgment of Subba Rao and Shah, J]. eventually became law in *Rustom Cavasjee Cooper* v. *Union of India*[15], where the eleven Judge Bench finally discarded *Gopalan*[14] *view and held that various fundamental rights contained in different Articles are not mutually exclusive...*"
>
> * * *
>
> "*28.* ... The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."

27. In view of the decisions in *R.C. Cooper*[15] and *Maneka Gandhi*[16], delivered by Benches larger than *Kharak Singh*[3], the majority view in *Kharak Singh*[3] is expressly overruled.

19 (2010) 3 SCC 571 : (2010) 2 SCC (Cri) 401
20 (1970) 2 SCC 298

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28. Further, the decisions in *M.P. Sharma*[2] and *Kharak Singh*[3] were rendered on principles of constitutional interpretation set out in *A.K. Gopalan* v. *State of Madras*[14]. An eleven Judge Bench of the Supreme Court in *R.C. Cooper*[15] has expressly overruled the *A.K. Gopalan*[14] judgment (as affirmed by a seven-Judge Bench in *Maneka Gandhi*[16]).

VII. *Expansion of Part III Rights*

29. The eleven Judge Bench in *R.C. Cooper*[15] upheld a wider and more expansive interpretation of Part III rights. The Court (per J.C. Shah, J. for the majority), inter alia, held:

> "*52.* ... 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.*"
>
> * * *
>
> "*55.* We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in *A.K. Gopalan case*[14] that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."

30. In *Maneka Gandhi*[16], the Supreme Court held:

> "*5.* ... It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression "personal liberty" as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. *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 a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in R.C. Cooper case*[20] *and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength.* We may point out even at the cost of repetition that this Court has said in so many terms in *R.C. Cooper case*[20] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the

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expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). *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....*"

31. Further, a nine Judge Bench of the Supreme Court in *I.R. Coelho* v. *State of T.N.*[17] has held that the Constitution of India is a living document and its interpretation should be dynamic and evolve with time. The Supreme Court has also held:

"*140. ... Article 21 is the heart of the Constitution. It confers right to life as well as right to choose.* When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the "essence of right" test but also the "rights test" has to apply, particularly when *Kesavananda Bharati*[21] and *Indira Gandhi*[22] cases have expanded the scope of basic structure to cover even some of the fundamental rights."

VIII. *Right to Privacy in the post-R.C. Cooper era*

32. In the aforesaid background regarding the interpretation of Part III rights and particularly Article 21, the decision of the Supreme Court in *Selvi* v. *State of Karnataka*[23] [3 Judge] and its express assertion of a fundamental right to privacy is extremely important.

33. In *Selvi*[23], the Court considered the right to privacy exhaustively in paras 204-226 (pp. 363-70) of the judgment. The decision dealt with *M.P. Sharma*[2], *Kharak Singh*[3] and *Maneka Gandhi*[16] and held:

"*209. ... Following the judicial expansion of the idea of 'personal liberty', the status of the 'right to privacy' as a component of the Article 21 has been recognised and reinforced.*'

* * *

"*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) ...* A conjunctive

21 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
22 *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1
23 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1

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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.

226. 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". However, *this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others*. In order to address such circumstances, it is important to examine some other dimensions of Article 21." (emphasis supplied)

34. Even prior to *Selvi*[23], in *District Registrar and Collector* v. *Canara Bank*[24], a two Judge Bench of the Supreme Court (after considering the judgments in *M.P. Sharma*[2] and *Kharak Singh*[3]) held:

"*39*.... the right to privacy has been implied in Articles 19(1) (*a*) and (*d*) and Article 21 ...

"*40*. A two Judge Bench in *R. Rajagopal* v. *State of T.N.*[8] held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21, "*It is the right to be let alone.*" *Every citizen has a right to safeguard the privacy of his own.* However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. *The right to privacy has since been widely accepted as implied in our Constitution*, in other cases, namely, *People's Union for Civil Liberties* v. *Union of India*[9], *Mr 'X'* v. *Hospital 'Z'*[10], *People's Union for Civil Liberties* v. *Union of India*[25] and *Sharda* v. *Dharmpal*[26]." (emphasis supplied)

35. These decisions, subsequent to *M.P. Sharma*[2] and *Kharak Singh*[3], reinforced the right to privacy after due consideration of the existing case law. The Supreme Court over the last four decades has consistently recognised the right to privacy.

24 (2005) 1 SCC 496
25 (2003) 4 SCC 399
26 (2003) 4 SCC 493

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36. The ratio decidendi of previous decisions must be determined in the context of the understanding of subsequent Benches. *Salmond on Jurisprudence*, (P.J. Fitzgerald, 12th Edn.) at pp. 178-79 states:

> "But while the freedom to distinguish previous decision makes the operation of precedent more flexible, it has given rise to the view that the ratio decidendi of a case is in fact what later cases consider it to be ... *Cases cannot be looked at in isolation but must be interpreted in the light of later authority which may have widened, restricted, distinguished or explained them....*" (emphasis supplied)

IX. *International norms on the Right to Privacy*

A. *International instruments*

37. The right to privacy is internationally recognised as a fundamental human right and has been incorporated as such in the following:

37.1. Article 12 of the Universal Declaration of Human Rights, 1948 ("UDHR") provides:

> "**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." (*p. 378/Vol. II/Petitioners' Compilation*)

37.2. Article 17 of the International Covenant on Civil and Political Rights, 1966 ('ICCPR') provides:

> "**17.** 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks." (*p. 3.72/Vol. II/Petitioners' Compilation*)

India signed and ratified the ICCPR on *10-4-1979* without any reservation with respect to Article 17.

37.3. UN General Assembly Resolution No. 28/16 dated 1-4-2015, appointing the Special Rapporteur on the Right to Privacy along with his Report on the Right to Privacy dated 8-3-2016.

37.4. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Union), 1950— European Convention on Human Rights provides:

> "**8.** ***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." (*p. 385/Vol. II/Petitioners' Compilation*)

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37.5. Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, 2012 provide:

"**7.** ***Respect for private and family life.***— Everyone has the right to respect for his or her private and family life, home and communications.

8. ***Protection of personal data.***— 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." (*Page 391/Vol. II/Petitioners' Compilation*)

37.6. Article 8 of Schedule I of the UK Human Rights Act, 1998 provides:

"**8.** ***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." (*Page 395/Vol. II/Petitioners' Compilation*)

38. In the absence of any domestic law to the contrary, India's international obligations must be enforced. In this regard, reliance is placed on the following judgments:

(*i*) *Vishaka* v. *State of Rajasthan*[27], [3 Judge] at para 7.

(*ii*) *Pratap Singh* v. *State of Jharkhand*[28], [5 Judges], (per S.B. Sinha, J. in his part concurring opinion) at para 64.

B. *Relevant literature and case Jaw*

39. Relevant literature on the subject emphasises that privacy has a core Anglo-Commonwealth meaning which includes both informational and physical privacy. If privacy is to be protected comprehensively, both these aspects need to be protected (*p. 398 at 400, 403, 412/Vol. II/Petitioners' Compilation*).

40. Privacy rights, in their most elementary sense, are about restricting access to oneself or one's "private space" in which the individual is free to be him/herself. Infringement of privacy is an affront to an individual's personality and dignity and is damaged both by the violation and by the demonstration that the personal space is not inviolate. This idea of privacy as the protection of an "inviolate personality" was articulated by Samuel Warren

27 (1997) 6 SCC 241 : 1997 SCC (Cri) 932
28 (2005) 3 SCC 551 : 2005 SCC (Cri) 742

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and Louis Brandeis in 1890 and they defined privacy as "the right to be let alone" (*p. 463 at 463, 465, 475, 481/Vol. II/Petitioners' Compilation*).

41. Over the next century, the right of privacy evolved from a tortious remedy to a statutory and constitutional right providing protection against and control over unwanted access to the physical self as well as personal information. Alan Westin's oft-cited definition describes privacy as "the claim of individuals, groups, or institutions to determine for themselves *when, how, and to what extent information about them is communicated to others*." (p. 398 at 405/Vol. II/Petitioners' Compilation).

42. The modern conception of privacy law is formulated in response to new technologies and practices by businesses and governments that enhance their power by giving rise to enormous data gathering and data analysis, without means of oversight or accountability (*p. 435 at 461/Vol. II/Petitioners' Compilation*).

43. In view of this, privacy rights against the government demand that State power is limited and unobtrusive in a manner that liberal democracy requires. As Gary Marx argues,

> "… a thread running through all totalitarian systems from the prison to the authoritarian State is lack of respect for the individual's right to control information about the self. It has been said that the mark of a civilisation can be seen in how it treats its prisoners; it might also be seen in how it treats personal privacy."

Thus, privacy rights protect against totalitarian governments (*p. 435 at 437, 438, 457/Vol. II/Petitioners' Compilation*).

44. Scholars have endorsed a presumption in favour of liberty which places the burden of proof on the State to justify any interference. Accordingly,

> "… the question of justice is not, why privacy, but rather why not? ... Coercion, not privacy or private choice, needs legitimising." (*p. 435 at 444-445/Vol. II/Petitioners' Compilation*).

45. Further, the highest courts across jurisdictions have recognised the individual's right to privacy against the State as well as private bodies. The most recent international judgments in this regard are:

(*i*) Court of Justice of European Union — *Tele2 Sverige AB* v. *Post- och telestyrelsen*[29]

(*ii*) US Supreme Court — *Obergefell* v. *Hodges*[30]

(*iii*) UK Supreme Court — *R.* v. *Commr. of Police of the Metropolis*[31]

(*iv*) Canadian Supreme Court — *R.* v. *Spencer*[32]

29 (2017) 2 WLR 1289
30 192 L Ed 2d 609 : 135 S Ct 2584 : 576 US— (2015)
31 2011 UKSC 21 : (2011) 1 WLR 1230
32 2014 SCC OnLine Can SC 34 : 2014 SCC 43

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46. These submissions supplement the written submissions dated 15-7-2017 filed by the petitioners.

47. At the outset, it is submitted that, as recognised by an unbroken line of decisions of this Court since 1975 the "right to privacy" is protected under Part III of the Constitution of India[33]. It is submitted that this Court has recognised several unenumerated rights as facets of Article 21[34]. Similarly, the right to privacy has also been recognised as flowing from Article 21.

48. The "right to privacy" itself cannot be defined with any specificity. However, it extends to several aspects, including—

(*a*) Bodily integrity
(*b*) Personal autonomy
(*c*) Right to be let alone
(*d*) Informational self-determination
(*e*) Protection from State surveillance
(*f*) Dignity
(*g*) Confidentiality
(*h*) Compelled speech
(*i*) Freedom to dissent
(*j*) Freedom of movement
(*k*) Freedom to think

49. There can be no exhaustive enumeration of aspects of the "right to privacy", and it must be determined on a case-to-case basis[35].

50. It is submitted that in a technologically dynamic society it is imperative to keep dimensions of "tight to privacy" flexible to adapt and adjust with the new scenarios. A nine-Judge Bench of this Court in *I.R. Coelho* v. *State of T.N.*[36] has held that the "*... Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it*".

51. In *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[37], Pandian, J. in his concurring view opined,

> "15. The exploration of the new principles are essential in those areas not before explored; more so when the old principles are found to be not

33 The Finance Minister in his speech before the Rajya Sabha on 16-3-2016, at the time of introduction of the Aadhaar Bill, has acknowledged the existence of the fundamental right to privacy. Relevant excerpt of the Speech is enclosed herewith as *Annexure A*

34 A partial list of unenumerated rights recognised under Article 21 by the Supreme Court is enclosed herewith as *Annexure B*

35 In *PUCL* v. *Union of India*, (1997) 1 SCC 301 at para 18, this Court has, inter alia held,

> "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 the facts of the said case*..."

36 (2007) 2 SCC 1

37 (1993) 4 SCC 441

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responding to the unresolved and unforeseen modern challenges or to have become inapplicable to the new situations or found to be unsound....

16. The proposition that the provisions of the Constitution must be confined only to the interpretation which the Framers, with the conditions and outlook of their time would have placed upon them is not acceptable and is liable to be rejected for more than one reason — firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the Framers at the time of framing the Constitution when it is juxtaposed to the present time. *The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time*."

52. It is submitted that the right to privacy emanates from a conjoint reading of the golden triangle of Articles 14, 19 and 21 of the Constitution. It is submitted, that many of the fundamental rights guaranteed under Part III of the Constitution cannot be enjoyed to the fullest, in the absence of a fundamental right to privacy.

53. It is submitted that recognition of the fundamental right to privacy is consistent with international norms and India's international obligations under different conventions and treaties. It is an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law. Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations. Article 17[38] of the International Covenant on Civil and Political Rights (ICCPR) is not contrary to any municipal law. In this backdrop, Part III, more particularly Article 21, must be interpreted in conformity with international law.

54. It is submitted that in view of the decisions in *Rustom Cavasjee Cooper* v. *Union of India*[39] (11-Judge) and *Maneka Gandhi* v. *Union of India*[40] (7-Judge), the law laid down in *M.P. Sharma*[41] and *Kharak Singh*[42], is no longer good law.

38 India signed and ratified the ICCPR on 10-4-1979 without any reservation with respect to Article 17. Article 17 is reproduced hereinbelow for ready reference—

17. (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks."

(Page 372/Vol. II/Petitioners' Compilation)

39 (1970) 1 SCC 248 : Page 55/Vol. I /Petitioners' Compilation

40 (1978) 1 SCC 248 : Page 57/Vol. 1/Petitioners' Compilation

41 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865

42 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

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Part A: Privacy generally

1. Privacy did not emerge one fine day fully formed and structured from the theoretical penumbras of various constitutional articles. Rather it is an amorphous and a protean concept that emerges from values and principles that have evolved from case law over hundreds of years.

2. One workable definition of the right to privacy, one recognised by Brandeis in his seminal article "The right to privacy"[1] is the right to be left alone. The right to be left alone can be described merely as an expression at a higher level of abstraction of several rights that flow directly from the principles of life and liberty that were enshrined in Clause 39 of the Magna Carta[2] (1215).

3. In England, eavesdropping was criminalised under the Justices of Peace Act, 1361. In his seminal "Commentaries on the Laws of England" (8th Edn., 1778, Vol. IV, p. 167,168), Blackstone writes of common nuisances which he states are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and are indictable only… In this category he includes,

> "6. Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after recourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior."

4. Nowadays privacy rights are explicitly recognised or are recognised by implication under the Universal Declaration of Human Rights (1948) (arguably part of customary international law and therefore part of the law of India[3]), the International Covenant of Civil and Political Rights (ratified by India and so to be read into the Constitution[4]), the European Convention of Human Rights, the Constitutions of the United States, the United Kingdom and virtually every other democratic or liberal Constitution. Constitutional courts in India have explicitly recognised a right to privacy for over 40 years. Our statutes recognise privacy interests as well. In particular the Protection of Human Rights Act, 1993 is relevant.

1 (1890) 4 Harv Law Review 193

2 No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land. As correctly pointed out by this Court in *Mohd. Arif* v. *Supreme Court of India*, (2014) 9 SCC 737, para 18 : (2014) 5 SCC (Cri) 408 the original charter did not get off the ground and was later re-enacted many times. In *Coke's Second Institute* (2nd Edn., 1797), clause 39 appears as "No Freeman shall be taken, or imprisoned, or be disseised of his freehold, or outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, , but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."

3 See *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647

4 See *Jolly George Verghese* v. *Bank of Cochin*, (1980) 2 SCC 360; *Visakha* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932

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5. Privacy or the right to be left alone has the following, amongst other important components:

A. *Privacy of one's home and residence*. This flows directly from *Semayne case*[5], which famously held that "every man's home is his castle" and has been applied to India by the Privy Council in *Aga Kurboolie Mohamed* v. *R.*[6] It was also specifically endorsed in the majority by Justice Ayyangar in *Kharak Singh*[7] judgment.

B. *Privacy of personal belongings and freedom from arbitrary searches and seizures*. This flows from the landmark judgments of Lord Camden in *Huckle* v. *Money*[8] (cited in *Common Cause* v. *Union of India*[9] on damages for tort) and *Entick* v. *Carrington*[10] (cited in *M.P. Sharma*[11], *District Registrar & Collector* v. *Canara Bank*[12] and many other cases) and also includes the law of protection of confidential information in cases like *Albert* v. *Strange*[13]. This forms the basis of the Fourth Amendment and Fifth Amendment in the United States. In India as well there is a long line of judgments by which arbitrary searches and seizures have been quashed and stringent guidelines have been laid down in cases like *DGIT* v. *Spacewood Furnishing (P) Ltd.*[14] and *ITO* v. *Seth Bros.*[15] each dealing with powers under Section 134 of the IT Act or the Constitution Bench decision in *Karnail Singh* v. *State of Haryana*[16] dealing with powers under Section 50 of the NDPS Act.

C. *Privacy of personal data, and freedom from surveillance*. This flows from the cases such as the phone tapping case, *PUCL* v. *Union of India*[17] as well as the duty of State Authorities to protect confidential information in *Marcel* v. *Commr. of Police*[18] and *S and Marper* v. *United Kingdom*[19]. Also relevant is the decision of the German Federal Court in the Census case (1983). An important Indian case is *Selvi* v. *State of Karnataka*[20].

5 (1604) 5 Co Rep 91a : 77 ER 194
6 1843 SCC OnLine PC 3 : (1841-46) 3 Moo IA 164
7 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 (1763) 2 Wils KB 205 : 95 ER 768
9 (1999) 6 SCC 667 : 1999 SCC (Cri) 1196
10 (1765) 2 Wils KB 275 : 95 ER 807
11 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865
12 (2005) 1 SCC 496
13 (1849) 1 Mac & G 25 : 41 ER 1171
14 (2015) 12 SCC 179
15 (1969) 2 SCC 324
16 (2009) 8 SCC 539 : (2009) 3 SCC (Cri) 887
17 (1997) 1 SCC 301
18 1992 Ch 225: (1991) 2 WLR 1118 (CA)
19 2008 ECHR 1581
20 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1

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D. *Privacy of personal choice*. This includes judgments the landmark decision of Lord Mansfield in *Da Costa* v. *Jones*[21] wherein his Lordship was pleased to hold unenforceable a wager between 2 persons over the biological sex of a third person, as well as landmarks such as *Griswold* v. *Connecticut*[22] (contraceptives for married couples), *Eisenstadt* v. *Baird*[23] (contraceptives for unmarried couples), *Roe* v. *Wade*[24] (abortion), *Planned Parenthood* v. *Casey*[25] (abortion), *Lawrence* v. *Texas*[26] (gay rights), *Obergefell* v. *Hodges*[27] (gay marriage) et al. In fact a curative petition is pending in this Hon'ble Court on the gay rights in the *Naz Foundation case*[28].

6. Each of these liberties forms an important core or at the very least a penumbra of fundamental rights guarantees in Part III of the Constitution, whether considered historically or even in terms of jurisprudence.

A and B: Articles 21 (right to personal liberty), 300-A (right to property)

C: Articles 20(3), 21, 19(1)(*c*), 19(1)(*a*)

D: Articles 14, 19, 21 (right to life)

7. The correctness and validity of *M.P. Sharma* v. *Satish Chandra*[11] ("*M.P. Sharma*") and *Kharak Singh* v. *State of U.P.*[7] ("Kharak Singh") need to be evaluated in this background.

***Part B: M.P. Sharma*[11] *and Kharak Singh*[7]**

8. *The stray observations in the judgment in M.P. Sharma*[11] *about the lack of a right of privacy were inaccurate as being somewhat overbroad in 1954 and are clearly erroneous today. As such, this Hon'ble Court may clarify the same and limit the ratio of the judgments to the facts of that case.*

8.1. It is axiomatic that judgments are not be interpreted as Euclid's theorems but are authorities to what was argued and what was decided. In *M.P. Sharma*[11] the petitioners argued that the provisions of search and seizure contained in the Criminal Procedure Code were bad in view of the provisions of Article 20(3) on the basis of *Boyd* v. *United States*[29] States which in turn was based on the 4th and 5th Amendments to the US Constitution and on *Entick* v. *Carrington*[10]. The Court rejected this argument stating that there was no 4th Amendment in the Indian Constitution. In doing so, the Court wrongly conflated the 4th Amendment with the right to privacy. The 4th Amendment is an important part of privacy (point 5B above) but not the only component. Other components were not required to be considered, were not

21 (1778) 2 Cowp 729 : 98 ER 1331
22 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 ; 381 US 479 (1965)
23 (1972) SCC OnLine US SC 62 : 31 L Ed 2d 349 : 405 US 438 (1972)
24 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
25 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833 (1992)
26 2003 SCC OnLine US SC 73 : 539 US 558 (2003)
27 576 US _____ (2015)
28 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1
29 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)

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argued and were thus not considered. Thus the stray observation in *M.P. Sharma*[11] needs to be clarified as obiter and not a proposition against the right to privacy.

8.2. The provisions in the Criminal Procedure Code and other statutes such as the NDPS, the IT Act, etc. dealing with search and seizure may be struck down or read down on a case-to-case basis if they confer arbitrary or uncanalised powers or if they are draconian and thus bad under Article 21 or even under Article 20(3). However, there is no general prohibition on search and seizure provisions imposed by Articles 21 and 20(3). This merits some clarification by this Hon'ble Court.

9. *The observations and findings contained in the majority judgment of Kharak Singh that limit the right to privacy and deny the right against surveillance cannot be sustained in the light of the judgment in R.C. Cooper* v. *Union of India*[30] *(11 Judges), and Maneka Gandhi* v. *Union of India*[31] *(7 Judges), and in particular the finding in paragraph 5 of the judgment in Maneka Gandhi*[31] *by which the minority view of then Justice Subba Rao is deemed as correct and the majority view overruled merits reaffirmation and clarification.*

9.1. The majority in *Kharak Singh*[7] relies upon the reasoning in *A.K. Gopalan* v. *State of Madras*[32] dealing with the exclusivity of fundamental rights, a view set aside by *R.C. Cooper*[30] (11 Judges) and clarified by *Maneka Gandhi*[31] (7 Judges)

9.2. The majority in *Kharak Singh*[7] fails to correctly interpret the word "freely" in Article 19(1)(*c*) and errs in confining it to physical restraints alone. It also ignores the impact a lack of privacy has on free speech under Article 19(1)(*a*). This is both historical and problematic in terms of jurisprudence and theory.

9.2.1. Blackstone (8th Edn., 1778) Vol. I, page 134-1337) states that

> "personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraints, unless by due course of law... the confinement of the person in any wise, is an imprisonment...And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond."

9.2.2. Bentham, the father of legal positivism, (and who dismissed Blackstone's Natural Law predilections as nonsense upon stilts!!) conceptualised the idea of an ideal or model security institution, known as the Panopticon. The Panopticon is an architectural creation, within which constant and round-the-clock watch can be kept on the inmates, workers or

30 (1970) 1 SCC 248

31 (1978) 1 SCC 248

32 AIR 1950 SC 27 : (1950) 51 Cri LJ 1383

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patients. The characteristic feature of this arrangement is that there is a complete asymmetry of knowledge, and hence power: the guards in the central tower can see into any of the cells at any given time, but due to special blinds the inmates cannot see the guards, or if they are being watched at any specific moment. In his own words,

> "I think, without exception, to all establishments whatsoever, in which, within a space not too large to be covered or commanded by buildings, a number of persons are meant to be kept under inspection. No matter how different, or even opposite the purpose: whether it be that of punishing the incorrigible, guarding the insane, reforming the vicious, confining the suspected, employing the idle, maintaining the helpless, curing the sick, instructing the willing in any branch of industry, or training the rising race in the path of education: in a word, whether it be applied to the purposes of perpetual prisons in the room of death, or prisons for confinement before trial, or penitentiary-houses, or houses of correction, or work-houses, or manufactories, or mad-houses, or hospitals, or schools. It is obvious that, *in all these instances, the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose X of the establishment have been attained. Ideal perfection, if that were the object, would require that each person should actually be in that predicament, during every instant of time. This being impossible, the next thing to be wished for is, that, at every instant, seeing reason to believe as much, and not being able to satisfy himself to the contrary, he should conceive himself to be so.*[33]"

Bentham's ideas for a prison form a philosophical base for a surveillance state with the State as a Panopticon all seeing and all knowing[34]. Michael Foucault contended that the nature of the oneway surveillance in the Panopticon – what he referred to as the gaze – resulted in an asymmetry of knowledge, and hence power. Ultimately, Foucault argued, the omniscient surveillance created conditions whereby the observed themselves became instruments of their own suppression. So whereas Bentham viewed his Panopticon as a technology for reforming men, Foucault saw a method for creating "docile bodies.[35]"

9.2.3. Twentieth Century totalitarian dictatorships such as Nazi Germany or the Stalinist Soviet Union or even Communist East Germany point to the impact of perpetual surveillance on human conduct and human morals. The same is also reflected in George Orwell's 1984, or the recent award winning movie "The Lives of Others".

33 Bentham, Jeremy, *The Panopticon Writings*, Miran Bozovic (Ed.) (London: Verso, 1995) pp. 29-95

34 In any case, Bentham as a utilitarian dismissed natural rights as "nonsense upon stilts". But even he envisaged such a structure only for prisons or institutions and not people at large.

35 Scott O'Reilly, Philosophy and the Panopticon, Philosophy Now Issue 36 <http://philosophynow.org/issues/36/Philosophy_and_the_Panopticon>.

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9.2.4. Justice Subba Rao's dissenting opinion in *Kharak Singh*[7] merits reaffirmation, particularly where he states,

"If a man is shadowed, his movements are obviously constricted. He can move physically, but it can be a movement of an automaton. How could a movement under the scrutinizing gaze of the policeman be described as a free movement? The whole country is his jail. The freedom of movement in clause (*d*) [of Article 19] therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom."

9.2.5. In Fali Nariman's book, *Before Memory Fades*[36] at pp. 189-190, he writes about the impact of the emergency upon lawyers:

> "CK Daphtary (CK) and ST Desai (ST) were distinguished contemporaries, very senior and both Gujarati speaking. They always came in early to the Bar library, sat opposite each other, occasionally exchanging pleasantries. One morning in August 1975, I was the sole witness to the following conversation:
>
> ST Desai: (holding a cigarette between his third and fourth fingers, with loosely clenched fists, as was his habit, and occasionally inhaling) Chandubhai- bolo (Chandubhai – speak)
>
> CK Daphtary: (puffing away at his pipe; his eyes sparkling with mischief) Sunderlal- tame pehle bolo (Sunderlal-you speak first).
>
> In those dark days of emergency when informers were around, you only spoke, within the hearing of others, when you had to. Unwittingly these stalwarts of the Bar had encapsulated, in an innocent, spontaneous one-act play, the entire climate of the times!"

9.2.6. The judgment in the phone tapping case clearly points out the detrimental impact on free speech that unauthorised tapping can have. The decision of the US Supreme Court in *Katz* v. *United States*[37] as well as the dissent in *Olmstead* v. *United States*[38] are also illustrative.

9.2.7. The importance of privacy for the right to association can also be gleaned by the US Supreme Court decision in *NAACP* v. *Alabama*[39] wherein the Court was faced with the legality of the demand of the State of Alabama of the member list of the National Association for the Advancement of Colored People. In those days because of widely prevalent attitudes of pro segregation in Alabama, disclosure of such membership lists would have had a detrimental impact on the people. The Supreme Court in a unanimous decision struck down the law holding per Justice Harlan:

36 Fali S. Nariman, *Before Memory Fades: An Autobiography* (1st Edn., 2010) pp. 189-190.
37 1967 SCC On Line US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)
38 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 227 US 438 (1928)
39 1958 SCC OnLine US SC 146 : 2 L Ed 2d 1488 : 357 US 449 (1958)

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> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds*[40]: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs...We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.... We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.

9.3. *Kharak Singh*[7], while quoting with approval the famous "limb and faculty test" of *Munn* v. *Illinois*[41] per Field, J., proceeds to completely ignore that privacy is a vital "limb and faculty" without which we are indeed reduced to animal existence. *Kharak Singh*[7] espouses a cribbed, cabined and confined view of privacy — the right to be secure in one's home [*Semayne case*[5]], and the right to be free from arbitrary search and seizure [*Wolf* v. *Colorado*[42]] are upheld but the right to be free of surveillance or the valuable

40 1950 SCC OnLine US SC 46 : 94 L Ed 925 : 339 US 382 at p. 402 (1950)
41 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)
42 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)

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aspect of "life" in terms of personal choices are ignored (See 5A-D above). In this regard, it is pertinent to consider the dissenting view of Justice Harlan in *Poe* v. *Ullman*[43], which echoes our own *Maneka Gandhi*[31], interpreting the term "liberty" in terms of the 5th and 14th Amendments to the US Constitution to mean "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

10. *The line of judgments from Gobind* v. *State of M.P.*[44], *R. Rajagopal* v. *State of T.N.*[45], *PUCL* v. *Union of India*[17], *Sharda* v. *Dharampal*[46]; *District Registrar & Collector* v. *Canara Bank*[12]; *Selvi* v. *State of Karnataka*[20] *etc. are not per incuriam but instead correctly lay down the law and need to be reaffirmed.*

10.1. This Hon'ble Court has correctly interpreted the provisions of Part III to uphold the rights contained in Para 5A-D. For 40 years they have formed a vibrant and important part of our law and our national culture. An invitation to hold them per incuriam is an invitation to government led lawlessness and to medieval despotism and tyranny. In the words of Lord Camden in *Huckle* v. *Money*[8] or *Entick* v. *Carrington*[10] eg. "worse than the Spanish inquisition". To paraphrase Senator Kennedy's famous speech about Judge Robert Bork, an India without the right to privacy is a land in which women would be forced into back alley abortions, and where rogue police could break down citizens doors in midnight raids.

10.2. A table encapsulating only some of the law laid down by this Hon'ble Court based on the right to privacy is as under:

Case title	*Issue(s) Involved*	*Guidelines developed*
Gobind v. *State of M.P.*[44]	Surveillance of an individual, including domiciliary visits and picketing of residences	Regulations permitting surveillance of an individual were upheld, if sufficient evidence is present indicating that the person under surveillance could lead a life of crime or cause social unrest in the future. "Compelling State Interest" test evolved. Para 22- "There can be no doubt that privacy-dignity claims deserve to be

43 1961 SCC OnLine US SC 133 : 6 L Ed 2d 989 : 367 US 497 (1961)

44 (1978) 2 SCC 148 : 1975 SCC (Cri) 468

45 (1994) 6 SCC 632

46 (2003) 4 SCC 493

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		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." Para 33- "Mere convictions in criminal cases where nothing gravely imperilling safety of society cannot be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer."
PUCL v. *Union of India*[17]	(*a*) Interception of phone messages (*b*) Challenge to the constitutional validity of S. 5(2) of the Telegraph Act	The Hon'ble Supreme Court created guidelines, in respect of interception of telephonic messages, which mandatorily have to be observed, in addition to the requirements contained in S. 5(2) of the Telegraph Act. Para 30- "The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/ conversations is concerned the section clearly lays down the situations/conditions under which it can be exercised. But the

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		substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable."
District Registrar & Collector v. *Canara Bank*[12]	Challenge to the constitutionality of S. 73 of the Indian Stamp Act, 1989, as amended by the State of Andhra Pradesh, empowering (a) the Collector to carry out inspection of documents in private custody and (b) the Collector to allow "any person" to inspect, make notes from papers in public offices	The Hon'ble Supreme Court declared S. 73 of the Indian Stamp Act to be ultra vires the Constitution of India. Para 58- "Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out."
State of Maharashtra v. *Bharat Shanti Lal Shah*[47]	Challenge to the constitutional validity of the MCOCA	The Hon'ble Supreme Court held that the MCOCA does not contravene Constitutional provisions. Para 61- "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

47 (2008) 13 SCC 5

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		intended to prevent the commission of an organised crime….Thus as the Act under challenge contains sufficient safeguards and also satisfies the aforementioned mandate the contention of the respondents that provisions of Sections 13 to 16 are violative of the Article 21 of the Constitution cannot also be accepted."
Selvi v. *State of Karnataka*[20]	Use of narco-analysis, polygraph tests and Brain Electrical Activation Profile, against the will of the accused	Guidelines were published by the National Human Rights Commission in 2000, suggesting the procedure to be followed while administering a polygraph test and the same were adopted by the Hon'ble Supreme Court. Para 226- "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"."
Bhabani Prasad Jena v. *Orissa State Commission for Women*[48]	Whether the High Court possesses the power to order the administration of a DNA test of a child	Para 22- "In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the

48 (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053

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		court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed."
Girish Ramchandra Deshpande v. *Central Information Commr.*[49]	Whether the CIC correctly classified the information sought as "personal information"	The Hon'ble Supreme Court held that the Petitioner did not exhibit bonafide public interest in seeking information. Para 12- "The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which could cause unwarranted invasion of privacy of that individual."

10.3. These judgments insofar as they incorporate customary international law and various international conventions to which India is a party are a part of the law of India.

10.4. The judgments in *M.P. Sharma*[11] and *Kharak Singh*[7], to the extent that they contradict these judgments require clarification and/or setting aside.

49 (2013) 1 SCC 212 : (2013) 1 SCC (L&S) 150

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1. The following written submissions are placed for the kind consideration and perusal of this Hon'ble Court in furtherance and addition to the arguments already canvassed on behalf of the petitioners:

A. ***A liberal interpretation of the Constitution should be preferred***

2. A narrow and stilted interpretation[1] of the Constitution should be discarded in favour of an interpretation which is broad-based and liberal. The latter would bring out in full measure the purpose which the framers of the Constitution had in mind viz. to confer the fullest degree of personal liberty to its subjects as gathered from the language they used and the spirit their words convey.[2]

3. In any event, where "even in the absence of Article 21 in the Constitution the State has no power to deprive a person of his life or liberty without the authority of law",[3] the mere fact that the fundamental right to privacy is absent in letter is wholly irrelevant for determining its existence. Even the language deployed by the Constitution reiterates the understanding that an inalienable natural right inherent in every human being is "recognised" under Article 21 as opposed to such article being the fountainhead of the right to life and personal liberty.

4. A cardinal reason for the Constitution to be considered, and rightly so, as a "living document"[4] and the "usufruct of the living and not the property of the dead", is because its framers could not have known all the components of liberty and its manifold possibilities.[5] Further, by legitimising the process of constitutional amendments, its framers intentionally discarded any presumption of having an insight into all components of constitutional governance particularly, personal liberty.[6] Therefore, it becomes imperative to construe the provisions of the Constitution in the light of prevailing circumstances, which have considerably changed since the early years of its working in the 1950s to 1960s. The most prominent example being the advent of information technology and the ushering in of a digital economy. Indeed, times can blind us to certain truths and later generations can see that laws once thought of as necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[7]

1 For example, to say that since no explicit fundamental right to privacy exists in letter, there is no fundamental right to privacy at all.

2 *Ram Singh* v. *State of Delhi*, 1951 SCR 451 : AIR 1951 SC 270, para 25 : (1951) 52 Cri LJ 904 (Dissenting opinion of Bose, J.); *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1, para 42; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, para 208 (separate opinion of Beg, J.)

3 See *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521, para 530 (dissenting opinion of Khanna, J.)

4 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1, paras 42, 50

5 *Lawrence* v. *Texas*, 2003 SCC OnLine US SC 73 : 539 US 558 (2003) at p. 578 (Opinion of the Court)

6 *Lawrence* v. *Texas*, 539 US 558 (2003) at pp. 578-79 (Opinion of the Court)

7 *Lawrence* v. *Texas*, 539 US 558 (2003) at p. 579 (Opinion of the Court)

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5. The framers of the Constitution perhaps viewed fundamental rights as "isolated islands of individual articles in Part III", in a manner similar to their Lordships in *A.K. Gopalan* v. *State of Madras*[8]. This is evidenced by the Drafting Committee's approach of qualifying the term "liberty" with the word "personal" so as to prevent any overlapping of rights between Articles 19 and 21. However, the evolution of constitutional interpretation from the aforesaid approach to a "syncretic and holistic understanding of fundamental rights" removes the requirement of identifying privacy in a watertight compartment of a singular article in the Constitution.[9] Therefore, what ought to be accomplished through the present reference is the identification of this basic human right of privacy across the length and breadth of the Constitution.

B. ***The march of law***

6. The decisions of the 1970s of the Constitution Bench of this Hon'ble Court, which favoured a liberal interpretation of the Part III rights, rendered the dissenting opinion of Subba Rao, J. in *Kharak Singh*[10] to be sound law. Furthermore, this set the stage for an evolution of the judicial understanding of privacy which posited that the "right to privacy": (*i*) is a fundamental right; and, (*ii*) that it deals with "persons" and not merely "places."[11]

7. In the year 1975, this Hon'ble Court, while examining the existence of a fundamental right to privacy in *Gobind* v. *State of M.P.*[12] observed thus:

> "20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favorable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in *Olmstead* v. *United States*[13] [277 US 438, 471] 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."

8. More specifically, this Hon'ble Court in *District Registrar and Collector* v. *Canara Bank*[14] expounded on the importance of the fundamental right to privacy as a facet, inter alia, of life and personal liberty under Part III of the Constitution of India. This was done on the strength of: (*i*) its earlier decisions including *Gobind* v. *State of M.P.*[15]; and (*ii*) decisions of the Supreme Court of the United States which were in tune with *Rustom Cavasjee Cooper* v. *Union of India*[16].

8 AIR 1950 SC 27 : (1950) 51 Cri LJ 1383
9 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
10 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329
11 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496, para 53
12 (1975) 2 SCC 148, para 20 : 1975 SCC (Cri) 468
13 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 at p. 471 (1928)
14 (2005) 1 SCC 496, paras 39, 48.2, 53
15 (1975) 2 SCC 148
16 (1970) 1 SCC 248

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9. Furthermore, the authoritative pronouncement of a Bench consisting of eleven Judges of this Hon'ble Court in *Rustom Cavasjee Cooper* v. *Union of India*[16], leaves no manner of doubt that the premise upon which the twin decisions of *M.P. Sharma* v. *Satish Chandra*[17] and *Kharak Singh* v. *State of U.P.*[10] were predicated, stands altered. Ergo, where the main pillars have been demolished, the edifice of these twin judgments cannot be allowed to remain. Therefore, a Constitution Bench of this Hon'ble Court in *Mohd. Arif* v. *Supreme Court of India*[18] has observed that the wheel has turned full circle and that the minority opinion in *Kharak Singh* v. *State of U.P.*[10] has come to hold the field.

10. This Hon'ble Court in *District Registrar and Collector* v. *Canara Bank*[19] has thus observed a forward march of law:

> "40. [···] The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, *People's Union for Civil Liberties* v. *Union of India*[20], *Mr 'X'* v. *Hospital 'Z'*[21], *People's Union for Civil Liberties* v. *Union of India*[22] and *Sharda* v. *Dharmpal*[23]."

> "53. Once we have accepted in *Gobind*[15] 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."

11. Therefore, it is most respectfully submitted that a case-by-case development of the right to privacy, which is a requirement necessitated by this Hon'ble Court's decision in *Gobind* v. *State of M.P.*[24] has taken place vide a series of decisions of this Hon'ble Court,[25] and has also been recognised as such.[26]

17 AIR 1954 SC 300 : 1954 Cri LJ 865

18 (2014) 9 SCC 737, paras 25-28 : (2014) 5 SCC (Cri) 408. See also *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, para 5. Referring to *Kharak Singh*, AIR 1963 SC 1295, Bhagwati, J. (as he then was, and speaking for himself, Untwalia and Fazal Ali, JJ.) observed "5. [···] 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, the minority view must be regarded as correct and the majority view must be held to have been overruled."

19 (2005) 1 SCC 496, paras 40, 53

20 (1997) 1 SCC 301

21 (1998) 8 SCC 296

22 (2003) 4 SCC 399

23 (2003) 4 SCC 493

24 (1975) 2 SCC 148, para 28. "28. The right to privacy in any event will necessarily have to go through a process of case-by-case development".

25 See also *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632; *State of Maharashtra* v. *Bharat Shanti Lal Shah*, (2008) 13 SCC 5; *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1; *Ram Jethmalani* v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310; *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810; *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*, (2013) 16 SCC 82, *Bachpan Bachao Andolan* v. *Union of India*, (2017) 1 SCC 653 : (2017) 1 SCC (Cri) 499, etc.

26 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496, para 40

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12. Inasmuch as this Hon'ble Court has relied upon the understanding of Part III as rendered in *Rustom Cavasjee Cooper* v. *Union of India*[27] and *Maneka Gandhi* v. *Union of India*[28], (i.e. fundamental rights are of the widest amplitude encompassing a variety of rights), it stands well settled that every person has the fundamental right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other aspects.[29]

C. *Identification of the "right to privacy" as a "fundamental right"*

13. The fundamental right to privacy inheres in Article 21 with its facets being placed across the length and breadth of Part III of the Constitution.

14. Homo sapiens is first and foremost a social animal; yet, "the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole".[30] The Constitution is not, and cannot be, a totalitarian design depending for its success upon the homogenisation or depersonalisation of humanity. It is for this reason that this Hon'ble Court has reached into the Constitution's spirit and, through a contextual and meaningful interpretation thereof, has elaborated upon the idea of a "human" and its conception as a "being", not as a mere formal contemplation but as an essential constitutional requirement.[31]

27 (1970) 1 SCC 248, para 43. "43. [···] Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions.

28 (1978) 1 SCC 248, paras 5, 22. "5. [···] The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R.C. Cooper case*, (1970) 2 SCC 298 and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in so many terms in *R.C. Cooper case*, (1970) 2 SCC 298 that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). 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."; "22. [···] The long years of the freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and in fact the entire cultural and spiritual history of India formed the background against which these rights were enacted and consequently, these rights were conceived by the Constitution-makers not in a narrow limited sense but in their widest sweep, for the aim and objective was to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured.

29 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632, para 26.1

30 Laurence H. Tribe, *American Constitutional Law*, § 15-1, p. 1302 (2nd Edn., 1988).

31 See also Laurence H. Tribe, *American Constitutional Law*, § 15-3, p. 1308 (2nd Edn., 1988).

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15. Privacy does not stand on the pedestal of secrecy.[32] Rather, it stands on the pedestal of "dignity" and "personal liberty". While "liberty" presumes an autonomy of self which includes freedom of thought, belief, expression and intimate conduct amongst other things,[33] personal liberty entails a positive constitutional promise of the existence of a realm for all individuals, where it would not be permissible for the State to enter.[34] This realm of protection is essential to secure, protect and ensure a right to live with human dignity; human life has its charm and there is no reason why life should not be enjoyed with all permissible pleasures.[35]

16. John Stuart Mill, in his essay on liberty, commented that the people's "choice of pleasures, and their mode of expending their income, after satisfying their legal and moral obligations to the State and to individuals, are their own concern, and must rest with their own judgment."[36] Without the identification of this sphere as being a person's right to privacy, and without a concomitant identification of an injunction on the State through Part III of the Constitution, the right to life itself may be rendered otiose in many of its vibrant and necessary facets.

17. In this regard, guidance may also be sought from the evolution of the "right to privacy" jurisprudence of the European Court of Human Rights (ECtHR), which has examined multifarious facets of privacy in its decisions. In *S & Marper* v. *United Kingdom*[37], the ECtHR made an attempt to summarise these facets of privacy emanating from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and observed as follows:[37]

> "66. The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It 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 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. Article 8 protects in addition a right to

32 *United States* v. *Jones*, 181 L Ed 2d 911 : 132 S Ct 945 : 565 US 400 (2012) (concurring opinion of Sotomayor, J.).

33 *Lawrence* v. *Texas*, 539 US 558 (2003) at p. 562. (Opinion of the Court).

34 *Lawrence* v. *Texas*, 539 US 558 (2003) at p. 578. (Opinion of the Court).

35 See *Noise Pollution (5), In re*, (2005) 5 SCC 733, para 10.

36 John Stuart Mill, *On Liberty* 1859, p. 92 (Batoche Books — Kitcher, 2001).

37 2008 ECHR 1581, paras 66, 67.

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personal development, and the right to establish and develop relationships with other human beings and the outside world. The concept of private life moreover includes elements relating to a person's right to their image.

67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding." (References removed; emphasis supplied)

18. Therefore, to ensure that the State recognises its constitutional obligation to protect and safeguard this right, it has become imperative to seek a judicial and a constitutional recognition of the fundamental "right to privacy". Any measure adopted by the State for it to be a constitutionally valid restriction: (*i*) must be in consonance with a legal architecture premised upon the protection of one's fundamental "right to privacy"; (*ii*) must not erode the efficacy of the fundamental "right to privacy"; and (*iii*) must not lead to wielding of an unqualified exercise of power by the State which may cause chilling of fundamental rights.

D. ***The role of the Judiciary***

19. As our Constitution's "sentinel on the qui vive"[38], this Hon'ble Court must (*i*) curb arbitrary exercises of power; and (*ii*) prevent permeation of unconstitutional surveillances and transgressions into one's fundamental right to privacy. This is particularly when the seriousness of the ramifications on privacy multiply in this digital age in comparison to "papers" and "physical property". The State cannot be allowed to use technology with an unfettered discretion such that it may alter the relationship between a citizen and the Government in a way that is inimical to a democratic society.[32]

20. Modern cellphones[39] have evolved from being mere "tools of convenience" to "extensions of the users" themselves and therefore, may hold and reveal the respective "privacies of life".[40] However, the mere fact that such personal and sensitive data/information can be physically carried around would not disentitle a person of his privacy. Therefore, when the State ignores this aspect to act in a manner which is detrimental to the people's right to privacy, particularly in today's age of digitization, it becomes incumbent upon this Hon'ble Court to perform its esteemed duty and determine the constitutionality of such measure to protect one's fundamental rights.

38 *State of Madras* v. *V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196, para 13 : 1952 Cri LJ 966. "13. [···] This is especially true as regards the "fundamental rights", as to which this Court has been assigned the role of a sentinel on the qui vive."

39 The term, "cellphones" is used interchangeably with the term, "mobile phones".

40 *Riley* v. *California*, 134 S Ct 2473 : 573 US — (2014) (Opinion of the Court)

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21. The authoritative identification of a fundamental right to privacy would amount to explicitly subjecting a state action to the rigours of Article 13(2) of the Constitution as a result of which, a State action would have to be justified by the State on the anvil of a "reasonable restriction" or a "procedure established by law", or otherwise. Identification of such a right to privacy in the context of the present times has also found mention in a decision of this Hon'ble Court in *State of Maharashtra* v. *Bharat Shanti Lal Shah*[41], wherein their Lordships observed as follows:

> "60. The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance with procedure validly established by law. Thus, what the court is required to see is that the procedure itself must be fair, just and reasonable and non-arbitrary, fanciful or oppressive."

E. ***Necessity of identifying the fundamental right to privacy in a "digital" age***

22. The premise that a voluntary disclosure of information to third parties would nullify the expectation of privacy of the person disclosing such information is ill suited, particularly to the digital age, which is characterised by people revealing a great deal of private information to third parties while carrying out mundane tasks of life:[32]

> "People disclose the phone numbers they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to the Internet service providers; and the books, groceries, and medications they purchase to online retailers. Though some may find such a trade-off of privacy convenient and worthwhile, or have come to accept without complaint the warrantless disclosure to the State of every website they had visited in the last week, or month, or year, all voluntary disclosure of information cannot disentitle the protection of one's right to privacy."

23. Further, before the advent of cellphones, a search of a person was limited by physical realities and tended, as a general matter, to constitute only a narrow intrusion on privacy of the body. However, with the introduction of cellphones with immense storage capacity, even a basic search of the person (who walks around with his cellphone) could yield and expose sensitive personal information and data which was otherwise protected in great measures.[40]

24. Dehors a recognition of the fundamental right to privacy, the State would be empowered to conduct a search of a person possessing a mobile phone and access personal data/information stored thereon, upon standards devised in a different time and for a different purpose.[42] Recognising the incongruence between applying "pre-cellphone" era tests to a "post-

41 (2008) 13 SCC 5, para 60

42 Particularly when the gulf between physical practicability and digital capacity only continues to widen.

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cellphone" era and the need to protect one's right to privacy, the Supreme Court of the United States in *Riley* v. *California*[40] held that while examination of a wallet belonging to a person may be permissible without a warrant, an examination of a person's cellphone without a warrant is wholly impermissible.[40] In this context, the Court observed:[40]

> "First, a cellphone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cellphone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr Jones; he would not carry a record of all his communications with Mr Jones for the past several months, as would routinely be kept on a phone."
>
> "Finally, there is an element of pervasiveness that characterizes cellphones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cellphone, with all that it contains, who is the exception."

25. Digital society has not only emerged, but has gained critical appeal in India. In this context, it would be relevant to mention certain figures so as to provide a perspective of the ramifications of not identifying or not protecting the fundamental right to privacy:

Comparison of connectivity and mobility between India and the United States.

Sl.	*Particulars*	*India*	*USA*
1.	Mobile Phones	118 Cr. (89%)	32 Cr. (103%)
2.	Internet Connections	35 Cr.	22 Cr.
3.	Cars	4 Cr.	25 Cr.
4.	Population	132 Cr.	31 Cr.

26. The qualitative distinctiveness of the present times in which constitutional principles are to be evolved and applied has been captured by the Supreme Court of the United States in *Riley* v. *California* in the following words:[40]

> "An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease [···] Data on a cellphone can also reveal where a person has been. Historic location information is a standard feature on many smart phones

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and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building."

27. As submitted supra, privacy is not predicated upon secrecy. Inasmuch as privacy is not a discrete commodity, possessed absolutely or not at all, those who disclose certain facts to a bank or a phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes. Therefore, what a person seeks to preserve as private, even in an area accessible to the public, has to remain constitutionally protected.[32]

28. In fact, contemporary approaches to the right to privacy allow for placing informational privacy even in this digital age in a sacrosanct bracket. Retention of an individual's information is violative of such individual's privacy irrespective of its real effect on the individual. In *Digital Rights Ireland Ltd.* v. *Minister of Communications*[43], the Court of Justice of the European Union held as follows:

"33. 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."

29. In *S & Marper* v. *United Kingdom*[44], the ECtHR held that even the mere storing of data relating to one's private life is a violation of one's right to privacy:

"67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander* v. *Sweden*[45]). The subsequent use of the stored information has no bearing on that finding (*Amann* v. *Switzerland*[46])."

30. It is most respectfully submitted that the obligation of the State to respect, not interfere and protect one's realm of personal liberty and privacy is only heightened in the context of the digital age, inasmuch as it has now become possible for even the State to use electronic means to commit unconstitutional invasions on privacy.

F. ***Parliamentary recognition of the fundamental right to privacy***

31. The postulated issue of recognition of the right to privacy as a fundamental right is not merely to be looked at from the viewpoint of judicial dicta but also from how Parliament has manifested its understanding of the said right. On an analysis of the various legislations which recognise and enforce the right to privacy as a fundamental right, it would be clear that its place in the Constitution is firmly cemented.

43 Joined Cases C-293/12 and C-594/12, decided on 8-4-2014 : ECLI:EU:C:2014:238, para 33
44 No. 30562/2004, ECHR-2008, para 67
45 (1987) 9 EHRR 433
46 (2000) 30 EHRR 843, para 69 (GC)

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32. An analysis of existing legislations, apart from leading to the unfolding of a legislative understanding of the right to privacy, would also be consonant with the judicial practice of looking at the extant statutory architecture, which includes a macro exercise of comparatively examining statutes to arrive at a judicial finding.[47] It is most humbly submitted that an analysis of the existing statutes would reveal that Parliament has recognised the right to privacy as a fundamental right under the Constitution.

33. In this context, it would be relevant to examine and juxtapose pre-constitutional as well as post-constitutional statutes. When interpreting pre-constitutional statutes, regard must be had to: (*i*) the historical background leading to the legislation; (*ii*) the amendments effected therein; and (*iii*) the various aspects covered by it.[48]

34. Analysing the various Central legislations leads to the conclusion that Parliament has, time and again, given recognition to the right to privacy by either reiterating its principles in the statutory provisions or by introducing fetters to the exercise of the right to privacy by attempting to make laws which satisfy the requirement of a "reasonable restriction" imposed by way of a "procedure established by law". Furthermore, even in pre-constitutional legislations, the sacrosanct position of the right to privacy had been legislatively recognised inasmuch as special procedures had been established in such laws while introducing limitations on any aspect of the right to privacy.

G. ***Table of statutes recognising and dealing with the right to privacy***

Sl. No.	*Statute*	*Section/Regulation*
1.	The Right to Information Act, 2005	Section 8(1)(j): Unwarranted invasion of the privacy of the individual.[49]
2.	The Juvenile Justice (Care and Protection of Children) Act, 2015	Section 3(xi): Principle of right to privacy and confidentiality.[50]
3.	Information Technology Act, 2000	Section 66-E: Punishment for violation of privacy.

47 *Thressiamma Jacob* v. *Deptt. of Mining and Geology*, (2013) 9 SCC 725, paras 54-58 : (2013) 4 SCC (Civ) 559

48 *Dental Council of India* v. *Hari Prakash*, (2001) 8 SCC 61, para 3.1

49 *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*, (2013) 16 SCC 82, paras 63-64. "64. Right to be left alone [···] the most comprehensive of the rights and most valued by civilised man. [···] 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 safeguards to protect the rights under Section 8(*j*)".

50 *Bachpan Bachao Andolan* v. *Union of India*, (2017) 1 SCC 653, para 10. "10. Section 3 enunciates the general principles to be followed in the administration of the Act. Among them are: [···] (*xi*) Principle of right to privacy and confidentiality."

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4.	Protection of Human Rights Act, 1993	Section 2(1)(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.[51]
5.	Census Act, 1948	Section 15: Records not open to inspection nor admissible.
6.	The Collection of Statistics Act, 2008	Sections 9-14: Security of information; only to be used for statistical purposes.
7.	The Protection of Children from Sexual Offences Act, 2012	Section 23: Lowering his reputation or infringing upon his privacy.
8.	Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002	Reg. 7.14: Shall not disclose the secrets of a patient.[52]
9.	Credit Information Companies (Regulation) Act, 2005	Section 20: Privacy principles.[53]

51 *The Universal Declaration of Human Rights*, in Article 12, states that, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."; *The International Covenant on Civil and Political Rights*, in Article 17(1), states that, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation", and, in Article 17(2), "Everyone has the right to the protection of the law against such interference or attacks."

52 *Suchita Srivastava* v. *Chandigarh Admn.*, (2009) 9 SCC 1, para 22 : (2009) 3 SCC (Civ) 570. "22. 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."; Case of *L.H.* v. *Latvia, No. 52019/07*, decided on 29-4-2014 : ECHR-2014, para 56.

53 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496, para 53. "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-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. [···] 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."

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10.	Bankers' Books Evidence Act, 1891	Section 5: Cannot be compelled to produce books in certain cases.
11.	The Representation of Peoples Act, 1951	Section 128: Maintenance of secrecy of voting.[54]
12.	Indian Evidence Act, 1872	Sections 122, 126, 129: Protected communications.[55]
13.	Indian Penal Code, 1860	Section 228-A: Disclosure of identity of the victim of certain offences.[56]
14.	Code of Criminal Procedure, 1973	Section 46: Shall not touch the person of the woman and no arrest after sunset and before sunrise.[57]

54 *People's Union for Civil Liberties* v. *Union of India*, (2013) 10 SCC 1, para 56: "56. Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 14. Thus, secrecy is required to be maintained for both categories of persons."

55 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632, para 26(1). "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."

56 *State of Punjab* v. *Ramdev Singh*, (2004) 1 SCC 421, para 1 : 2004 SCC (Cri) 307. "1. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. [···] It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution of India."; *Mukesh* v. *State (NCT of Delhi)*, (2017) 6 SCC 1, para 379 : (2017) 2 SCC (Cri) 673 (Concurring opinion of Bhanumati, J.): "379. Crime against women is an unlawful intrusion of her right to privacy, which offends her self-esteem and dignity."; *State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384, para 21 : 1996 SCC (Cri) 316. "21. [···] It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process."

57 See also *Directorate of Revenue* v. *Mohd. Nisar Holia*, (2008) 2 SCC 370, para 14 : (2008) 1 SCC (Cri) 415. "14. [···] The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammeled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected. Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right to privacy deals with persons and not places."

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15.	Indian Telegraph Act, 1885	Section 5: Possession and interception.[58]
		Section 5(2) (pre-amendment): Certificate shall be conclusive proof of public emergency.
		Section 5(2) (post-amendment): 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.
16.	Indian Post Office Act, 1898	Section 26: Power to intercept for public good; occurrence of any public emergency, or in the interest of the public safety or tranquillity.

35. This Hon'ble Court in *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[59], observed that the right to privacy is not only recognised as a basic human right under Article 12 of the Universal Declaration of Human Rights, but, more importantly, that Parliament has recognised the right to privacy as a sacrosanct facet of Article 21. The aforesaid was observed with specific reference to Section 8(1)(*j*) of the Right to Information Act, 2005, wherein this Hon'ble Court was called upon to adjudicate the scope and ambit of an exception to a general right to information. The same goes to inform the contemporanea expositio that has been granted to the right to privacy under our constitutional framework.

58 *People's Union for Civil Liberties (PUCL)* v. *Union of India*, (1997) 1 SCC 301, paras 17, 34. "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."; "34. [···] In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(*b*) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected."

59 (2013) 16 SCC 82, paras 63-64. Also, in the context of the Privacy Bill, 2011, it was observed as follows: "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 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."

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36. Additionally, this Hon'ble Court, in *Directorate of Revenue* v. *Mohd. Nisar Holia*[57], in the context of the Narcotic Drugs and Psychotropic Substances Act, 1985, recognised a fundamental right to privacy. In this context, it was observed thus:

> "14. [···] the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammeled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. [···] Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right to privacy deals with persons and not places."

37. Therefore, even dehors the line of judicial precedents after *M.P. Sharma* v. *Satish Chandra*[17], and *Kharak Singh* v. *State of U.P.*[10], it is no longer res integra that the said right to privacy is a fundamental right guaranteed under Part III of the Constitution which presupposes a specific and special procedure established by law to be derogated from. It is in this light that this Hon'ble Court has also interpreted the said right to privacy as a "sacrosanct facet of Article 21"[49], upon undertaking a judicial examination of the pertinent statutes.

H. ***Domestic application of the transnational perspective on the right to privacy***

38. The right to privacy has been recognised in International Covenants, particularly those which: (*i*) have been judicially recognised and applied in the context of Part III of the Constitution; or (*ii*) have found place in opinio juris i.e. India's State-practice under international law, which has manifested in the form of parliamentary enactments and executive incorporations. Reliance on such international covenants in the context of interpreting the provisions of Part III of the Constitution, would not only "foster respect for international law" in accordance with Article 51(*c*), but also help in recognising the universally accepted rights of all human beings.

39. This Hon'ble Court, in a series of its decisions, including decisions considering the "right to privacy", has relied upon international instruments to interpret fundamental rights:

> (*i*) This Hon'ble Court in *Vishaka* v. *State of Rajasthan*[60], has held that it is now an acceptable rule of judicial construction that regard must

60 (1997) 6 SCC 241, para 14 : 1997 SCC (Cri) 932. "14. [···] It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

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be had to international conventions and norms for domestic law when there is no inconsistency between them and there is a purported void in domestic law.

(*ii*) This Hon'ble Court in *District Registrar and Collector* v. *Canara Bank*[61], relied upon the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the European Convention on Human Rights, to discuss the scope of the right to privacy.

(*iii*) This Hon'ble Court in *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[62], observed that the right to privacy: (*i*) is recognised as a basic human right under Article 12 of the Universal Declaration of Human Rights; and (*ii*) that Parliament has recognised the right to privacy as a sacrosanct facet of Article 21.

(*iv*) This Hon'ble Court in *Selvi* v. *State of Karnataka*[63], referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms, to construe the scope of Article 20(3) and Article 21 of the Constitution.

(*v*) This Hon'ble Court in *Nilabati Behera* v. *State of Orissa*[64], relied upon the International Covenant on Civil and Political Rights to assert an enforceable right to compensation under Part III of the Constitution.

(*vi*) This Hon'ble Court in *PUCL* v. *Union of India*[65], relied upon the International Covenant on Civil and Political Rights to interpret Article 21 in a manner which would be in conformity with international law.

40. Some of the International Instruments which directly ensure the "right to privacy", are as follows:

(*i*) The Universal Declaration of Human Rights, in Article 12, states that, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

(*ii*) The International Covenant on Civil and Political Rights, in Article 17(1), states that, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation", and, in Article 17(2), "Everyone has the right to the protection of the law against such interference or attacks."

61 (2005) 1 SCC 496, para 20

62 (2013) 16 SCC 82, para 58. "58. The right to privacy is also recognised as a basic human right under Article 12 of the Universal Declaration of Human Rights."

63 (2010) 7 SCC 263

64 (1993) 2 SCC 746, para 21 : 1993 SCC (Cri) 527. "21. We may also refer to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right."

65 (1997) 1 SCC 301, para 26. "26. Article 17 of the International Covenant — quoted above — does not go contrary to any part of our municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law."

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(*iii*) The European Convention on Human Rights, in Article 8(1), states that, "Everyone has the right to respect for his private and family life, his home and his correspondence."

41. Thus, the right to privacy is a natural corollary of basic human rights inherent in every individual and recognised internationally.

I. ***It is the rights that are fundamental, not the limitations***

42. At the outset, it is most respectfully submitted that, "however helpful taxonomies might be, they usually leave essentially unspecified the substance of what is being protected, telling us neither the character of the choices or the information we are to classify as special, nor the contexts of decision in which such classification is to be employed."[66] This must also hold true in the context of the kinds of tests which may be employed to restrict a fundamental right, with the additional and mandatory requirement that any restriction on a fundamental right must be narrowly tailored.

43. In every case involving the imposition of limitations and restrictions on fundamental rights, it is the rights which are fundamental, not its limitations. Therefore, it becomes the duty and responsibility of this Hon'ble Court to guard and defend these rights zealously.[67]

44. Such a duty entails that: (*i*) rights which were intended to be fundamental are kept fundamental; and (*ii*) that neither Parliament nor the executive exceed the bounds within which they are confined by the

66 Laurence H. Tribe, *American Constitutional Law*, § 15-1, p. 1303 (2nd Edn., 1988).

67 *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1, paras 26-28, 90 : (2015) 2 SCC (Cri) 449. "**26**. This Court has laid down what "reasonable restrictions" means in several cases. In *Chintamanrao* v. *State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118, this Court said: (SCR p. 763 : AIR p. 119, para 7) [···] "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.; **27**. In *State of Madras* v. *V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, this Court said: (SCR pp. 606-07 : AIR pp. 199-200, para 15) [..]impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. 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.; **28**. Similarly, in *Mohd. Faruk* v. *State of M.P.*, (1969) 1 SCC 853, this Court said: (SCC p. 857, para 10 : SCR p. 161 E-G): [···] or that a less drastic restriction may ensure the object intended to be achieved.; **90**. [···] repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms."

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Constitution when given the power to impose fetters on freedoms guaranteed under Part III of the Constitution. Additionally, in the specific case of the executive, the duty is to see further that it does not travel beyond the powers conferred by Parliament,[68] given that Parliament itself has recognised a fundamental right to privacy.[49]

45. This duty is not limited to the rendition of fundamental rights guaranteed at the inception. It also extends to those rights, which the people of India "have learned through the years to cherish, to the very fullest extent of the guarantee, and to ensure that they are not whittled away or brought to nought either by parliamentary legislation or by executive action".[69]

46. An exercise of State power entails trust. Therefore, those who wield it, must be accountable for it; "[a]ll power is a trust and its exercise by Governments must be subject to social audit and Judas exposure."[70] This accountability stems in the requirement of strict adherence to the constitutional ethos, particularly of the stringent tests for restricting fundamental rights.

47. Additionally, just as a responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot abdicate its principal duty by pleading financial inability, the State cannot use personal information without providing for adequate safeguards for the protection of personal information, and consequently, the protection of the right to privacy.[71]

48. Lastly, this Hon'ble Court must be cautious while considering appeals to emotions, generally, in the context of constitutional interpretation, and particularly, when placed as justifications for curtailing and/or restricting a fundamental right. Emotional arguments are completely irrelevant in the interpretation and application of law.[72] Additionally, an argument that "a particular interpretation would open a floodgate of litigation" must also be rejected.[73]

68 *Ram Singh* v. *State of Delhi*, 1951 SCR 451 : AIR 1951 SC 270 : (1951) 52 Cri LJ 904 (Bose, J., dissenting; para 22)

69 *Ram Singh* v. *State of Delhi*, 1951 SCR 451 : AIR 1951 SC 270 (Bose, J., dissenting; para 22); *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248, para 43; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, paras 5, 22

70 *P.N. Kaushal* v. *Union of India*, (1978) 3 SCC 558, para 48

71 See *Municipal Council, Ratlam* v. *Vardichan*, (1980) 4 SCC 162, paras 14-15 : 1980 SCC (Cri) 933

72 *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643, para 54; *D. Bhuvan Mohan Patnaik* v. *State of A.P.*, (1975) 3 SCC 185, paras 12, 13, 17 : 1974 SCC (Cri) 803; *T.A. Quereshi* v. *CIT*, (2007) 2 SCC 759, para 16; *Raghunathrao Ganpatrao* v. *Union of India*, 1994 Supp (1) SCC 191, paras 101, 102, 105.

73 *Coal India Ltd.* v. *Saroj Kumar Mishra*, (2007) 9 SCC 625, para 19 : (2008) 2 SCC (L&S) 321. "**19**. The floodgate argument does not appeal to us. The same appears to be an argument of desperation. Only because there is a possibility of floodgate litigation, a valuable right of a citizen cannot be permitted to be taken away." See also *N. Kannadasan* v. *Ajoy Khose*, (2009) 7 SCC 1, para 127 : (2009) 3 SCC (Civ) 1

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J. *Conclusion*

49. It is therefore discernible that an arbitrary curb on the exercise of the right to privacy causes a concomitant chilling effect on the exercise of other rights under Part III of the Constitution of India. In that light, the minority opinion in *Kharak Singh* v. *State of U.P.*[10], is instructive to determine the necessity and propriety of recognising a right which is already inherent in our constitutional ethos:[74]

> "31 [···] 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 channeling one's actions through anticipated and expected grooves. So also 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 the right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty." (emphasis supplied)

50. This is further buttressed by the observations in the decision of the Supreme Court of the United States in *United States* v. *Jones*[32]:

> "Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."

VI. Attorney General for India, Mr K.K. Venugopal, for the respondents

Preface

1. This matter has been placed before a Constitution Bench of 5 Judges of this Hon'ble Court pursuant to the reference, by 3 Judges of this Hon'ble Court, in *K.S. Puttaswamy* v. *Union of India*[1]. The three-Judge Bench in its reference order stated:

> "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*[2] and *Kharak Singh*[3] are to be read literally and accepted

74 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 at pp. 1305-06, para 31 (Dissenting opinion of Subba Rao, J.).

1 (2015) 8 SCC 735

2 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865

3 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

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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*[2] and *Kharak Singh*[3] 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.

14. We, therefore, direct the Registry to place these matters before the Hon'ble the Chief Justice of India for appropriate orders."

(emphasis supplied)

2. The "*apparent unresolved contradiction in the law declared by this Court*" referred to in the aforementioned order, in the submission of the Union of India, relates to a contradiction between *M.P. Sharma* v. *Satish Chandra*[2] ("*M.P. Sharma*") (8 Judges) and *Kharak Singh* v. *State of U.P.*[3] ("*Kharak Singh*") (6 Judges) on the one hand, and *Gobind* v *State of M.P.*[4] ("*Gobind*") (3 Judges), *R. Rajagopal* v. *State of T.N.*[5] ("*Rajagopal*") (2 Judges), *People's Union for Civil Liberties* v. *Union of India*[6] ("*PUCL*") (2 Judges) on the other.

3. The Union of India further submits the following:

3.1. *M.P. Sharma*[2] (8 Judges) and *Kharak Singh*[3] (6 Judges) hold that there is no fundamental right to privacy in the Constitution.

3.2. There appears to be inconsistency between *M.P. Sharma*[2] (8 Judges) and *Kharak Singh*[3] (6 Judges) taken together on the one hand, and *Gobind*[4] (3 Judges), *Rajagopal*[5] (2 Judges), and *PUCL*[6] (2 Judges) taken together on the other;

3.3. Given that the earlier decisions in *M.P. Sharma*[2] and *Kharak Singh*[3] are by larger Benches, those decisions would bind, and would be treated as having finally declared position regarding the absence of a fundamental right to privacy under our Constitution.

4 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
5 (1994) 6 SCC 632
6 (1997) 1 SCC 301

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These propositions will now be elaborated in turn.

A. M.P. Sharma*[2] *and Kharak Singh*[3] *hold that there is no fundamental right to privacy in the Constitution

4. In *M.P. Sharma*[2], the central issue relevant for the purposes of this note, before an 8-Judge Bench of this Hon'ble Court was whether search warrants and seizure of documents on such searches under Sections 94 and 96 of the Code of Criminal Procedure, 1898 for searching premises of certain companies alleged to have been part of commission of criminal offences ought to be quashed on the ground that such searches (and documents seized consequent thereto) violate the fundamental right against self-incrimination in Article 20(3) of the Constitution. Article 20(3) reads,

> "*No person accused of any offence shall be compelled to be a witness against himself.*"

It was held that a search warrant is under a communication from a Magistrate to a police officer under law (in this case the Code of Criminal Procedure) and, consequently, there is no testimonial act of the accused involved in this process. Similarly, a seizure consequent to such search warrant is also not a testimonial act. Per Jagannadhadas, J.:

> "17. … 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 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*. Even in the American decisions there is a strong current of judicial opinion in support of this distinction."
>
> (emphasis supplied)

5. In the context of the right to privacy, it was held (per Jagannadhadas, J.):

> "17. … 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

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

6. As a result of this analysis, the Court held:

"18. We are, therefore, clearly of the opinion that the searches with which we are concerned in the present cases cannot be challenged as illegal on the ground of violation of any fundamental rights and that these applications are liable to be dismissed."

7. It is thus clear that *M.P. Sharma*[2] holds (in para 17 extracted above) that since the Constitution-makers have not thought it fit to subject searches and seizures to any fundamental right to privacy in Article 21 (like in the 4th Amendment to the Constitution of the United States of America), there is no question of incorporating such a right into Article 20(3). Thus it is testament for the following propositions:

a. Searches authorised by law do not violate Article 20(3);

b. No fundamental right to privacy exists in Article 21 and consequently no such right can be brought into Article 20(3) by a strained construction.

8. In *Kharak Singh*[3], the central issue relevant for the purposes of this note, before a 6-Judge Bench of this Hon'ble Court was whether Chapter XX of the Uttar Pradesh Police Regulations violated the fundamental rights guaranteed under Article 21 of the Constitution. The relevant regulations (which were admitted by the U.P. Government as being non-statutory in nature) permitted the police to engage in secret picketing, domiciliary visits, periodical enquiries, reporting of movements and collection of records of "history-sheeters" i.e. persons who are, or are likely to become habitual criminals and therefore require surveillance. Regulation 236, which according to the Court "*for all practical purposes, defines 'surveillance*' " provided:

"236. 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 absence from home;

(*e*) the verification of movements and absences by means of inquiry slips;

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(*f*) the collection and record on a history-sheet of all information bearing on conduct."

9. It was held by the majority that the regulation which deals with secret picketing [clause (*a*) of Regulation 236] does not violate personal liberty. The majority of the Court said (per Ayyangar, J.)

"10. We shall now consider each of these clauses of Regulation 236 in relation to the "freedoms" which it is said they violate:

(a) Secret picketing of the houses of suspects.—

It is obvious that the secrecy here referred to is secrecy from the suspect; in other words its purpose is to ascertain the identity of the person or persons who visit the house of the suspect, so that the police might have a record of the nature of the activities in which the suspect is engaged. This, of course, cannot in any material or palpable form affect either the right on the part of the suspect to "move freely" nor can it be held to deprive him of his "personal liberty" within Article 21. It was submitted that if the suspect does come to know that his house is being subjected to picketing, that might affect his inclination to move about or that in any event it would prejudice his "personal liberty". We consider that there is no substance in this argument. *In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness*." (emphasis supplied)

10. This clearly envisages that intimacy in a household or exercise of personal autonomy within a household free from surveillance was not considered by the Court to be protected by Article 21. It is instructive to note that such right to conceal information about oneself, particularly intimate information inside one's own household, could be seen as a component of the right to privacy.

11. However, with regard to the regulation pertaining to domiciliary visits at night [Regulation 236(*b*)], the Court held (per Ayyangar, J.):

"10. … The question that has next to be considered is whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitute a violation of the freedom guaranteed by Article 19(1)(*d*) or "a deprivation" of the "personal liberty" guaranteed by Article 21.

13. … Frankfurter, J. observed in *Wolf* v. *Colorado*[7].

7 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)

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"The security of one's privacy against arbitrary intrusion by the police … is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples … 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."

14. Murphy, J. considered that such invasion was against "the very essence of a scheme of ordered liberty.

15. It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads:

> "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."

and that our Constitution does not in terms confer any like constitutional guarantee. 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 concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle" and in *Semayne case*[8] 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*[8] 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. In our view clause (*b*) of Regulation 236 is plainly violative of Article 21 and as there is no "Law" on which the same could be justified it must be struck down as unconstitutional." (emphasis supplied)

12. It is clear that the impugned regulation which allowed an unauthorised intrusion into a person's home was found unconstitutional since

8 (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194

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it was antithetical to "ordered liberty, if not of the very concept of civilisation". This was seen as a common law right which was enshrined in Article 21. It is instructive to note however that such a right was not seen as a facet of a right to privacy but a standalone protection that flowed directly from the Court's conception of "ordered liberty" and the sanctity of a person's home.

13. With regard to the regulations pertaining to shadowing of history-sheeters for the purpose of recording their movements and activities and obtaining of information relating to persons with whom they associate, [Regulations 236(*c*), (*d*) and (*e*)] the majority of the Court held (per Ayyangar, J.):

> "17. … Having given the matter our best consideration we are clearly of the opinion that 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 which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*"
>
> (emphasis supplied)

14. Thus it is clear that the Court provided limited protection to unauthorised intrusions into a person's home as contrary to ordered liberty under Article 21. It is critical to note that such a right was viewed by the Court in contradistinction to the right of privacy, particularly regarding movements of an individual or his need for intimacy and safeguards against surveillance, which, according to the Court, were not guaranteed.

15. The judgment by Subba Rao, J. held not only the regulation pertaining to domiciliary visits, but also the other impugned regulations pertaining to secret picketing, periodical enquiries, reporting of movements and collection of records of history-sheeters as unconstitutional since they impeded free movement protected by Article 19(1)(*d*) and personal liberty protected by Article 21. It held (per Subba Rao, J.):

> "27. … 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."

16. On a combined reading of the two judgments it is clear that they hold that there is no fundamental right to privacy in the Constitution. It is only unauthorised intrusions (without law) into one's home that is protected under

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Article 21 of the Constitution as a component of ordered liberty. Thus, in view of the aforementioned judgments, no Article 32 petition lies in this Hon'ble Court on the ground of violation of privacy.

17. It may be noted that there continues to be a common law right to privacy, but the existence of such a common law right would not, in any manner, dilute the position regarding the non-maintainability of an Article 32 petition before this Hon'ble Court on the ground of the (alleged) violation of privacy.

B. There appears to be a contradiction between M.P. Sharma[2] and Kharak Singh[3] on the one hand and Gobind[4], Rajagopal[5], PUCL[6] on the other debut

18. It is respectfully submitted that there appears to be a contradiction between *M.P. Sharma*[2] and *Kharak Singh*[3] taken together on the one hand, and *Gobind*[4], *Rajagopal*[5] and *PUCL*[6] on the other. In *Gobind*[4], the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations were challenged. These Regulations were in pari materia with Regulation 236 of the U.P. Police Regulations in *Kharak Singh*[3], except for the fact that these were made by the Government of Madhya Pradesh under Section 46(2)(*c*) of the Police Act, 1961. Thus, these Regulations had the force of law for the purpose of Article 21. The contradiction between *Gobind*[4] (and the subsequent cases) and *M.P. Sharma*[2] and *Kharak Singh*[3] can be identified based on the conclusions they reached with regard to the right to privacy. As mentioned above, *M.P. Sharma*[2] did not read the right to privacy in Article 20(3) of the Constitution. *Kharak Singh*[3] held that an unauthorised intrusion into one's home is a violation of ordered liberty under Article 21. Privacy was held to not be part of the same right.

19. The judgment in *Gobind*[4] considered privacy as flowing from notions of autonomy, dignity, liberty and intimacy. This is evident from the following extracts from *Gobind*[4] (per Mathew, J.):

> "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.

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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 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.*

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 the 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.

25. *Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against Government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.*" (emphasis supplied)

20. *Gobind*[4] accepted a penumbral theory of interpretation that there could be rights emanating from other rights and privacy could be one of them. The Court said:

"30. *Having reached this conclusion, we are satisfied that drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen will be made if Regulations 855 and 856 were to be read widely.* To interpret the rule in harmony with the Constitution is therefore necessary and canalisation of the powers vested in the police by the two regulations earlier read becomes necessary, if they are to be saved at all. Our founding fathers were thoroughly opposed to a Police Raj even as our history of the struggle for freedom has borne eloquent testimony to it. The relevant articles of the Constitution we have adverted to earlier, behove us therefore to narrow down the scope for play of the two regulations. We proceed to give direction and restriction to the application of the said regulations with the caveat that if any action were

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taken beyond the boundaries so set, the citizen will be entitled to attack such action as unconstitutional and void.

31. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. *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.*

21. Ultimately, the Court in *Gobind*[4] upheld the impugned Regulations since they had the force of law with compelling State interest for the purpose of Article 21 (unlike the impugned Regulation 236(*b*) in *Kharak Singh*[3]):

"31. … 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 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. Even if we hold that Article 19(1)(*d*) guarantees to a citizen a right to a privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid."

22. Thus, there is an apparent contradiction between *Gobind*[4] on the one hand, and *M.P. Sharma*[2] and *Kharak Singh*[3] on the other. While *M.P Sharma*[2] and *Kharak Singh*[3] never recognised the right to privacy, *Gobind*[4] does recognise such a right under the Constitution. Further, while *Gobind*[4], like *Kharak Singh*[3], considers unauthorised intrusions into the home of an individual as a violation of Article 21, it does so after reading in privacy as a fundamental right under Article 21, whereas *Kharak Singh*[3] clearly finds no such right to exist. As a result of this finding, it also considers individual autonomy and personal intimacies to be enjoyed free from observation as protected under the right to privacy, directly contrary to *Kharak Singh*[3]. Curiously though, *Gobind*[4], despite such recognition, upholds the impugned regulations in totality on the ground that they had the force of law and were consequently not an unauthorised intrusion. Thus, *Gobind*[4], a bench of 3 Hon'ble Judges reads in a general right to privacy into Article 21, contrary to *M.P. Sharma*[2] and particularly *Kharak Singh*[3], both larger Benches.

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23. It is humbly submitted that *Gobind*[4]*'s* understanding of privacy has been eventually followed in *Rajagopal*[5] as well as *PUCL*[6]. In *Rajagopal*[5], the Supreme Court held (*per* Jeevan Reddy, J):

> "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."

The position of law laid down in *Rajagopal*[5] is identical to *Gobind*[4], insofar as it recognises an implicit right to privacy in Article 21.

24. Further, *PUCL*[6] crystallised the position that the right to privacy must be read under Article 21 of the Constitution. The Court in *PUCL*[6] observed that *Gobind*[4] and *Rajagopal*[5] have read the right to privacy under Article 21. The Court held (*per* Kuldip Singh, J.):

> "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"."

25. As mentioned above, *Kharak Singh*[3] and *Gobind*[4] dealt with similar fact situations. *Kharak Singh*[3] recognised a penumbral right to "ordered liberty" in Article 21, which was the right of a person against unauthorised intrusion into their homes. However, *Kharak Singh*[3] did not recognise the right to privacy per se under Article 21 in any form, penumbral or otherwise. On the contrary, it expressly rejected such a reading (para 17 of *Kharak Singh*[3]). In *Gobind*[4], contrary to *Kharak Singh*[3], a kernel of a general right to privacy was recognised in Article 21, which included rights to intimacy and secrecy, free from observation. This line of reasoning which was followed in *Rajagopal*[5] and *PUCL*[6] is contrary to the express recognition of there being no such right to privacy delivered by larger Benches of this Court in *M.P. Sharma*[2] and *Kharak Singh*[3].

26. In light of the above, it is humbly submitted that there is inconsistency between *Gobind*[4] (and *Rajagopal*[5] and *PUCL*[6]) on the one hand, and *Kharak Singh*[3] and *M.P. Sharma*[2] on the other. *M.P. Sharma*[2] did not recognise a right to privacy in the Constitution and consequently refused

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to read it into Article 20(3). *Kharak Singh*[3] recognised the right not to be subject to unauthorised intrusion into one's home as part of ordered liberty under Article 21 but in the same token, rejected a guaranteed general right to privacy. *Gobind*[4], on the other hand, explicated the ordered liberty principle as containing a general right to privacy, followed in subsequent judgments. In this respect, the three-Judge Bench decision in *Gobind*[4], and the subsequent decisions which adopt a similar line, are inconsistent with *M.P. Sharma*[2] and *Kharak Singh*[3].

27. It is a fundamental principle with regard to Bench strength that smaller Benches are expected to follow and apply decisions of larger Benches. This was held by the Supreme Court in *State of U.P.* v. *Ajay Kumar Sharma*[9]:

> "13. Time and again this Court has emphatically restated the essentials and principles of "precedent" and of stare decisis which are a cardinal feature of the hierarchical character of all common law judicial systems. *The doctrine of precedent mandates that an exposition of law must be followed and applied even by coordinate or coequal Benches and certainly by all smaller Benches and subordinate courts. That is to say that a smaller and a later Bench has no freedom other than to apply the law laid down by the earlier and larger Bench; that is the law which is said to hold the field.* Apart from Article 141, it is a policy of the courts to stand by precedent and not to disturb a settled point. The purpose of precedents is to bestow predictability on judicial decisions and it is beyond cavil that certainty in law is an essential ingredient of rule of law. *A departure may only be made when a coordinate or coequal Bench finds the previous decision to be of doubtful logic or efficacy and consequentially, its judicial conscience is so perturbed and aroused that it finds it impossible to follow the existing ratio. The Bench must then comply with the discipline of requesting the Hon'ble Chief Justice to constitute a larger Bench.*" (emphasis supplied)

28. The position of law regarding what a Bench can do when decisions of two or more coordinate or larger Benches stand before it was decided in *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*[10], (Lahoti, CJ):

> "12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:
>
> (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

9 (2016) 15 SCC 289 : (2017) 3 SCC (Civ) 452 : (2016) 4 SCC (Cri) 623 : (2015) 3 SCC (L&S) 69
10 (2005) 2 SCC 673 : 2005 SCC (Cri) 546 : 2005 SCC (L&S) 246

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(2) *A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.*

(3) The above rules are subject to two exceptions: (*i*) *the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength*; and (*ii*) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*[11] and *Hansoli Devi*[12]."

29. Further, in *P.A. Inamdar* v. *State of Maharashtra*[13], a seven-Judge Bench of the Supreme Court made an important observation when it was faced with a decision of an eleven-Judge Bench (Lahoti, C.J.):

"20. Before we embark upon dealing with the issues posed before us for resolution, we would like to make a few preliminary observations as a preface to our judgment inasmuch as that would outline the scope of the controversy with which we are actually dealing here. At the very outset, we may state that our task is not to pronounce our own independent opinion on the several issues which arose for consideration in *Pai Foundation*[14]. *Even if we are inclined to disagree with any of the findings amounting to declaration of law by the majority in Pai Foundation*[14] *we cannot; that being a pronouncement by an eleven-Judge Bench, we are bound by it. We cannot express dissent or disagreement howsoever we may be inclined to do so on any of the issues. The real task before us is to cull out the ratio decidendi of Pai Foundation*[14] *and to examine if the*

11 *Union of India* v. *Raghubir Singh*, (1989) 2 SCC 754

12 *Union of India* v. *Hansoli Devi*, (2002) 7 SCC 273

13 (2005) 6 SCC 537 : 2 SCEC 745

14 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 : 2 SCEC 1

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explanation or clarification given in Islamic Academy[15] *runs counter to Pai Foundation*[14] *and if so, to what extent. If we find anything said or held in Islamic Academy*[15] *in conflict with Pai Foundation*[14] *we shall say so as being a departure from the law laid down by Pai Foundation*[14] *and on the principle of binding efficacy of precedents, overrule to that extent the opinion of the Constitution Bench in Islamic Academy*[15].

30. It appears to be the stand of the petitioners that the subsequent decisions by smaller Benches of this Hon'ble Court decide contentions not raised or decided in *M.P. Sharma*[2] and *Kharak Singh*[3], and should, therefore, notwithstanding their inconsistency with *M.P. Sharma*[2] and *Kharak Singh*[3], be treated as having correctly read the fundamental right of privacy into Article 21. This, it is submitted, is wholly untenable, in the light of the decision of this Hon'ble Court in *T. Govindaraja Mudaliar* v. *State of T.N.*[16], wherein it was held:

"10. The argument of the appellants is that prior to the decision in *Rustom Cavasjee Cooper case*[17], it was not possible to challenge Chapter IV-A of the Act as violation of Article 19(1)(*f*) owing to the decision of this Court that Article 19(1)(*f*) could not be invoked when a case fell within Article 31 and that was the reason why this Court in all the previous decisions relating to the validity of Chapter IV-A proceeded on an examination of the argument whether there was infringement of Article 19(1)(*g*), and clause (*f*) of that article could not possibly be invoked. We are unable to hold that there is much substance in this argument. *Bhanji Munji case*[18], and other decisions which followed it were based mainly on an examination of the inter-relationship between Article 19(1)(*f*) and Article 31(2). There is no question of any acquisition or requisition in Chapter IV-A of the Act. The relevant decision for the purpose of these cases was only the one given in *Kochuni case*[19], after which no doubt was left that the authority of law seeking to deprive a person of his property otherwise than by way of acquisition or requisition was open to challenge on the ground that it constituted infringement of the fundamental rights guaranteed by Article 19(1)(*f*). It was, therefore, open to those effected by the provisions of Chapter IV-A to have agitated before this Court the question which is being raised now based on the guarantee embodied in Article 19(1)(*f*) which was never done. It is apparently too late in the day now to pursue this line of argument. In this connection we may refer to the observations of this Court in *Mohd. Ayub Khan* v. *Commr. of Police*[20] according to which even if certain aspects of

15 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697 : 2 SCEC 339
16 (1973) 1 SCC 336
17 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
18 *State of Bombay* v. *Bhanji Munji*, AIR 1955 SC 41
19 *K. K. Kochuni* v. *State of Madras & Kerala*, AIR 1960 SC 1080
20 AIR 1965 SC 1623 : (1965) 2 SCR 884 : (1965) 2 SCJ 706

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a question were not brought to the notice of the court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In *Somawanti* v. *State of Punjab*[21] *a contention was raised that in none of the decisions the argument advanced in that case that a law may be protected from an attack under Article 31(2) but it would be still open to challenge under Article 19(1)(f), had been examined or considered. Therefore, the decision of the Court was invited in the light of that argument This contention, however, was repelled by the following observations at p. 794.*

> "*The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided*."

11. It is common ground in the present cases that the validity of Chapter IV-A of the Act has been upheld on all previous occasions. *Merely because the aspect now presented based on the guarantee contained in Article 19(1)(f) was not expressly considered or a decision given thereon will not take away the binding effect of those decisions on us*." (emphasis supplied)

31. This view was reaffirmed in *Anil Kumar Neotia* v. *Union of India*[22], herein, the Court has held:

18. In that view of the matter this question is no longer open for agitation by the petitioners. It is also no longer open to the petitioners to contend that certain points had not been urged and the effect of the judgment cannot be collaterally challenged. See in this connection the observations of this Court in *T. Govindaraja Mudaliar* v. *State of T.N.*[16], where this Court at pp. 229 and 230 of the report observed as follows: (SCC pp. 342-43, para 10)…." (emphasis supplied)

32. A few facts with regard to the Aadhaar scheme, which is under challenge in these cases, are also noteworthy. Around 115 crore residents of India are now enrolled with Aadhaar with an adult coverage of over 99%. The uniqueness of Aadhaar helps in elimination of duplicates and fakes from any beneficiary database, ensuring that the teeming millions of poor people of this country are now receiving the subsidies and benefits directly into their bank accounts, which they were hitherto deprived of. This has also lead to immense savings through reduction of leakages and wastages and therefore, it subserves vital public interest, which ought not to be interfered with on account of the apprehensions raised in these petitions. There is also tremendous convenience to the old, infirm and the weaker sections of people who receive benefits like pensions, etc. at their doorstep on account of Aadhaar based E-KYC.

21 AIR 1963 SC 151 : (1963) 2 SCR 774 : (1963) 2 SCJ 35
22 (1988) 2 SCC 587

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33. It is also pertinent to note that it is incorrectly claimed by the petitioners that as per the Notifications under Section 7 of the Aadhaar Act, 2016, people will be denied benefits if they do not enroll for Aadhaar by 30-6-2017 (now extended to 30-9-2017) and therefore people will suffer hardships. It may be noted that while the notifications require people to enroll for Aadhaar by 30-6-2017(now extended to 30-9-2017), it is provided in the notifications themselves that if people are not able to enroll for Aadhaar before the time prescribed due to lack of enrolment facilities in the nearby areas, then they can register their request for Aadhaar enrolment before the appropriate authorities giving their contact details , so that as and when enrolment facilities are set up in the area, such persons can be enrolled for Aadhaar and for such people, benefits will continue to be given even if they have not enrolled for Aadhaar before 30-9-2017. Moreover, there is also no question of any exclusion of any genuine beneficiaries, since Section 7 of the Aadhaar Act itself requires either Aadhaar authentication or furnishing proof of possession of Aadhaar number on the basis of which subsidies, benefits, etc can be availed by the beneficiaries concerned. Therefore, the averment of the Petitioner that there is large scale exclusion on account of authentication failure, etc is misplaced and untenable in law.

Conclusion

34. For the foregoing reasons, it is submitted that in view of the binding decisions by larger Benches of this Hon'ble Court in *M.P. Sharma*[2] and *Kharak Singh*[3], the present petitions under Article 32 of the Constitution do not lie, and are liable to be dismissed by this Hon'ble Court.

VII. Additional Solicitor General of India, Mr Tushar Mehta, for the respondents

1. The right to privacy is, though an inherent right, is only a common law right. Whenever and wherever the competent legislature has found it necessary expedient or desirable to protect a person's privacy, it has done so by enacting a statute and thus, making a statutory right of privacy. Such common law right which can be protected based upon specific subjects may not be declared as fundamental right on the following grounds and also on the ground that there are no "judicially discernable and manageable standards" to ascertain and define privacy. Any view on the ground of privacy, if taken, by smaller Benches, are per in curiam and, therefore, not a good law.

2. Privacy has always been recognised as a "right". It is a very important and enforceable right but not a fundamental right:

2.1. That the ratio of *Kharak Singh* v. *State of U.P.*[1] that "privacy" is not a fundamental right has not been expressly or impliedly overruled by subsequent judgments rendered by this Hon'ble Court. The subsequent

1 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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judgments which elevates the "right to privacy" as a fundamental right are per incuriam.

2.2. That in view of the law which exists as on date there is no fundamental right to privacy guaranteed under Part III of the Constitution of India including under Article 21. If this Hon'ble Court would "read" privacy in Part III, it will amount to amending the Constitution though the omission to mention privacy in Part III is conscious.

2.3. Neither the Constituent Assembly nor the competent legislature exercising power of amendment of the Constitution have embodied right of privacy under Part III of the Constitution and the omission clearly appears to be conscious. Even by employing "external aid" for interpreting i.e. Constitution Assembly Debates, the interpretation canvassed by the petitioners, etc. that privacy is a fundamental right cannot be sustained, inasmuch as, the framers of the Constitution expressly did not deem it fit expedient or appropriate to incorporate a right to privacy in Part III of the Constitution in their wisdom.

2.4. The courts have always refrained from creating a new right adopting the process of interpretation since creating a "right" is not the prerogative of the courts, but that of the competent legislature. Even in other jurisdiction, the courts have refrained from "creating" a right by way of judicial law- making.

2.5. Wherever, the legislature of other sovereign countries of the world deemed it fit to confer "privacy" with constitutional status, they incorporated the same either by way of amendment to the Constitution or by way of adoption of the same through parliamentary process. In absence thereof the right to privacy is, at best, a "common law right" and the same can only be conferred/protected by way of a statute made by the competent legislature.

3. UIDAI respectfully adopts the aforesaid submission made by the Union of India. However, in addition to the submissions made by the Union of India, UIDAI submits as under.

I. ***"Privacy" is inherently a vague and subjective concept—A vague concept which is incapable of any precise definition/contours cannot be conferred with a status of constitutional fundamental right***

4. It is respectfully submitted that the term "privacy" is inherently vague and subjective notion having different meaning for different individuals. Such a notion is incapable of being precisely defined and has rambling application to various aspect of human life depending upon the preconceived notions of each individual. It is submitted that such a vague concept whose contours cannot be precisely defined cannot be elevated to and/or conferred status of a constitutional fundamental right as there would be no judicially discernable and manageable standards to control and enforce the said right.

5. It is submitted that world over, all the legal as well as social scholars and luminaries are ad idem that privacy, as a concept, is elusively difficult to define. The definitional framework which may be required to ascertain the extent and origins of privacy within the Indian Constitutional law set-up may

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further be difficult to ascertain. This concept of privacy has over the years remained with little or almost no authoritative explanation.

6. In this context it would be relevant to refer to the view expresed by some scholars who have tried to define privacy:

6.1. Mr Richard B. Parker in his article "A Definition of Privacy," has stated as under:

> "... privacy is control over when and by whom the various parts of us can be sensed by others. By "sensed," is meant simply seen, heard, touched, smelled, or tasted. By "parts of us," is meant the part of our bodies, our voices, and the products of our bodies. "Parts of us" also includes objects very closely associated with us. By "closely associated" is meant primarily what is spatially associated. The objects which are "parts of us" are objects we usually keep with us or locked up in a place accessible only to us."

(Richard B. Parker, "A Definition of Privacy," Rutgers Law Review 27 (1974) : 281)

6.2. Rachel L. Finn, David Wright and Michael Friedewald of Fraunhofer Institute for Systems and Innovation Research, in their paper titled as "Seven Types of Privacy" stated as under:

> "Privacy" is a key lens though which many new technologies, and most especially new surveillance technologies, are critiqued.[2] *However, "privacy" has proved notoriously difficult to define.* Serge Gutwirth says 'The notion of privacy remains out of the grasp of every academic chasing it. Even when it is cornered by such additional modifiers as "our" privacy, it still finds a way to remain elusive.'[3] Colin Bennett notes that 'attempts to define the concept of 'privacy' have generally not met with any success'.[4] *Legal scholars James Whitman and Daniel Solove have respectively described privacy as 'an unusually slippery concept'*[5], and '*a concept in disarray. Nobody can articulate what it means*'[6]. Furthermore, *Debbie Kaspar notes that 'scholars have a famously difficult time pinning down the meaning of such a widely used term [and] ... most introduce their work by citing this difficulty*'.[7] Helen Nissenbaum has argued that privacy is best understood though a notion of "*contextual integrity*", where it is not the sharing of information that is a problem,

2 David Lyon, *Surveillance after September 11* (Cambridge: Polity Press, 2003).
3 Serge Gutwirth, *Privacy and the Information Age* (Lanham, MD: Rowman & Littlefield, 2002), 30.
4 Colin J. Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Ithaca NY: Cornell University Press, 1992).
5 James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty", (2004) 113 Yale Law Journal 1153-54.
6 Daniel Solve, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy", (2007) 44 San Diego Law Review 758.
7 Debbie V.S. Kaspar, "The Evolution (or Devolution) of Privacy", (2005) 20 Sociological Forum 72.

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rather it is the sharing of information outside of socially agreed contextual boundaries.

* * *

Although a widely accepted definition of privacy remains elusive, there has been more consensus on a recognition that privacy comprises multiple dimensions, and some privacy theorists have attempted to create taxonomies of privacy problems, intrusions or categories.

* * *

However, these scholars' focus on the ways in which privacy can be infringed and the legal problem which must be solved is largely reactive. *They focus on specific harms which are already occurring and which must be stopped, rather than over-arching protections that should be instituted to prevent harms.*

* * *

We also suggest that the fluidity of privacy as a concept may be an important aspect of its utility, since technological developments may introduce new types of privacy. *As technologies develop and proliferate, various types of privacy which had not previously been considered or identified as under threat may become compromised.*

* * *

... we propose that fluidity and flexibility are necessary to enable "privacy" to respond to technological changes. More precise conceptualisations, taxonomies and boundaries surrounding privacy, particularly in the legal field, may disrupt the use of privacy to protect individuals and groups from intrusions that impact upon their freedoms, fundamental rights and access to goods and services."

(emphasis supplied)

(Seven Types of Privacy—Rachel L. Finn David Wright Michael Friedewald, Fraunhofer Institute for Systems and Innovation Research)

6.3. The academic Helen Nissenbaum, in the book *Privacy in Context—Technology, Policy, and the Integrity of Social Life*', has enunciated key concepts on the definitional exercise as:

"*Almost as many who have taken up the subject of privacy in relation to information technology have declared it deeply problematic, referring not only to questions and disagreements about its value, benefits, and harms but to its conceptual morass.* Attempts to define it have been notoriously controversial and have been accused of vagueness and internal inconsistency-of being overly inclusive, excessively narrow, or insufficiently distinct from other value concepts. *Believing conceptual murkiness to be a key obstacle to resolving problems, many have embarked on the treacherous path of defining privacy.* As a prelude to addressing crucial substantive questions, they have sought to establish whether privacy

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is a claim, a right, an interest, a value, a preference, or merely a state of existence. They have defended accounts of privacy as a descriptive concept, a normative concept, a legal concept, or all three. They have taken positions on whether privacy applies only to information, to actions and decisions (the so called Constitutional rights to privacy), to special seclusion, or to all three. They have declared privacy relevant to all information, or only to a rarefied subset of personal, sensitive, or intimate information, and they have disagreed over whether it is a right to control and limit access or merely a measure of the degree of access others have to us and to information about us. They have posited links between privacy and anonymity, privacy and secrecy, privacy and confidentiality, and privacy and solitude.

Believing that one must define or provide an account of privacy before one can systematically address critical challenges can thwart further progress….

… Maintaining all these meanings while delineating a concept to support policy, moral judgment, and technical design seems a hopeless ambition.

…

Those who recognise the perils of inclusiveness attempt to purify the concept by trimming away some of the inconsistency and ambiguity, declaring certain uses wrong or confused. *This has meant disputing the proper application of privacy so called Constitutional case, or it has meant rejecting control over information as part of the meaning of privacy in favour of degree of access or visa-versa*."

(Helen Nissenbaum, *Privacy in Context, Technology, Policy, and the Integrity of Social Life*, Stanford University Press)

6.4. Scholar Julie E. Cohen in an article in Harvard Law Review titled "What Privacy Is For" has stated as under:

"*Most privacy theorists have tended to think that the key to defining privacy lies in locating privacy's essence in one or another overarching principle* (such as liberty, inaccessibility, or control) and then offering finely parsed resolutions of the resulting conflicts between the principles and ordinary, everyday practices and expectations. *Definitions of privacy grounded in core principles, however, inevitably prove both over and under inclusive when measured against the types of privacy expectations that real people have*. For example, such definitions can't explain the widespread belief that sharing personal details with one's friends or one's airplane seatmate does not automatically equal sharing them with one's employer. In the real world, privacy expectations and behaviors are unruly and heterogeneous, persistently defying efforts to reduce them to neat conceptual schema.

……

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> The self has no autonomous, pre-cultural core, nor could it, because we are born and remain situated within social and cultural contexts. *And privacy is not a fixed condition, nor could it be, because the individual's relationship to social and cultural contexts is dynamic. These realities do not weaken the case for privacy; they strengthen it.*
>
> ...
>
> Subjectivity is a function of the interplay between emergent selfhood and social shaping; privacy, which inheres in the interstices of social shaping, is what permits that interplay to occur. *Privacy is not a fixed condition that can be distilled to an essential core, but rather "an interest in breathing room to engage in socially situated processes of boundary management*." It enables situated subjects to navigate within preexisting cultural and social matrices, creating spaces for the play and the work of self-making."

6.5. Scholar Adam Moore, in a Journal Of Social Philosophy, wrote an article titled as "Defining Privacy" wherein it was argued that if privacy exists in various fields, requiring varying degrees of protection, it would be incongruent to define it within the Constitutional framework as one overarching. In the said article following was argued by Adam Moore:

> "*Privacy has been defined in many ways over the last few hundred years*.[8] Warren and Brandeis, following Judge Thomas Cooley, called it "the right to be let alone,"[9] Pound and Freund have defined privacy in terms of an extension personality or personhood.[10] Legal scholar William Prosser separated privacy cases into four distinct but related torts. "Intrusion: Intruding (physically or otherwise) upon the solitude of another in a highly offensive manner. Private facts: Publicizing highly offensive private information about someone which is not of legitimate concern to the public. False light: Publicizing a highly offensive and false impression of another. Appropriation: Using another's name or likeness for some advantage without the other's consent."[11]
>
> Alan Westin and others have described privacy in terms of information control.[12] Still others have insisted that privacy consists of a

8 See Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca, NY and London: Cornell University Press, 1997), chaps. 1-4.

9 See Thomas M. Cooley, *Cooley on Torts* (2nd Edn., 1888); S. Warren and L. Brandeis, "The Right to Privacy", The Harvard Law Review 4 (1890): 193-220.

10 Roscoe Pound, "Interests in Personality", Harvard Law Review 28 (1915): 343; and Paul A. Freund, "Privacy: One Concept or Many?" in *Privacy Nomos XIII*, ed. Roland Pennock and John W. Chapman (New York: Atherton Press, 1971), 182.

11 Dean William Prosser, "Privacy", California Law Review 48 (1960): 383, 389, quoted in E. Alderman and C. Kennedy, *The Right to Privacy* (New York: Alfred A. Knopf, 1995), 155-56.

12 Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1968); Adam D. Moore, *Intellectual Property and Information Control* (New Brunswick, NJ: Transaction Publishing, 2001, 2004).

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form of autonomy over personal matters.[13] William Parent argued that "[p]rivacy is the condition of not having undocumented personal knowledge about one possessed by others,"[14] while Julie Inness defined privacy as "the state of possessing control over a realm of intimate decisions, which include decisions about intimate intimate information, and intimate actions."[15]

More recently, Judith Wagner DeCew has proposed that the "realm of the private to be whatever types of information and activities are not, according to a reasonable person in normal circumstances, the legitimate concern of others."[16]

.....

"I have maintained that privacy should be defined as a right to control access to places, locations, and personal information along with use and control rights to these goods. *Nevertheless, it is likely the case that any definition of a right to privacy will not satisfy everyone. It is equally true that how the right is justified will play an important role in providing the dimensions of the definition at issue—thus, any attempt to define privacy rights independent of a justifying theory will likely be incomplete.*"

(Adam Moore, "Defining Privacy", Journal of Social Philosophy, Vol. 39 No. 3, Fall 2008, 411-428)

6.6. Thus it is respectfully submitted that while it may at the outset seem inherently harmless and innocuous to lay down the parameters of privacy, it may result in limiting the role of citizen or the role of State in one way or the other if the privacy is to be held to be fundamental right. As stated above, it is seen that for the better part of the century, foremost legal scholars have not been able to define the contours of privacy. It has been an almost unanimous view that any exercise to include such a concept within the fundamental rights framework may do violence to the delicate balance of State machinery and individual citizenry. The criticism of the American approach, highly relied upon by the petitioner is perfectly conceptualised in an essay on the seminal work of Warren and Brandeis in the Harvard Law Review article in 1890.

13 *Eisenstadt* v. *Baird*, 405 US 438 at p. 453 (1972). See also Louis Henkin, "Privacy and Autonomy," Columbia Law Review 74 (1974): 1410, 1425; Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?" Notre Dame Law Review 58 (1983): 445; Daniel R. Ortiz, "Privacy, Autonomy, and Consent," Harvard Journal of Law and Public Policy 12 (1989): 91; and H. TristramEnglehardt Jr., "Privacy and Limited Democracy," Social Philosophy and Policy 17 (Summer 2000): 120-40.

14 W. A. Parent, "Privacy, Morality, and the Law," Philosophy and Public Affairs 12 (1983): 269.

15 Julie Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992).

16 DeCew, *In Pursuit of Privacy*, 58: 64. DeCew.

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6.7. Professor, Dorothy J. Glancy, in her article "The Invention of The Right to Privacy", in Arizona Law Review, states that:

> "*Fewer than ninety years later it is surprising to find that this relatively new chapter in our law appears to have fallen into such disarray that one United States Supreme Court Justice has characterized the right to privacy cases decided by his Court as "defying categorical description*".
>
> ...
>
> All that Warren and Brandeis ever claimed to have invented was a legal theory which brought into focus a common "right to privacy" *denominator already present in a wide variety of legal concepts* and precedents from many different areas of the common law. It is for that reason that their article reads as if the authors had literally ransacked every traditional area of the common law they could find-such as contracts, property, trusts, copyright, protection of trade secrets, and torts-in order to pluck out the already existing legal principle underlying all of these various parts of the common law. This underlying legal principle was the right to privacy."

(Dorothy J. Glancy, The Invention of The Right to Privacy, Arizona Law Review, Volume 21 1979 Number 1)

7. Thus it is clear from the above that not only "privacy" as a concept is incapable of being precisely defined but also its application on various facets of human behaviour and activities are essentially individual specific, therefore, incapable of any "judicially discernable and manageable standard" according to which it can be enforced. As such in absence of any precise guidance as to what conduct of human life is covered under the concept of "privacy" it cannot be conferred with a constitutional status of a "protected fundamental right".

II. ***The codified statutory law in India already confers protection to individuals' "Right to Privacy".***

8. It is respectfully submitted that as stated above, ascertaining the contours of the proposed right to privacy within the constitutional set-up could be a daunting task. Further, such right would have to stand the test of fast changing time wherein new avenues, technological advancements and fields are emerging rapidly. In this changing scenario privacy can be best protected through statutory legislations which would be dealing with subject specific legislations which can precisely define the conduct and/or activity of humans requiring protection and also provide for breach thereof in absence of which *only*, a constitutional remedy under Article 226 can be resorted to. It is submitted that when a statute is subject specific, it will not be difficult for the competent legislature to either define "privacy" or provide for its protections in the context of such a specific subject.

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9. In this context, it is extremely crucial to note here that it is completely incorrect to suggest that the mandate of Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant of Civil and Political Rights which provides for protection against arbitrary or unlawful interference with individual's privacy, family, home and correspondence, and which seeks to protect unlawful attacks on his honour and reputation has not been embodied in Indian law as submitted by some of the petitioners.

10. It is respectfully submitted that wherever, competent legislature has deemed it fit, expedient, desirable or necessary to protect privacy in any aspect of human life, the legislature has protected the same under a specific statute. It is submitted that by enacting respective statutes dealing with specific subjects as detailed hereinafter, not only the legislature has protected individual's privacy in family, home, correspondence, and unlawful attacks on his honour and reputation but the legislature, in its wisdom, has also protected privacy in other facets of human life.

11. The question of protecting "privacy" as a "right" can be broadly classified as under:

PRIVACY

Physical privacy (Re body)	Mental privacy (Re mind)
	Dissemination of information of personal naure
	Personal choices

12. The following are the broad facets of privacy. The list is obviously illustrative and not exhaustive:

(*i*) Physical privacy
(*ii*) Privacy in one's home
(*iii*) Privacy in communication
(*iv*) Privacy in financial affairs
(*v*) Privacy of health
(*vi*) Privacy of individual information
(*vii*) Online privacy
(*viii*) Privacy of thought

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13. It is respectfully submitted that wherever legislature deemed it fit and expedient, the above facets of "common law right of privacy" have been statutorily recognised, codified, defined and protected under the respective statutes, with a safeguard that the same cannot be abridged in any manner other than as provided under those specific statutes.

14. The same is evident from the following illustrative chart, which provides for laws which protect privacy of individuals in specific fields:

The Right to Information Act, 2005	*Section 8 (i)* of the Act *forbids disclosure of 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* The test for disclosure of the said information under the Act is that the authority created under the has to be satisfied that the larger public interest justifies the disclosure of such information.
The Easements Act, 1882	*Section 18* of the Act provides for Customary easement and provides that by the custom of a certain town no owner or occupier of a house can open a new window therein *so as substantially to invade his neighbour's privacy*.
Penal Code, 1860	Indian penal code comprehensively covers almost all the aspect of human privacy including but not limiting to individual's privacy, family privacy, home and correspondence privacy, and protection against unlawful attacks on individuals honour and reputation. *Privacy of property* *— 268. — Public nuisance* "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which

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must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

— *Section 441—Criminal trespass*

"Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass"."

— *Section 442—House trespass*

"Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling. or any building used as a place for worship, or as a place for the custody of property, is said to commit "House-trespass"."

— *Section 443—Lurking house-trespass*

"Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass"."

— *Section 444*—Lurking house-trespass by night

"Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night"."

— *Section 445—House-breaking*

"A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house· or any part of it in any of the six ways here in after described; or if, being in the house or

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any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say:

First—If he enters or quits through a passage by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly—If lie enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly—If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

Sixthly—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass."

— *Section 446—House-breaking by night*

"Whoever commits house-breaking, after sunset and before sunrise, is said to commit "house-breaking by night"."

— Section 449—House-trespass in order

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	to commit offence punishable with death "Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punishable with 152[imprisonment for life], or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine." — *Section 450—House-trespass in order to commit offence punishable with imprisonment for life* "Whoever commits house-trespass in order to the committing of any offence punishable with [imprisonment for life], shall be punished with imprisonment of either description for a term not exceeding, ten years, and shall also be liable to fine." — *Section 451—House-trespass in order to commit offence punishable with imprisonment* "Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years." — *Section 452*—House-trespass after preparation for hurt, assault or wrongful restraint "Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to

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	fine." — *Section 458—Lurking house-trespass or house-breaking by night after preparation for hurt, assault, or wrongful restraint* — *Section 459—Grievous hurt* caused whilst committing lurking house trespass or house-breaking — *Section 461—Dishonestly* breaking open receptacle containing property — Section 462—Punishment for same offence when committed by person entrusted with custody
Evidence Act	— *Section 122*. Communications during marriage. "No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other. — *Section 124*. Official communications "No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure. — *Section 125*. Information as to commission of offences No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.1[125. Information as to commission of

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offences.—No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue."

Explanation.—"Revenue officer" in this section means an officer employed in or about the business of any branch of the public revenue.]

— *Section 126 Professional communications*

No barrister, attorney, pleader or vakil shall at an time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [illegal] purpose; [illegal] purpose;"

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client. Explanation.—The obligation stated in this section continues after the employment has ceased.

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Illustrations

(a) A, a client, says to B, an attorney—"I have committed forgery, and I wish you to defend me" . As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue". This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

— *Section 127—Section 126 to apply to interpreters, etc*

The provisions of Section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.

— *Section 128—Privilege not waived by volunteering evidence*

If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Section 126; and if any party. to a suit or proceeding calls any such barrister, 1 [pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters

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which, but for such question, he would not be at liberty to disclose.—If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Section 126; and if any party to a suitor proceeding calls any such barrister, 1 [pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose."

—*Section 129. Confidential communications with legal advisers*

No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given; but no others.

— *Section 130—Production of title-deeds of witness not a party*

No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

— *Section 131—Production of documents or electronic records which another person. having possession could refuse to produce*

No one shall be compelled to produce documents in his possession or electronic

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	records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production. 12 [131. Production of documents or electronic records which another person, having possession, could refuse to produce.—No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.]"

(emphasis supplied)

Indian Telegraph Act, 1885	The Act contains several provisions which regulate and *prohibit the unauthorised interception or tampering with messages sent over "telegraphs*". *Section 5* of the Act empowers the Government to take possession of licensed telegraphs and to order *interception of messages in cases of 'public emergency' or 'in the interest of the public safety*'. Interception may only be carried out pursuant to a written order by an officer specifically empowered for this purpose by the State/Central Government. The officer must be 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*" *Section 24* makes it a criminal offence for a person *to enter a telegraph office "with the intent of unlawfully learning the contents of any message*". Such a person may be punished with imprisonment for a term of up to a year. *Section 25* further imposes a criminal penalty on anyone *who damages or tampers with any*

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	telegraph with the intent to prevent the transmission of messages or to acquaint himself with the contents of any message or to commit mischief. Punishment in this case could extend to 3 years imprisonment or a fine or both. *Section 26* makes it an offence for a Telegraph Officer *to alter, unlawfully disclose or acquaint himself with the content of any message*. This is also punishable with up to 3 years imprisonment or a fine or both. *Section 30* criminalises the *fraudulent retention or willful detention of a message* which is intended for someone else. Punishment extends to 2 years imprisonment or fine or both.
License Agreements granted under the Telegraph Act	Although the statute itself governs the actions of telecom operators in a general way, *more detailed guidelines protecting individual privacy regulating their behaviour are contained in the terms of the licenses issued to the telecoms which permit them to conduct businesses*. Frequently, these licenses contain clauses requiring telecom operators to safeguard the privacy of their consumers. A few examples include: *Clause 21* of the National Long Distance License comprehensively covers various aspects of *privacy* including— (*a*) *Licensees to be responsible for the protection of privacy of communication, and to ensure that unauthorised interception of message does not take place.* (*b*) *Licensees to take all necessary steps to safeguard the privacy and confidentiality of any information about a third party and their business to whom they provide service and from whom they have acquired such information by virtue of those service and* shall use their best endeavours to secure that: (*i*) No person acting on behalf of the licensees or the licensees themselves divulge

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or uses any such information except as may be necessary in the course of providing such service to the third party; and

(*ii*) No such person seeks such information other than is necessary for the purpose of providing service to the third party.

(*c*) The above safeguard however does not apply where

(*i*) The information relates to a specific party and that party has consented in writing to such information being divulged or used, and such information is divulged or used in accordance with the terms of that consent; or

(*ii*) The information is already open to the public and otherwise known.

(*d*) The licensees shall take necessary steps to ensure that they and any person(s) acting on their behalf observe confidentiality of customer information.

2) *Clause 39.2* of the Unified Access Service Licence and Clause 42.2 of the Cellular Mobile Telephone Service licence enjoin the licensee to take all necessary steps to safeguard the privacy and confidentiality of any information about a third party, and its business to whom it provides the service. The licensee is required to use its best endeavours to secure that no person acting on behalf of the licensee or the licensee divulges or uses any such information—except as may be necessary in the course of providing such service to the third party.

3) The Internet Services Licence Agreement (which authorises ISPs to function in India) similarly contains provisions touching on privacy:

(*a*) Part VI of the Licence Agreement gives the Government the right to inspect/ monitor the TSPs systems. The TSP is responsible for making facilities available for such interception.

(*b*) *Clause 32* under Part VI contains

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provisions mandating the confidentiality of information. These provisions are identical to those described in Clause 21 of the NLD License agreement (see above).

(*c*) *Clause 33.4* makes it the responsibility of the TSP to trace nuisance, obnoxious or malicious calls, messages or communications transported through its equipment.

(*d*) *Clause 34.8* requires ISPs to maintain a log of all users connected and the service they are using (mail, telnet, http, etc.). The ISPs must also log every outward login or telnet through their computers. These logs, as well as copies of all the packets originating from the customer premises equipment (CPE) of the ISP, must be available in REAL TIME to Telecom Authority. The clause forbids logins where the identity of the logged-in user is not known.

(*e*) *Clauses 34.12* and *34.13* requires the licensee to make available a list of all subscribers to its services on a password protected website for easy access by Government authorities.

(*f*) *Clause 34.16* requires the licensee to activate services only after verifying the bona fides of the subscribers and collecting supporting documentation. There is no regulation governing how long this information is to be retained.

(*g*) *Clause 34.22* makes it mandatory for the Licensee to make available "details of the subscribers using the service" to the Government or its representatives "at any prescribed instant".

(*h*) *Clause 34.23* mandates that the licensee maintain "all commercial records with regard to the communications exchanged on the network" for a period of "at least one year for scrutiny by the licensor for security reasons and may be destroyed thereafter

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	unless directed otherwise by the licensor". (*i*) Clause 34.28(*viii*) forbids the licensee from, transferring the following information to any person/place outside India: (*j*) Any accounting information relating to subscriber (except for international roaming/billing) (Note: it does not restrict a statutorily required disclosure of financial nature) ; and (*k*) User information (except pertaining to foreign subscribers using Indian operator's network while roaming). (*l*) Clauses 34.28(*ix*) and (*x*) require the TSP to provide traceable identity of their subscribers and on request by the Government must be able to provide the geographical location of any subscriber at any given time. (*m*) Clause 34.28(*xix*) stipulates that "in order to maintain the privacy of voice and data, monitoring shall only be upon authorisation by the Union Home Secretary or Home Secretaries of the States/Union Territories". (It is unclear whether this is to operate as an overriding provision governing all other clauses as well)
Privacy and Confidentiality Direction by TRAI	*Vide its 2010 directions TRAI has sought to implement the privacy and confidentiality related clauses in the service providers' licences*. Accordingly by this direction, the TRAI ordered all service providers to "*put in place an appropriate mechanisms, so as to prevent the breach of confidentiality on information belonging to the subscribers and privacy of communication*". All service providers were required by this regulation to submit a report to the TRAI giving details of measures so adopted. (emphasis supplied)
The Bankers Book Evidence Act, 1891	Acts confers statutory protections against inspection and dissemination of bankers books of accounts.

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Section 2A. Conditions in the printout.

A printout of entry or a copy of printout referred to in sub-section (8) of Section 2 shall be accompanied by the following, namely:

(a) a certificate to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager; and

(b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of (A) the safeguards adopted by the system to ensure that data is entered or other operation performed only by authorised persons;

(B) the safeguards adopted to prevent and detect unauthorised change of data;

(C) the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;

(D) the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;

(E) the mode of verification in order to ensure that data has been accurately transferred to such removable media;

(F) the mode of identification of such data storage devices;

(G) the arrangements for the storage and custody of such storage devices;

(H) the safeguards to prevent and detect any tampering with the system; and

(I) any other factor which will vouch for the integrity and accuracy of the system.

(c) a further certificate from the person in charge of the computer system to the effect that to the best of his knowledge and belief, such computer system operated properly at the material time, he was provided with all the relevant data and the printout in question represents correctly, or is appropriately derived from, the relevant data.

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	Section 5. Case in which officer of bank not compellable to produce books No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any bankers book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause. *Section 6. Inspection of books by order of Court or Judge* (1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a bankers book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies. (2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct. (3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same/shall not be enforced without further order.

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Credit Information Companies (Regulation) Act, 2005	Chapter VI of the Act embodies information *privacy principles with respect to credit information* *Section 2—Definitions.—* (*e*) "credit information company" means a company formed and registered under the Companies Act, 1956 and which has been granted a certificate of registration under sub-section (2) of Section 5; (*f*) "credit institution" means a banking company and includes— (*i*) a corresponding new bank, the State Bank of India, a subsidiary bank, a co-operative bank, the National Bank and regional rural bank; (*ii*) a non-banking financial company as defined under clause (f) of Section 45-I of the Reserve Bank of India Act, 1934; 1. "specified user" means any credit institution, credit information company being a member under sub-section (3) of Section 15, and includes such other person or institution as may be specified by regulations made, from time to time, by the Reserve Bank for the purpose of obtaining credit information from a credit information company; *Section 19*—Accuracy and security of credit information.—A credit information company or credit institution or specified user, as the case may be, in possession or control of credit information, shall take such steps (including security safeguards) as may be prescribed, to ensure that the data relating to the credit information maintained by them is accurate, complete, duly protected against any loss or unauthorised access or use or unauthorised disclosure thereof. *Section 20. Privacy principles.—* Every credit information company, credit institution and specified user, shall adopt the following privacy principles in relation to collection, processing, collating, recording,

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preservation, secrecy, sharing and usage of credit information, namely:

a. the principles—

i. which may be followed by every credit institution for collection of information from its borrowers and clients and by every credit information company, for collection of information from its member credit institutions or credit information companies, for processing, recording, protecting the data relating to credit information furnished by, or obtained from, their member credit institutions or credit information companies, as the case may be, and sharing of such data with specified users;

ii. which may be adopted by every specified user for processing, recording, preserving and protecting the data relating to credit information furnished, or received, as the case may be, by it;

iii. which may be adopted by every credit information company for allowing access to records containing credit information of borrowers and clients and alteration of such records in case of need to do so;

b. the purpose for which the credit information may be used, restriction on such use and disclosure thereof;

c. the extent of obligation to check accuracy of credit information before furnishing of such information to credit information companies or credit institutions or specified users, as the case may be;

d. preservation of credit information maintained by every credit information company, credit institution, and specified user as the case may be (including the period for which such information may be maintained, manner of deletion of such information and maintenance of records of credit information);

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	e. networking of credit information companies, credit institutions and specified users through electronic mode; f. any other principles and procedures relating to credit information which the Reserve Bank may consider necessary and appropriate and may be specified by regulations. *Section 22. Unauthorised access to credit information.*— 1. No person shall have access to credit information in the possession or control of a credit information company or a credit institution or a specified user unless the access is authorised by this Act or any other law for the time being in force or directed to do so by any court or tribunal and any such access to credit information without such authorisation or direction shall be considered as an unauthorised, access to credit information. 2. Any person who obtains unauthorised access to credit information as referred to in sub-section (1) shall be punishable with fine which may extend to one lakh rupees in respect of each offence and if he continues to have such unauthorised access, with further fine which may extend to ten thousand rupees for every day on which the default continues and such unauthorised credit information shall not be taken into account for any purpose. [The said Act also provides for penal provision for violation of privacy]
Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983	The Act imposes a bar on public financial institutions to disclose information relating to affairs of its constituents *Section 2. Definitions.*— (1) In this Act, "public financial institution" means— (a) the Industrial Credit and Investment Corporation of India Limited, a company formed and registered under the Indian Companies Act, 1913 (7 of 1913);

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(b) the Industrial Reconstruction Corporation of India Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956); or

(c) any other institution, being a company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) or a company to which the provisions of Section 619 of that Act apply, which the Central Government may, having regard to the nature of the business carried on by such institution, by notification in the Official Gazette, specify to be a public financial institution for the purposes of this Act.

(2) Every notification issued under clause (c) of sub-section (1) shall, as soon as may be, after it is issued, be laid before each House of Parliament.

Section 3. Obligation as to fidelity and secrecy.—

1) A public financial institution shall not, except as otherwise provided in sub-section (2) or in any other law for the time being in force, divulge any information relating to, or to the affairs of, its constituents except in circumstances in which it is, in accordance with the law or practice and usage, customary among bankers, necessary or appropriate for the public financial institution to divulge such information.

(2) A public financial institution may, for the purpose of efficient discharge of its functions, collect from, or furnish to,—

(a) the Central Government; or

(b) the State Bank of India constituted under Section 3 of the State Bank of India Act, 1955 (23 of 1955), any subsidiary bank within the meaning of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959). any corresponding new bank constituted under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings)

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	Act, 1970 (5 of 1970) or under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), any other scheduled bank within the meaning of the Reserve Bank of India Act, 1934 (2 of 1934); or (c) any other public financial institution, such credit information or other information as it may consider useful for the purpose, in such manner and at such time as it may think fit. Explanation.—For the purposes of this sub-section, the expression "credit information" shall have the same meaning as in clause (c) of Section 45A of the Reserve Bank of India Act, 1934 (2 of 1934) subject to the modification that the banking company referred to therein shall mean a bank referred to in clause (b) of this sub-section or a public financial institution. 1 [(3) Nothing contained in this section shall apply to the credit information disclosed under the Credit Information Companies (Regulation) Act, 2005.]
Payment and Settlement Systems Act, 2007	*Section 15 of the Act grants confidentiality to the document or information obtained by the Reserve Bank from the system provider which provides payment system for credit card. debit card related transactions* [eg VISA] *Section 15. Information. etc., to be confidential.*—1. Subject to the provisions of sub-section (2), any document or information obtained by the Reserve Bank under Sections 12 to 14 (both inclusive) shall be kept confidential. 2. Notwithstanding anything contained in sub-section (1), the Reserve Bank may disclose any document or information obtained by it under Sections 12 to 14 (both inclusive) to any person to whom the disclosure of such document or information is considered necessary for protecting the integrity, effectiveness or security of the payment system, or in the interest of banking or monetary policy or the operation of the payment systems generally or in the public interest.

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Indian Income Tax Act, 1961	Act provides for *confidentiality of income and tax information of the Assessee*;
Fair Practice Code for Credit Card Operations, 2010	Under these guidelines banks/NBFCs are directed to *ensure confidentiality of the customer's records and maintain fair practices in debt collection*. The said guidelines also lays down that *no bank or its agents would resort to invasion of privacy viz., persistently bothering the card holders/their family members at odd hours, either for offering of credit card or for the purpose of recovery of the balance amount*. It also provides for violation of "do not call" code etc.
The Right To Information Act, 2005	*Section 8(d)* of the said provides exemption from disclosure of information *if the said information contains commercial confidence, trade secrets or intellectual property and disclosure of which would harm the competitive position of a third party*. The said information is disclosed only if competent authority is satisfied that larger public interest warrants the disclosure of such information;

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016	Chapter VI Protection of Information 28. Security and confidentiality of information. The Authority shall ensure the security of identity information and authentication records of individuals. Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals. The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or regulations made thereunder, and against accidental or intentional destruction, loss or damage.

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Without prejudice to sub-sections (1) and (2), the Authority shall

adopt and implement appropriate technical and organisational security measures;

ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:

29. *Restriction on sharing information.*

No core biometric information, collected or created under this Act, shall be—

shared with anyone for any reason whatsoever; or

used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by regulations.

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	No identity information available with a requesting entity shall be—
	used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or disclosed further, except with the prior consent of the individual to whom such information relates.
	No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.
	30. ***Biometric information deemed to be sensitive personal information.***
	The biometric information collected and stored in electronic form, in accordance with this Act and regulations made thereunder, shall be deemed to be "electronic record" and "sensitive personal data or information", and the provisions contained in the Information Technology Act, 2000 and the rules made thereunder shall apply to such information, in addition to, and to the extent not in derogation of the provisions of this Act.
	Explanation.—For the purposes of this section, the expressions—
	"electronic form" shall have the same meaning as assigned to it in clause (r) of sub-section (1) of Section 2 of the Information Technology Act, 2000;
	"electronic record" shall have the same meaning as assigned to it in clause (t) of sub-section (1) of Section 2 of the Information Technology Act, 2000;
	"sensitive personal data or information" shall have the same meaning as assigned to it in clause (iii) of the Explanation to Section 43A of the Information Technology Act, 2000.

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31. ***Alteration of demographic information or biometric information.***

1. In case any demographic information of an Aadhaar number holder is found incorrect or changes subsequently, the Aadhaar number holder shall request the Authority to alter such demographic information in his record in the Central Identities Data Repository in such manner as may be specified by regulations.

2. In case any biometric information of Aadhaar number holder is lost or changes subsequently for any reason, the Aadhaar number holder shall request the Authority to make necessary alteration in his record in the Central Identities Data Repository in such manner as may be specified by regulations.

3. On receipt of any request under sub-section (I) or sub-section (2), the Authority may, if it is satisfied, make such alteration as may be required in the record relating to such Aadhaar number holder and intimate such alteration to the concerned Aadhaar number holder.

4. No identity information in the Central Identities Data Repository shall be altered except in the manner provided in this Act or regulations made in this behalf.

32. ***Access to own information and records of requests for authentication.***

The Authority shall maintain authentication records in such manner and for such period as may be specified by regulations.

Every Aadhaar number holder shall be entitled to obtain his authentication record in such manner as may be specified by regulations.

The Authority shall not, either by itself or through any entity under its control, collect, keep or maintain any information about the purpose of authentication.

33. ***Disclosure of information in certain cases.***

1. Nothing contained in sub-section (2) or sub-section (5) of Section 28 or sub-section (2) of Section 29 shall apply in respect of any *disclosure of information, including identity*

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	information or authentication records, made pursuant to an order of a court not inferior to that of a District Judge: Provided that no order by the court under this sub-section shall be made without giving an opportunity of hearing to the Authority. 2. Nothing contained in sub-section (2) or sub-section (5) of Section 28 and clause (b) of sub-section (1), sub-section (2) or sub-section (3) of Section 29 shall apply in respect of any disclosure of information, including identity information or authentication records, *made in the interest of national security in pursuance of a direction of an officer not below the rank of Joint Secretary to the Government of India specially authorised in this behalf by an order of the Central Government*: Provided that every direction issued under this sub-section, shall be reviewed by an Oversight Committee consisting of the Cabinet Secretary and the Secretaries to the Government of India in the Department of Legal Affairs and the Department of Electronics and Information Technology, before it takes effect: Provided further that any direction issued under this sub-section shall be valid for a period of three months from the date of its issue, which may be extended for a further period of three months after the review by the Oversight Committee.
The Census Act, 1948	*Protection from unauthorised disclosure of information gathered by the officers of State during the survey for census.*
The Collection of Statistics Act, 2008	*Protection from unauthorised disclosure of information furnished to the statistics officer* or to any person or agencies authorised under the Act. Provision for keeping the identity of the informant confidential. [Chapter III – Section 9-14]
Juvenile Justice (Care and Protection of Children)	Under *Section 3* of the Act the Central Government, the State Governments, the

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Act, 2000	Board, and other agencies, as the case may be, while implementing the provisions of this Act are to be guided by *principles of Principle of right to privacy and confidentiality*. *Section 74* of the said Act *prohibits disclosure of identity of children in any newspaper magazine, news-sheet or audio-visual media or other forms of communication which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime*. As per *Section 51* of the Act the report of the probation officer or social worker on a juvenile having been charged with the offence is be *kept confidential*;
The Protection of Children from Sexual Offences Act, 2012	Provides for *protecting children's rights of privacy and confidentiality who are victim of offences of sexual assault*, sexual harassment and pornography,

The Information Technology Act, 2000	*Section 30* Certifying Authority to follow certain procedures Every Certifying Authority shall,- (a) make use of hardware, software, and procedures that the secure from intrusion and misuse; (b) provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions; (c) adhere to security procedures to ensure that the secrecy and privacy of the digital signatures are assured; and (d) observe such other standards as may be specified by regulations. *Section 65* of the Act provides protection against tampering with individual's computer/ source documents. *Section 66* Hacking with Computer System.— (l) Whoever with the intent of cause or knowing that is likely to cause wrongful loss or damage to the public or any person

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	destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking. (2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both. Section 66E of the Act *provides for punishment for violation of privacy.* *Section 72* Breach of confidentiality and privacy.— Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.
Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011	India's most comprehensive data protection standards are found in the ITA and are known as the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011. The Rules seek to provide rights to the individual with regards to their information and obligate body corporate *to take steps towards protecting the privacy of consumer's information*. Among other things, the Rules define "sensitive personal information' and require that any corporate body must publish an online privacy' policy, provide individuals with the right to access and correct their information, obtain consent before disclosing

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	sensitive personal information 'except in the case' of law enforcement, provide individuals the ability to withdraw consent, establish a grievance officer, require companies to ensure equivalent levels of protection when transferring information, and put in place reasonable security practices.

15. Thus, from the aforesaid illustrative statutory provisions it is clear that both pre- and post-independence, the legislature has been granting protection to the various facets and aspects of this "common law right to privacy" through statutes enacted by the competent legislatures. As such, in view thereof there is no justification to confer it a separate constitutional protection under Part III of the Constitution by way of the process of judicial interpretation when it is impossible to lay down any definitive contours of the term "privacy".

III *In other jurisdictions also "privacy" is protected by statute*

16. It is submitted that not only in India but in other jurisdictions also there are instances where *privacy is not conferred with a status of constitutional right but the same has been protected under statutes governing various fields of human activity*. This fact necessarily depends upon country specific parameters. The same is evident from the analysis of laws of the following countries which have codified the law relating to "individual privacy" which primarily defined as personal data and has granted in statutory safeguards from any state or private action:

New Zealand	*The Privacy Act, 1993 (Act)* governs how agencies collect, use, disclose, store, retain and give access to personal information. The Act gives the Privacy Commissioner the power to issue, codes of practice that modify the operation of the Act in relation to specific industries, agencies, activities or types of personal information. Codes currently in place are: ➢ Credit Reporting Privacy Code ➢ Health Information Privacy Code ➢ Justice Sector Unique Identifier Code ➢ Superannuation Schemes Unique Identifier Code ➢ Telecommunications Information Privacy Code ➢ Civil Defence National Emergencies (Information Sharing) Code. Enforcement is through the Privacy Commissioner.

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Australia	Data privacy/protection in Australia is currently made up of a mix of Federal and State/Territory legislation. *The Federal Privacy Act 1988 (Cth) (Privacy Act) and its Australian Privacy Principles (APPs)* apply to private sector entities with an annual turnover of at least A$3 million and all Commonwealth Government and Australian Capital Territory Government agencies. The Privacy Act was last amended by the Privacy Amendment (Enhancing Privacy Protection) Act, 2012, which came into force on 12-3-2014. The amendments significantly strengthened the powers of the Privacy Commissioner to conduct investigations. (including own motion investigations), ensure compliance with the amended Privacy Act and, for the first time, introduced civil penalties for a serious/egregious breach or for repeated breaches of the APPs where remediation has not been implemented.
Israel	The laws that govern the right to privacy in Israel are the Basic Law: *Human Dignity and Liberty, 5752 - 1992; the Protection of Privacy Law, 5741-1981* and the regulations promulgated thereunder (the PPL) and the guidelines of ILITA (as defined below). The Israeli Law, Information and Technology Authority (ILITA), established in September 2006, as determined by Israel's Government Decision No. 4660, dated 19-1-2006.
Japan	*The Act on the Protection of Personal Information (APPI)* requires business operators who utilise for their business in Japan a personal information database which consists of more than 5000 individuals in total identified by personal information on any day in the past six months to protect personal information. Amendments to the APPI, which were passed in 2015 and go into effect no later than September 2017[1] (the Amendments), apply the APPI to all businesses in Japan, regardless of whether the business operator maintains a database of more than 5000 individuals. Further, the Amendments clarify the definition of personal information, add two new classes of information, and introduce new requirements for "opt out" choice for business operators to disclosure of personal information to third parties. Finally, as of 1-1-2016, the Amendments created a Privacy Protection Commission (the Commission), a central agency which will Act as a supervisory governmental organisation on

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	issues of privacy protection. The Amendments created the Privacy Protection Commission (the Commission), which will Act as a supervisory governmental organisation on issues of privacy protection.
China	Currently, there is not a comprehensive data protection law in the People's Republic of China (PRC). Instead, rules relating to personal data protection are found across various laws and regulations. Generally speaking, provisions found in laws such as the General Principles of Civil Law and the Tort Liability Law may be used to interpret data protection rights as a right of reputation or right of privacy. However, such interpretation is not explicit. A draft Personal Data Protection Law has been under review by the PRC Government for many years, but there is still no indication as to if and when such law will be passed.
Brazil	Currently, Brazil does not have a single statute establishing data protection framework. There are two bills of laws, namely, No. 330/2013 and No. 5.276/2016, under analysis before Congress that, when enacted, will specifically and broadly regulate such, subject-matter locally. According to the developments of both future regulations, Bill of Law No. 5.2726/16 (Bill of Law), dated of 13-5-2016, is likely to be enacted in the near future, since the Presidency declared it with a status of urgency under the terms of Section 64 of Brazilian Federal Constitution, thus, Bill of Law No. 330/13 should be disregarded. In the absence of specific law, Federal Law No. 12.965/2014 (Brazilian Internet Act), and its recently enacted regulating Decree No. 8.771/16 (Decree), dated of 11-5-2016, has brought some provisions on security and processing of personal data.
Saudi Arabia	Shari'a principles (that is, Islamic principles derived from the *Holy Quran* and the Sunnah, the latter being the witnesses' sayings of the Prophet Mohammed), which although not codified, are the primary source of law in the KSA. In addition to Shari'a principles, the law in the KSA consists of secular regulations passed by the government, which is secondary if it conflicts with Shari'a principles. At this time, there is no specific data protection legislation in place in the KSA (although we understand that a new freedom of information and protection of private data law is under review by the

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	Shura Council). Shari'a principles generally protect the privacy and personal data of individuals.
Qatar	On 3-11-2016 the Qatari Government passed a data protection law, Law No. 13 of 2016 concerning Personal Data Protection (Data Protection Law). The Data Protection Law will come into effect within six months of the date of issue, that is, 3-5-2017 (unless this period is extended). Qatar is the first GCC member state to issue a generally applicable data protection law. The Data Protection Law envisages further regulations being issued to assist its implementation. The Data Protection Law will apply to personal data when this data is processed electronically, or obtained, collected or extracted in any other way in preparation for the electronic processing thereof, or that is processed by combining electronic processing and traditional processing.
Singapore	Singapore enacted the Personal Data Protection Act 2012 (26 of 2012) (Act) on 15-10-2012. The Act took effect in 3 phases: (*i*) Provisions relating to the formation of the Personal Data Protection Commission (the 'Commission') took effect on 2-1-2013. (*ii*) Provisions relating to the National Do-Not-Call Registry (DNC Registry) took effect on 2-1-2014. (*iii*) The main data protection provisions took effect on 2-7-2014. The Act has extraterritorial effect, and so applies to organisations collecting personal data from individuals in Singapore whether or not the organisation itself has a presence in Singapore. The data protection obligations under the Act do not apply to the public sector, to whom separate rules apply.
Taiwan	The former Computer Processed Personal Data Protection Law (CPPL) was renamed as the Personal Data Protection Law (PDPL) and amended on 26-5-2010. The PDPL became effective on 1-10-2012, except that the provisions relating to sensitive personal data and the notification obligation for personal data indirectly collected before the effectiveness of the PDPL remained ineffective. The Government later proposed further amendment to these and other provisions, which passed

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	legislative procedure and became effective on 15-3-2016. In Taiwan, there is no single national data protection authority. The various ministries and city/County Governments serve as the competent authorities. There is no requirement in Taiwan for the Data Controller to appoint a Data Protection Officer. However, if the Data Controller is a government agency, a specific person should be appointed to be in charge of the security maintenance measures.
Malaysia	Malaysia's first comprehensive personal data protection legislation, the Personal Data Protection Act 2010 (PDPA), was passed by the Malaysian Parliament on 2-6-2010 and came into force on 15-11-2013. Pursuant to the PDPA, a Personal Data Protection Commissioner (Commissioner) has been appointed to implement the PDPA's provisions. Decisions of the Commissioner can be appealed against through the Personal Data Protection Appeal Tribunal.
Mexico	The Federal Law on the Protection of Personal Data held by Private Parties (Ley Federal de Protección de DatosPersonalesenPosesión de losParticulares) (the Law) was enacted on 5-7-2010 and entered into force on 6-7-2010. The Executive Branch has also issued: (*i*) the Regulations to the Federal Law on the Protection of Personal Data held by Private Parties (Reglamento de la Ley Federal de Protección de Datos PersonaiesenPosesión de losParticulares) on 21-12-2011 (the 'Regulations'), same which entered into force on 22-12-2011. (*ii*) the Privacy Notice Guidelines on 17-1-2013 (the Guidelines) which entered into force on 18-4-2013. (*iii*) the Parameters for Self Regulation regarding personal data on 29-5-2014 (the Parameters), which entered into force on 30-5-2014.
Nigeria	Nigeria does not have a comprehensive legislative framework on the protection of personal data. However, there are a few industry-specific and targeted laws and regulations that provide some privacy-related protections, which include: (*i*) The Constitution of the Federal Republic of Nigeria, 1999 (As Amended) (the Constitution) which provides for the fundamental rights of its citizens and

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	upholds the right of privacy as sacrosanct. Section 37 thereof provides for the guarantee and protection of the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. (*ii*) The Freedom of Information Act, 2011 (FOI Act) which seeks to protect personal privacy. Section 14 of the FOI Act provides that a public institution is obliged to deny an application for information that contains personal information unless the individual involved consents to the disclosure, or where such information is publicly available. Also, Section 16 of the FOI. Act provides that a public institution may deny an application for disclosure of information that is subject to various forms of professional privilege conferred by law (such as lawyer-client privilege, health workers-client privilege, etc). (*iii*) The Child Rights Act 26 of 2003 (the Child Rights Act) regulates the protection of children (persons under the age of 18 years). This Act limits access to information relating to children in certain circumstances. (*iv*) The Consumer Code of Practice Regulations 2007 (the NCC Regulations) issued by the regulator of the telecommunications industry in Nigeria, the Nigerian Communications Commission (NCC). The NCC Regulations provide that all licensees must take reasonable steps to protect customer information against improper or accidental disclosure, and must ensure that such information is securely stored and not kept longer than necessary. It also provides that customer information must not be transferred to any party except to the extent agreed with the Customer, as permitted or required by the NCC or other applicable laws or regulations. (*v*) In 2011, the NCC issued the Nigerian Communications Commission (Registration of Telephone Subscribers) Regulations, 2011. Section 9 of the Regulation provides that subscribers information contained in the Central Database shall be held in strict confidentiality basis and no person or entity shall be allowed access to any subscriber's information that is on the Central Database except as prescribed by the Regulation. "Central Database" is defined in the Regulation to mean subscriber information database, containing the biometric and other registration

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	information of all subscribers. Section 21 of the Regulation provides penal sanctions for violators. (*vi*) The National Information Technology Development Agency (NITDA) which is the national authority responsible for planning, developing and promoting the use of information technology in Nigeria, and which issues the Guidelines on Data Protection (NITDA Guidelines) pursuant to the NITDA Act, 2007. The NITDA Guidelines prescribe guidelines for organisations that obtain and process personal data of Nigeria residents and citizens within and outside Nigeria for protecting such personal data. The NITDA Guidelines apply to federal, State and local Government agencies and institutions as well as private sector organisations that own, use or deploy information systems within the Federal Republic of Nigeria.
Peru	Personal data protection is governed in Peru by: (*i*) the Personal Data Protection Law 29733 (PDPL) published on 3-7-2011 (*ii*) its regulations enacted by Supreme Decree 003-2013-JUS and published on 22-3-2013 (the Regulations), and (*iii*) the Security Policy on Information Managed by Databanks of Personal Data enacted by Directorial Resolution N° 019-2013-JUS/DGPDP on 11-10-2013. Although several provisions of the PDPL have been in force since 4-7-2011, most of the provisions of the PDPL only came into force on 8-5-2013 (30 business days after the issuance of the Regulations).
South Korea	In the past, South Korea did not have a comprehensive law governing data privacy. However, a law relating to protection of personal information (Personal Information Protection Act, "PIPA") was enacted and became effective as of 30-9-2011. Moreover, there is sector specific legislation such as: (*i*) the Act on Promotion of Information and Communication Network Utilisation and Information Protection (IT Network Act) which regulates the collection and use of personal information by IT Service Providers, defined as telecommunications business operators under Article 2.8 of the Telecommunications

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	Business Act; and other persons who provide information or intermediate the provision of information for profit by utilising services rendered by a telecommunications business operator (*ii*) the Use and Protection of Credit Information Act (UPCIA) which regulates the use and disclosure of Personal Credit Information, defined as credit information which is necessary to determine the credit rating, credit transaction capacity, etc. of an individual person. The UPCIA primarily applies to Credit Information Providers/Users, defined under Article 2.7 of the UPCIA as a person (entity) prescribed by Presidential Decree thereof who provides any third party with credit information obtained or produced in relation to his/her own business for purposes of commercial transactions, such as financial transactions with customers, or who has been continuously supplied with credit information from any third party to use such information for his/her own business, and (*iii*) the Act on Real Name Financial Transactions and Guarantee of Secrecy (ARNFTGS) which applies to information obtained by financial or financial services institutions. Under PIPA, except as otherwise provided for in any other Act, the protection of personal information shall be governed by the provisions of PIPA.
Trinidad and Tobago	In Trinidad and Tobago the Data Protection Act, 2011 provides for the protection of personal privacy and information (DPA) processed and collected by public bodies and private organisations. The DPA was partially proclaimed on 6-1-2012 by Legal Notice 2 of 2012 and only Part I and Sections 7 to 18, 22, 23, 25(1), 26 and 28 of Part II have come into operation. No time table has been set for the proclamation of the remainder of the DPA and it is possible that there may be changes to the remainder of the legislation before it is proclaimed.
Ukraine	The Law of Ukraine 2297 VI 'On Personal Data Protection' as of 1-6-2010 (Data Protection Law) is the main legislative Act regulating relations in the sphere of personal data protection in Ukraine. At 20-12-2012 Data Protection Law has been substantially amended by the Law of Ukraine 'On introducing amendments to the Law of Ukraine On personal data protection' dated 20-11-

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	2012 No. 5491-VI. Additional significant changes to Data Protection Law were envisaged by the Law of Ukraine 'On Amendments to Certain Laws of Ukraine regarding Improvement of Personal Data Protection System' dated 3-7-2013 No. 383-VII which came into force on 1-1-2014. In addition to the Data Protection Law, certain data protection issues are regulated by subordinate legislation specifically developed to implement the Data Protection Law.

17. Thus, from the aforesaid analysis, it is clear that there are other jurisdiction in the world where no constitutional protection is conferred to "right of privacy" nonetheless the same has been conferred statutory protection under respective statutes.

IV. *Position under English Law post their joining European Union*

18. So far as right to privacy in England is concerned, it is treated merely as a common law right. In examining the nature of the English cause of action for tort, it is necessary first of all to outline the distinctive nature of Article 8 ECHR rights.[17] The Article 8 right to a private life is a qualified right. Para 2 provides that:

> "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."

19. By its very nature, therefore, Article 8 envisages a balancing of competing rights, none of which is predominant, in determining whether the interference with Article 8 is lawful and a necessary or proportionate response. It has also been found to create negative and positive obligations on the State, to abstain from arbitrary interference in private or family life, but also to adopt measures designed to secure respect for private life even in private disputes.[18] While the State has a margin of appreciation in choosing the means by which to secure compliance with Article 8,[19] the nature of the State's obligation will depend on the particular aspect of private life that is at

17 See generally David Harris et al, Harris, O'Boyle, and Warbrick: *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 3rd Ed, 2014) ch 12.

18 *X and Y* v. *Netherlands*, (8978/80), (1986) 8 EHRR 235 at para 23.

19 See *Handyside* v. *United Kingdom*, (A/24), (1979-80) 1 EHRR 737.

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issue.[20] A wide margin of appreciation will exist in cases where the State is required to strike a balance between competing private and public interests or rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms[21], although the court has indicated that where the interference involves a most intimate aspect of private life, the margin allowed to the State will be narrowed[22]. This position does signify, however, that there remains a lack of clarity as to the nature and extent of the positive obligations imposed by Article 8.[23]

20. This becomes clear from the following analysis of the decision rendered by House of Lords in *Wainwright* v. *Home Office*[24], which makes out following two points:

(*a*) That even the Apex Court in England has refused to do is to formulate a general principle of "invasion of privacy" on constitutional touchstone;

(*b*) The concept of privacy is so inherently vague that even judicially trained minds can come to diametrically opposite conclusions on the same set of facts;

21. In this context it would be relevant to first analyse the said judgment from Point (*b*) above.

(*a*) In this case the court of first instance ie Leeds County Court held that the searches were wrongful (and hence not protected by authority of law) *because of the battery and invasion of the Wainwrights' "right to privacy", which he conceived to be a trespass to the person*. The court of first instance awarded Alan Wainwright £3,500 basic and £1,000 aggravated damages, and Mrs Wainwright £1,600 basic and £1,000 aggravated damages.

(*b*) *The Court of Appeal did not agree with the above judgment.*

(*c*) *The plaintiffs appealed to the House of Lords. Lord Hoffmann held that there was no tort for invasion of privacy, because (based on experience in the United States) it was too uncertain.* Moreover, a claim under Article 8 of the European Convention on Human Rights (ECHR), (right to privacy and family life), did not help because the ECHR was merely a standard which applied to whatever was currently present in the

20 *Soderman* v. *Sweden*, (5786/08), (2014) 58 EHRR 36. See also *X and Y* v. *Netherlands*, (8978/80), (1986) 8 EHRR 235 at para 24; *Von Hannover* v. *Germany* (No. 2), (40660/08), (2012) 55 EHRR 15 at para 104.

21 (Eur TS No. 5; 213 UNTS 221; 1953 UKTS No. 71) (4-11-1950; entry into force 3-9-1953) (*Evans* v. *UK*, (6339/05), (2008) 46 EHRR 34).

22 *Söderman* v. *Sweden*, (5786/08), (2014) 58 EHRR 36 at para 79

23 David Harris et al, Harris, O'Boyle, and Warbrick: *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 3rd Edn., 2014) at p. 533.

24 (2004) 2 AC 406 : (2003) 3 WLR 1137 (HL)

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common law. Common law protection was sufficient privacy protection for the ECHR's purpose.

Thus from the above it is clear that on the same set of facts, even judicially trained minds have also come to diametrically opposite conclusions, while dealing with the case of personal privacy that it makes it obvious that expressions "privacy is so vague that there is no manageable standard by which a person can be said to have committed breach or not to have committed a breach of the said vague concept.

22. Furthermore it is also clear that the *Apex Court in England in the said case of Wainwright (supra) refused to confer general principle of "invasion of privacy" a constitutional status*. The same is clear from the following extract of the case which is reproduced hereinbelow for ready reference:

"*15*. My Lords, let us first consider the proposed tort of invasion of privacy. Since the famous article by Warren and Brandeis ("The Right to Privacy"[25] the question of whether such a tort exists, or should exist, has been much debated in common law jurisdictions. Warren and Brandeis suggested that one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value which they called privacy or, following Judge Cooley. (Cooley on Torts, 2nd ed (1888), p 29) "the right to be let alone". They said that identifying this common element should enable the courts to declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public.

16. Courts in the United States were receptive to this proposal and a jurisprudence of privacy began to develop. It became apparent, however, that the developments could not be contained within a single principle; not, at any rate, one with greater explanatory power than the proposition that it was based upon the protection of a value which could be described as privacy. Dean Prosser, in his work on The Law of Torts, 4th ed (1971), p. 804, said that:

"What has emerged is no very simple matter ... it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'."

17. Dean Prosser's taxonomy divided the subject into (*1*) intrusion upon the plaintiffs physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment) (*2*) public disclosure of private facts and (*3*) publicity

25 (1890) 4 Harv L Rev 193

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putting the plaintiff in a false light and (*4*) appropriation, for the defendant's advantage, of the plaintiffs name or likeness. These, he said, at p 814, had different elements and were subject to different defences.

18. The need in the United States to break down the concept of "invasion of privacy" into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle. *There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy.* Sir Brian Neill's well known article "Privacy: a challenge for the next century" in Protecting Privacy (ed B Markesinis, 1999) contains a survey. *Common law torts include trespass, nuisance, defamation and malicious. falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998. There are also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers.* **But there are gaps**; *cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle.* The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of *Lord Phillips of Worth Matravers MR in Campbell* v. *MGN Ltd.*[26] On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in *Khorasandjian* v. *Bush*[27] was held by, the House of Lords in *Hunter* v. *Canary Wharf Ltd.*[28] to be a step too far. *The gap was filled by the 1997 Act.*

19. What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" (J use the quotation marks to signify doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Sir Robert Megarry V-C in *Malone* v. *Metropolitan Police Commr.*[29] I shall be sparing in citation but the whole of Sir Robert's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in

26 2003 QB 633 : (2003) 2 WLR 80 : 2004 UKHL 22 (CA)
27 1993 QB 727 : (1993) 3 WLR 476 (CA)
28 1997 AC 655 : (1996) 2 WLR 348 (HL)
29 1979 Ch 344 at pp. 372-381 : (1979) 2 WLR 700

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Malone v. *United Kingdom*[30] an infringement by a public authority of his right to privacy under article 8 of the Convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Sir Robert was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said, at p 372:

> "I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. *On the other hand it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another.*"

22. Once again. Parliament provided a remedy, subject to a detailed code of exceptions, in the Interception of Communications Act 1985. A similar problem arose in *R.* v. *Khan (Sultan)*[31], in which the defendant in criminal proceedings complained that the police had invaded his privacy by using a listening device fixed to the outside of a house. *There was some discussion of whether the law should recognise a right to privacy which had been prima facie infringed. but no concluded view was expressed because all their Lordships thought that any such right must be subject to exceptions, particularly in connection with the detection of crime and that the accused's privacy had been sufficiently taken into account by the judge when he exercised his discretion under Section 78 of the Police and Criminal Evidence Act 1984 to admit the evidence obtained by the device at the criminal trial.* The European Court of Human Rights subsequently held (*Khan* v. *United Kingdom*[32]) that the invasion of privacy could not be justified under Article 8 because, in the absence of any statutory regulation, the actions of the police had not been "in accordance with law". *By that time, however Parliament had intervened in the Police Act 1997 to put the use of surveillance devices on a statutory basis.*

26. All three ,judgments are flat against a judicial power to declare the existence of a high-level right to privacy and I do not think that they suggest that the courts should do so. The members of the Court of Appeal certainly thought that it would be desirable if there was legislation to confer a right to protect the privacy of a person in the position of Mr Kaue against the kind of intrusion which he suffered, but

30 (1984) 7 EHRR 14

31 1997 AC 558 : (1996) 3 WLR 162 (HL)

32 The Times, 23-5-2000

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they did not advocate any wider principle. And when the Calcutt Committee reported in June 1990, they did indeed recommend that "entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication" should be made a criminal offence: see the Report of the Committee on Privacy and Related Matters (1990) (Cm 1102), para 6.33. The Committee also recommended that certain other forms of intrusion, like the use of surveillance devices on private property and long-distance photography and sound recording, should be made offences.

27. But the Calcutt Committee did not recommend, even within their terms of reference (which were confined to press intrusion) the creation of a generalised tort of infringement of privacy: paragraph 12.5. This was not because they thought that the definitional problems were insuperable. They said that if one confined the tort to "publication of personal information to the world at large" (paragraph 12.12) it should be possible to produce an adequate definition and they made some suggestions about how such a statutory tort might be defined and what the defences should be. But they considered that the problem could be tackled more effectively by a combination of the more sharply-focused remedies which they recommended: paragraph 12.32. As for a "general wrong of infringement of privacy", they accepted, at paragraph 12.12, that it would, even in statutory form, give rise to "an unacceptable degree of uncertainty". There is nothing in the opinions of the judges in *Kaye* v. *Robertson*[33] which suggests that the members of the court would have held any view, one way or the other, about a general tort of privacy.

31. 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 the notion of underlying values-principles only in the broadest sense-which direct its development. A famous example is *Derbyshire County Council* v. *Times Newspapers Ltd.*[34], in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

32. 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

33 1991 FSR 62 : 1990 EWCA Civ 21

34 1993 AC 534 : (1993) 2 WLR 449 (HL)

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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). So in *Earl Spencer* v. *United Kingdom*[35] it was satisfied that the action for breach of confidence provided an adequate remedy for the Spencers' complaint and looked no further into the rest of the armoury of remedies available to the victims of other invasions of privacy. Likewise, in *Peck* v. *United Kingdom*[36] the court expressed some impatience, at paragraph 103, at being given a tour d'horizon of the remedies provided and to be provided by English law to deal with every imaginable kind of invasion of privacy. It was concerned with whether Mr Peck (who had been filmed in embarrassing circumstances by a CCTV camera) had an adequate remedy when the film was widely published by the media. It came to the conclusion that he did not.

34. Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under Article 8 have been infringed by a public , authority, he will have a statutory remedy. The creation of a general tort will, as Buxton LJ pointed out in the Court of Appeal *Wainwright* v. *Home Office*[37], pre-empt the controversial question of the extent, if any, to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities.

35. For these reasons I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy."

23. Thus from the aforesaid it is clear that this concept of "privacy" is so vague that it cannot be, in the present form, be declared a fundamental right as there are no judicially manageable standard to constitutionally enforce the same. The said right of privacy is sufficiently protected by appropriate statutes (as explained hereunder) depending upon the subject-specific precise and definable need for protection of privacy.

24. Further, following *Wainwright* v. *Home Office*[24], in *Campbell* v. *MGN Ltd.*[26], the Court held:

11. *In this country, unlike the United States of America there is no over-arching, all-embracing cause of action for 'invasion of privacy'*: see *Wainwright* v. *Home Office*[24]. *But protection of various aspects of*

35 (1998) 25 EHRR CD 105

36 (2003) 36 EHRR 719

37 2002 QB 1334 at p. 1360, para 92 : (2002) 3 WLR 405 (CA)

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privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of Appeal of New Zealand in *Hosking* v. *Runting*[38] (25-3-2004) is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998.

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*[39].

13. *The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed*: see the classic exposition by Megarry J. in *Coco* v. *A.N. Clark (Engineers) Ltd.*[40] The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.

14. This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney General* v. *Guardian Newspapers Ltd. (No. 2)*[41]. *Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential*. Even this

38 2004 NZCA 34

39 (1988) 2 SCR 417 at p. 426 (Can SC)

40 1969 RPC 41 at pp. 47-48

41 (1990) 1 AC 109 : (1988) 3 WLR 776 (HL)

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formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. *The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.*

15. In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example. *The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely*, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful *publication* by the 'Mirror' of private *information*.

16. The European Convention on Human Rights, and the Strasbourg jurisprudence, have undoubtedly had a significant influence in this area of the common law for some years. The provisions of Article 8, concerning respect for private and family life, and Article 10, concerning freedom of expression, and the interaction of these two articles, have prompted the courts of this country to identify more clearly the different factors involved in cases where one or other of these two interests is present. Where both are present the courts are increasingly explicit in evaluating the competing considerations involved. *When identifying and evaluating these factors the courts, including your Lordships' House. have tested the common law against the values encapsulated in these two articles. The development of the common law has been in harmony with these articles of the Convention*: see, for instance, *Reynolds* v. *Times Newspapers Ltd*.[42]

22. Different forms of words, usually to much the same effect, have been suggested from time to time. The second Restatement of Torts in the United States (1977), Article 652-D, p. 394, uses the formulation of disclosure of matter which 'would be highly offensive to a reasonable person'. In *Australian Broadcasting Corpn.* v. *Lenah Game Meats Pty Ltd*.[43], Gleeson CJ used words, widely quoted, having a similar meaning. *This particular formulation should be used with care, for two reasons. First, the 'highly offensive' phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second. the 'highly offensive' formulation can all too easily bring into account, when*

42 (2001) 2 AC 127 at pp. 203-204 : (1999) 3 WLR 1010 (HL)

43 (2001) 185 ALR 1 at p. 13, para 42

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deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion.

V. *Recent trends under American Law*

25. The American constitutional standard of privacy right is wholly inapplicable to the fundamental rights jurisprudence in India. The US Supreme Court has held that people cannot reasonably expect privacy in information they willingly disclose to third parties and, thus, that government intrusions on such information are not Fourth Amendment searches, commonly known as the Third Party Doctrine.[44]

26. In its 1979 decision in *Smith* v. *Maryland*[44], the Supreme Court ruled in favour of the Government, observing that "this Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties". The Smith ruling also made reference to another Fourth Amendment case decided three years earlier, *United States* v. *Miller*[45], that involved warrantless Government access of a suspect's bank records. In Miller supra, the US Supreme Court had also found in favour of the Government, holding that:

> "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."

27. The Miller and Smith decisions (supra) manifests what has since become known as the third-party doctrine. Under that doctrine, if you voluntarily provide information to a third party, the Fourth Amendment does not preclude the Government from accessing it without a warrant. More succinctly, as the Court held in *Smith*[44], you have "no legitimate expectation of privacy" from warrantless government access to that information.

28. In *United States* v. *Jones*[46], the question involved was GPS tracking performed directly by the Government, without a third party intermediary. The Government's physical intrusion onto private property, without a valid warrant, to attach a GPS tracker to a suspect's car was in question. The US Supreme Court justices voted unanimously that this was a "search" under the

44 *Smith* v. *Maryland*, 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 at pp. 743-44 (1979)

45 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)

46 181 L Ed 2d 911 : 132 S Ct 945 at p. 949 (2012)

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Fourth Amendment, although they were split 5-4 as to the fundamental reasons behind that conclusion. The majority held that by physically installing the GPS device on the defendant's car, the police had committed a trespass against Jones' "personal effects" — this trespass, in an attempt to obtain information, constituted a search per se.

29. As per recent American trends, the American lower courts have held that historical cell-site location information (CSLI) — a carrier's records of the cell tower used to route a user's calls and messages (typically the tower closest to the user)[47] — is such information willingly disclosed to third parties.[48] Recently, in *United States* v. *Graham*[49]. The Fourth Circuit upheld that rule, finding that two defendants could not reasonably expect privacy in CSLI that police used to place them at the crime scene.

30. To further understand the verdict in *United States* v. *Graham*[49] it is necessary to understand the factual background that led to the verdict:

(*a*) Aaron Graham and Eric Jordan were prosecuted for six armed robberies in Baltimore that occurred over the course of several weeks in early 2011;

(*b*) The fifth and sixth robberies took place on the same afternoon. Based on eyewitness testimony, the police arrested Graham and Jordan; they then acquired physical evidence connecting the defendants to two of the earlier robberies.

(*c*) While investigating those robberies, an officer seized (under warrant) two phones from Graham's car, linking them to the phone numbers Graham and Jordan gave at arrest.

(*d*) The police sought court orders through the Stored Communications Act (SCA), under which the Government may compel disclosure of certain records under a standard lower than probable cause.

(*e*) They demanded that Sprint/Nextel (the defendants' phone carrier) provide the historical CSLI associated with the defendants' phones for a total of 221 days over seven months, collecting over 28,000 CSLI data points for each defendant.

(*f*) Prosecutors used CSLI to place the defendants at most of the crime scenes.

31. Subsequently, Graham and Jordan brought a motion to suppress the CSLI as the fruit of an unconstitutional search. The District Court concluded that the defendants could not legitimately expect privacy in their historical CSLI records as they voluntarily conveyed that information to Sprint/Nextel; the third-party doctrine thus applied. Accordingly, the court rejected the

47 *United States* v. *Graham*, 796 F 3d 332 at p. 343 (4th Cir 2015)

48 See, e.g., *United States* v. *Carpenter*, 819 F 3d 880 at pp. 887-89 (6th Cir 2016)

49 824 F 3d 421 (4th Cir 2016)

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motion, and the defendants were then convicted following a jury trial. They appealed, arguing that the Government, by obtaining the CSLI, had violated their Fourth Amendment rights. A panel of the Fourth Circuit agreed.

32. On appeal, the Fourth Circuit, sitting en banc (Full Bench), reversed the panel's Fourth Amendment holding. Previously in minority, but now in the majority, Motz, J. first wrote that the third-party doctrine applies even to information conveyed for limited purposes. The Hon'ble Court held:

> "Defendants maintain that cell phone users do not convey CSLI to phone providers, voluntarily or otherwise. We reject that contention. With respect to the nature of CSLI, there can be little question that cell phone users "convey" CSLI to their service providers. After all, if they do not, then who does?
>
> ...
>
> *... user therefore "conveys" the location of the cell towers his phone connects with to his provider whenever he uses the provider's network.*
>
> ...
>
> There is similarly little question that cell phone users convey CSLI to their service providers "voluntarily."
>
> ...
>
> *When an individual purchases a cell phone and chooses a service provider, he expects the provider will, at a minimum, route outgoing and incoming calls and text messages. As most cell phone users know all too well, proximity to a cell tower is necessary to complete these tasks. Anyone who has stepped outside to "get a signal," or has warned a caller of a potential loss of service before entering an elevator, understands, on some level, that location matters.*
>
> ...
>
> If it were otherwise, courts would frequently need to parse business records for indicia of what an individual knew he conveyed to a third party. *For example, when a person hands his credit card to the cashier at a grocery store, he may not pause to consider that he is also "conveying" to his credit card company the date and time of his purchase or the store's street address. But he would hardly be able to use that as an excuse to claim an expectation of privacy if those pieces of information appear in the credit card company's resulting records of the transaction.* Cf. *United States* v. *Phibbs*[50] (Defendant "did not have both an actual and a justifiable privacy interest in ... his credit card statements.").
>
> ...
>
> *In their efforts to avoid the third-party doctrine, Defendants attempt to redefine it. They maintain that the third-party doctrine does not apply to historical CSLI because a cell phone user does not "actively choose[] to share" his location information.* Defendants' Br. at 30. Such a rule is

50 999 F 2d 1053 at pp. 1077-78 (6th Cir 1993)

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nowhere to be found in either *Miller*[45] or *Smith*[44]. Moreover, this purported requirement cannot be squared with the myriad of federal cases that permit the government to acquire third-party records, even when individuals do not "actively choose to share" the information contained in those records.

...

Thus, the redefinition of the third-party doctrine that Defendants advocate not only conflicts with Supreme Court doctrine and all the CSLI cases from our sister circuits, but is also at odds with other established circuit precedent.

C.

In another attempt to avoid the third-party doctrine, Defendants rely on a factual argument long rejected by the Supreme Court and a series of cases involving the content of communications to support their assertion that historical CSLI is protected by the Fourth Amendment.

First, Defendants emphasize that cellphone use is so ubiquitous in our society today that individuals must risk producing CSLI or "opt out of modern society." Defendants' En Banc Br. at 11. Defendants contend that such widespread use shields CSLI from the consequences of the third-party doctrine and renders any conveyance of CSLI "not voluntary," for [l]iving off the grid ... is not a prerequisite to enjoying the protection of the Fourth Amendment." Id.

But the dissenting justices in Miller[45] *and Smith*[44] *unsuccessfully advanced nearly identical concerns.*

...

The Supreme Court has thus twice rejected Defendants' theory. Until the Court says otherwise, these holdings bind us.

Second, Defendants rely on cases that afford Fourth Amendment protection to the content of communications to suggest that CSLI warrants the same protection.

...

The Supreme Court has thus forged a clear distinction between the contents of communications and the non-content information that enables communications providers to transmit the content. CSLI, which identifies the equipment used to route calls and texts, undeniably belongs in the non-content category. As the Sixth Circuit recently recognized, CSLI is non-content information because "cell-site data — like mailing addresses, phone numbers, and IP addresses — are information that facilitate personal communications, rather than part of the content of those communications themselves." *Carpenter*[51].

51 *United States* v. *Carpenter*, 2016 WL 1445183, at *4 (6th Cir 13-4-2016)

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...

Outrage at the amount of information the Government obtained, rather than concern for any legal principle, seems to be at the heart of Defendants' arguments.

...

Defendants' answer appears to rest on a misunderstanding of the analysis embraced in the two concurring opinions in Jones. There, the concurring justices recognized a line between "short-term monitoring of a person's movements on public streets," which would not infringe a reasonable expectation of privacy, and "longer term GPS monitoring," which would. *Jones*[46], S Ct at 964 (Alito, J., concurring in the judgment); see also id. at 955 (Sotomayor, J., concurring). But Jones involved government surveillance of an individual, not an individual's voluntary disclosure of information to a third party. And determining when government surveillance infringes on an individual's reasonable expectation of privacy requires a very different analysis.

In considering the legality of the government surveillance at issue in Jones[46]*. Justice Alito looked to what a hypothetical law enforcement officer, engaged in visual surveillance. could reasonably have learned about the defendant.* He concluded that four weeks of GPS monitoring by the government constituted a Fourth Amendment "search" because "society's expectation" had always been "that law enforcement agents and others would not — and indeed, in the main, simply could not — secretly monitor and catalogue" an individual's movements in public for very long. Id. at 964 (Alito, J., concurring in the judgment) (emphasis added). In other words, direct surveillance by the government using technological means may, at some point, be limited by the government's capacity to accomplish such surveillance by physical means.[52] However, society has no analogous expectations about the capacity of third parties to maintain business records. Indeed, we expect that our banks, doctors, credit card companies, and countless other third parties will record and keep information about our relationships with them, and will do so for the entirety of those relationships — be it several weeks or many years. Third parties can even retain their records about us after our relationships with them end; it is their prerogative, and many business-related reasons exist for doing so. *This is true even when, in the aggregate, these records reveal sensitive information similar to what could be revealed by direct surveillance. For this reason, Justice Alito's concern in Jones*[46] *is simply*

52 We note, though, that such a rule would be unprecedented in rendering unconstitutional — because of some later action — conduct that was undoubtedly constitutional at the time it was undertaken. See *United States* v. *Sparks*, 750 F Supp 2d 384 at p. 392 (D Mass 2010), aff'd, 711 F 3d 58 (1st Cir 2013) (recognizing the aggregation theory as "unworkable" because "conduct that is initially constitutionally sound could later be deemed impermissible if it becomes part of the aggregate").

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inapposite to the third-party doctrine and to the instant case. Here, Defendants voluntarily disclosed all the CSLI at issue to Sprint/Nextel.

...

Intrinsic to the doctrine is an assumption that the quantity of information an individual shares with a third party does not affect whether that individual has a reasonable expectation of privacy.

...

Of course, in the face of rapidly advancing technology, courts must "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*[53]. The Supreme Court has long concluded that the third-party doctrine does this. Thus the Court has never held that routing information, like CSLI, shared with third parties to allow them to deliver a message or provide a service is protected under the Fourth Amendment. Perhaps this is implicit acknowledgment that the privacy-erosion argument has a flip-side: technological advances also do not give individuals a Fourth Amendment right to conceal information that otherwise would not have been private.[54]

Moreover, application of the third-party doctrine does not render privacy an unavoidable casualty of technological progress — Congress remains free to require greater privacy protection if it believes that desirable. The legislative branch is far better positioned to respond to changes in technology than are the courts. See *Jones*[46] (Alito, J., concurring in the judgment) ("*A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.*"); see also *Application (Fifth Circuit), In re*[55] (explaining that the proper "recourse" for those seeking increased privacy is often "in the market or the political process"). The very statute at issue here, the Stored Communications Act (SCA), demonstrates that Congress can — and does — make these judgments. The SCA requires the government to meet a higher burden when acquiring "the contents of a wire or electronic communication" from "a provider of electronic communication service" than when obtaining "a record ... pertaining to a subscriber ... or customer" from the provider. 18

53 *Kyllo* v. *United States*, 2001 SCC OnLine US SC 61 : 150 L Ed 2d 94 : 533 US 27 at p. 34 (2001)

54 For example, the Smith Court noted that, because a phone user who "had placed his calls through an operator ... could claim no legitimate expectation of privacy" in routing information exposed to that operator, "a different constitutional result" did not follow simply "because the telephone company has decided to automate." *Smith*, 442 US 735 at pp. 744-45. Similarly here, "a different constitutional result" does not follow because the telephone company has decided to make its phones mobile. Cf. *United States* v. *Skinner*, 690 F 3d 772 at p. 778 (6th Cir 2012) ("Law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system.").

55 724 F 3d 600 at p. 615 (5th Cir 2013)

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U.S.C. § 2703(*a*), (*c*) (emphasis added). It requires the executive to obtain judicial approval, as the Government did here, before acquiring even non-content information. Id. § 2703(*c*), (*d*). And the SCA is part of a broader statute, the Electronic Communications Privacy Act of 1986 (ECPA), which Congress enacted in the wake of *Smith*[44]. See Pub. L. No. 99-508, 100 Stat. 1848."

33. Wilkinson, J. concurred, writing that decisions regarding the Fourth Amendment's privacy protections should be left to Congress. He held as follows:

"*Finally, Congress imparts the considerable power or democratic legitimacy to a high stakes and highly controversial area. The emergence of advanced communication technologies has set off a race between criminal enterprises on the one hand and law enforcement efforts on the other*. Modern communication devices — even as they abet the government's indigenous tendencies to intrude upon our privacy — also assist criminal syndicates and terrorist cells in inflicting large-scale damage upon civilian populations. Appellants' strict standard of probable cause and a warrant even for non-content information held by third parties thus risks an imbalance of the most dangerous sort, for it allows criminals to utilize the latest in technological development to commit crime and hamstrings the ability of law enforcement to capitalize upon those same developments to prevent crime. The fact that the appellants in this case were convicted of Hobbs Act violations and brandishing offenses cannot obscure the implications of their proposed standards for much more serious threats down the road.

...

It is human nature, I recognize, to want it all. But a world of total privacy and perfect security no longer exists, if indeed it ever did. We face a future of hard tradeoffs and compromises. as life and privacy come simultaneously under siege. How sad, near the very inception of this journey, for appellants to adopt the most stringent of Fourth Amendment standards, to discard the great values of democratic compromise, and to displace altogether the legislative role."

However, Wynn, J. declined to apply the third-party doctrine dissenting with the majority view. These cases show the feasibility of a contextual approach to privacy expectations.

VI. *Privacy rights under Singapore Constitution*

34. Similarly, in a recent decision rendered by the *Apex Court in Singapore* "privacy" has not been elevated to a constitutionally protected fundamental right. This case considered the same issues which were considered by this Hon'ble Court in *Naz Foundation case*[56]. The same is

56 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1

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clear from the following extract of the Singapore Apex Court decision rendered in *Lim Meng Suang* v. *Attorney General*[57], which reads as under:

> 43. The arguments raised by Mr Ravi and by Ms Barker on Article 9 in the present appeals are different. *Ms Barker argues that the right to life and personal liberty under Article 9(1) should include a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being*. Mr Ravi, on the other hand, contends that Section 377A is vague, arbitrary and absurd.
>
> 44. *In so far as Ms Barker's arguments are concerned, our view is that the right to privacy and personal autonomy which she canvassed should not be read into the phrase "life or personal liberty" in Article 9(1) for three reasons.*
>
> 48. In a related vein, foreign cases that have conferred an expansive Constitutional right to life and liberty should be approached with circumspection because they were decided in the context of their unique social, political and legal circumstances. For example, the Supreme Court of India has taken an expansive view of the right to life to include an individual's right to health and medical care. This approach must be understood in the context of India's social and economic conditions (see *Yong Vui Kong*[58] at [83]—[84]). A similarly broad approach has been adopted in the US because of the due process clauses in the Fifth and Fourteenth Amendments to the US Constitution, which are materially different from our Article 9(1).
>
> 49. *Indeed, it is significant that Ms Barker herself conceded that the private law relating to privacy was a developing one. It is clear that Lim and Chee (and likewise, Tan in CA 125/2013) cannot obtain by the (constitutional) backdoor what they cannot obtain by the (private law) front door*. Indeed, that would be a wholly inappropriate utilisation of the existing body of Constitutional law (which serves a quite different function). More importantly, as we have already noted above (at [30]), Lim and Chee base their Article 9(1) rights on a narrow conception of the right to privacy, viz, that the right to life and personal liberty under Article 9(1) should include a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being. *Once again, such a right ought, in our view, to be developed by way of the private law on privacy instead. Indeed, we also observe that the right claimed by Lim and Chee, although of an apparently limited nature, is, in point of fact, not only vague and general, but also contains within itself (contradictorily) the seeds of an unlimited right. Put simply, such a right could be interpreted*

57 2014 SGCA 53

58 *Yong Vui Kong* v. *Public Prosecutor*, (2010) 3 SLR 489 (Singapore)

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to encompass as well as legalise all manner of subjective expressions of love and affection, which could (in turn) embody content that may be wholly unacceptable from the perspective of broader societal policy. At this juncture, we are, of course, back to "square one", so to speak, for this brings us back (in substance at least) to the issue of whether or not Section 377A ought to enforce broader societal morality."

VII. *Protection of privacy laws by the countries Joining European Union*

35. Apart from above in the following countries which joined European Union and have adopted EU Data Protection Directive No. 95/46/EC, have the following framework of law for granting privacy to its citizen:

36. It deserves to be pointed out that in the context of EU directive for Data protection, the term "Data" is not restricted to electronic/computer data but the said term is used as an overarching term including privacy of an individual in general. The term "personal data" is defined as under:

> "personal data" shall mean any information relating to an identified or identifiable natural persons (data subject) an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity:

Country	*Legal position*
Germany	The main legal source of data protection in Germany is the *Federal Data Protection Act* (Bundesdatenschutzgesetz in German) (BDSG) which implements the European Union Data Protection Directive No. 95/46/EC. *Additionally, each German State has a data protection law of its own.* In principle, the data protection acts of the individual states intend *to protect personal data* from processing and use by public authorities of the States whereas the BDSG intends to protect personal data from processing and use by federal public authorities and private bodies. Enforcement is through the data protection authorities of the German States. The competence of the respective State authority depends on the place of business of the Data Controller.
United Kingdom	As a member of the European Union, the United. Kingdom. implemented the EU Data Protection Directive No. 95/46/EC in March 2000 through the Data Protection Act, 1998 (Act). Enforcement is through the Information Commissioner's Office (ICO). In common with the rest of the European Union, the United Kingdom will adopt the General Data Protection Regulation (GDPR) from May 2018. When the United Kingdom leaves the European Union it will, in theory, be free to adopt its own data protection laws. Whilst it is widely expected that the

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	United Kingdom will remain close to the standard set by the GDPR, it is currently too early to predict with any degree of certainty the extent to which future UK data protection laws will diverge from those of the European Union.
France	*Law No. 78 17 of 6-1-1978 on "Information Technology. Data Files and Civil Liberty" ('Law')* is the principal law regulating data protection in France. The EU Data Protection Directive No. 95/46/EC was implemented via Law No. 2004-801 of 6-8-2004 which amended the Law. Enforcement of the Law is principally through the "Commission Nationale de l'Informatique et des Libertes" (CNIL). The CNIL is responsible for ensuring that information technology remains at the service of citizens, and does not jeopardise human identity or breach human rights, privacy or individual or public liberties.
Switzerland	The processing of personal data is mainly regulated by the *Federal Act on Data Protection of 19-6-1992 (DPA)* and its ordinances, i.e. the Ordinance to the Federal Act on Data Protection (DP0) and the Ordinance on Data Protection Certification (ODPC). In addition, the processing of personal data is further restricted by provisions in other laws, mainly with regard to the public sector and regulated markets. It should be noted that a substantial revision of the DPA has just been initiated, the implementation of which is however, not to be expected before 2018. The revision of the DPA aims to strengthen data protection in general and to align the Swiss DPA with the requirements of the EU General Data Protection Regulation (GDPR), in order to facilitate compliance with Swiss companies with those aspects of the GDPR that are applicable to controllers or processors outside of the EU.
Italy	The Italian law applicable on privacy issues is the *Legislative Decree No. 196 of 30-6-2003* (Codice in materia di protezionedeidatipersonali, the "Privacy Code"). The Privacy Code implements Directives No. 95/46/EC, 2002/58/EC and 2009/12/EC. As a general rule, processing of personal (non-sensitive) data by private entities or profit seeking public bodies is only allowed if the data subject gives his/her express consent (Section 23 of the Privacy Code).
Spain	As a member of the European Union, Spain formally implemented the EU Data Protection Directive No. 95/46/EC in November 1999 with the *Special Data Protection Act, 1999* (the Act, also known as the "LOPD"

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	in Spain). Nevertheless, from 1992, Spain already had a Data Protection Act ("LORTAD") that was fully consistent with most of the contents of the EU Data Protection Directive No. 95/46/EC. The Act, simply represents an up-to-date version of LORTAD, rather than being a major change in the legal framework. Enforcement is through the Spanish Data Protection Commissioner's Office (AEPD). Its last amendment took place in March 2011.
Iceland	The governing legislation on data protection is *Act 77 of 2000 on the Protection and Processing of Personal Data (Data Protection Act),* which implemented EU Data Protection Directive No. 95/46/EC. All electronic processing of personal data, which falls under the Data Protection Act, must be notified to the Icelandic Data Protection Authority, by the controller of the data, unless an exemption applies.
Turkey	*The Turkish Data Protection Law No. 6698 (DP Law*), which is based on EU Directive No. 95/46/EC, came into force on 7-4-2016. In the DP Law, personal data was described as "Any information relating to an identified or identifiable natural person". The new DP Law introduces two bodies to watch over and regulate data processing and transfer activities. These are the Data Protection Board and the Data Protection Authority. The Data Protection Board is an independent decision-making body.
Netherlands	The Netherlands implemented the EU Data Protection Directive No. 95/46/EC on 1-9-2001 with the *Dutch Personal Data Protection Act (Wbp).* Enforcement is through the Dutch Data Protection Authority (AutoriteitPersoonsgegevens). Unless an exemption applies, Data Controllers who process personal data by automatic means must notify the AutoriteitPersoonsgegevens so that their processing of personal data may be registered and made public. Changes to the processing of personal data will require the notification to be amended.
Bulgaria	Bulgaria implemented the EU Data Protection Directive No. 95/46/EC with the *Personal Data Protection* Act (In Bulgarian:), promulgated in State Gazette No. 1 of 4-1-2002, as amended periodically (Act). The Act came into force on l-1-2002. The Act was last amended by the State Gazette, Issue No. 15 of 15-2-2013. Currently, a new Bulgarian data protection law is in process of discussion and is being prepared by a group of experts, including

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	experts from the Bulgarian Data Protection Authority. The new law is expected to be adopted by May 2018 and to create a new framework in connection to Regulation (EU) No. 2016/679. The Bulgarian data protection authority (DPA) is the Personal Data Protection Commission. Unless an exemption applies, prior to initiating any personal data processing data controllers must apply for registration with the DPA. The registration covers the Data Controller and the personal data registers controlled by it.
Finland	Finland is a member of the European Union and has implemented the EU Data Protection Directive No. 95/46/EC with the *Personal Data Act 523 of 1999 (Act)* (HenkilÖtietolaki) in June 1999. Other important Finnish laws concerning data privacy and protection are the Code for Information Society and Communications Services 917/2014 (Information Society Code) (Tietoyhteiskuntakaari) of 1-1-2015, which aims to inter alia ensure the confidentiality of electronic communication and the protection of privacy, and the Act on the Protection of Privacy in Working Life 759/2004 (Working Life Act) (Lakiyksityisyydensuojastatyöelämässä), which aims to promote the protection of privacy and other rights safeguarding the privacy in working life. Information Society Code is an ambitious effort to collect the relevant laws relating to information society under a single statute. The Information Society Code contains mostly the same provisions as the preceding laws, but it combines a large quantity of different provisions under a single law and covers a large area of legislation. The Working Life Act includes some specific provisions on privacy issues relating to employment and work environments such as right to monitor employees' email communication.
Ireland	The core Irish data protection law is comprised in the *Data Protection Act 1988* (1988 Act) as amended by the Data Protection (Amendment) Act 2003 (2003 Act) [together the Data Protection Acts (DPA)]. The 2003 Act implemented the EU Data Protection Directive No. 95/46/EC (Data Protection Directive). In addition to the DPA, the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations, 2011 ('ePrivacy Regulations') set out data protection rules in relation to direct marketing and electronic networks and services, including location data and cookies.

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VIII. ***Analysis of laws pertaining to privacy in countries where right to privacy has been established under their respective Constitution***

Country	*Legal position*
Russia	Fundamental provisions of data protection law in Russia can be found in the Russian Constitution, international treaties and specific laws. Russia is a member of the Strasbourg Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention) (ratified by Russia in 2006) and the Russian Constitution establishes the right to privacy of each individual (Articles 23 and 24). Most rules are found in specific legislation, particularly the Data Protection Act 152 FZ dated 27-7-2006 (DPA) and various regulatory acts adopted to implement the DPA as well as other laws, including the Information, Information Technologies and Information Protection Act 149 FZ dated 27-7-2006 establishing basic rules as to the information in general and its protection. In addition, the Russian Labour Code contains provisions on the protection of employees' personal data (Part XIV). Other laws may also contain data protection provisions which implement the provisions of DPA in relation to specific areas of State services or industries. On 22-7-2014 notable amendments to the DPA were adopted and came into force on 1-9-2015. The amendments require all personal data operators to store and process any personal data of Russian individuals within databases located in Russia (subject to few exceptions). The penalty for violation of this requirement is ultimately the blocking of websites involving unlawful handling of Russian personal data. A Register of Infringers of Rights of Personal Data Subjects shall be established by the Roscomnadzor and from there and the Roscomnadzor may move to block websites.
Chile	Personal Data Protection is addressed in several specific laws, as well as scattered provisions in related or complementary laws and other legal authority: (*i*) Constitution of the Republic of Chile, Article 19 N°, 4: establishes the 'respect and protection of the public and private life, and the honour of the person and its family'. Any person who by arbitrary or illegal

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	Act or omission suffers a deprivation, perturbation or threat to this right may file a Constitutional Protection Action.
	(*ii*) Law 19,628 "On the protection of private life", commonly referred as "Personal Data Protection Law" (PDPL): mainly defines and refers to the treatment of personal information in public and private databases. Last modified: 17-2-2012.
	(*iii*) Law 20,285, "On the Access to Public Information": sets forth the Public Function Transparency Principle, the individual right to access the information of Public Administration bodies, and the procedures and exceptions thereof.
	(*iv*) Law 20,575: "Establishes the Destination Principle' on the Treatment of personal data": incorporates additional rules when treating economic and debt-related personal data.
	(*v*) General Law on Banks, Article 154, establishes the Banking Secrecy: holds that, subject to certain specific exemptions, all deposits are secret, and related information can be given only to the account's owner or designated representative.
	(*vi*) Law 19,223, "Criminal Conducts related to Informatics": establishes sanctions for those who breach and unlawfully access and/or use the information available in electronic databases.
Argentina	Section 43 of the Federal Constitution grants citizens expeditious judicial action to gain access to information about them contained in public and private databases and to demand its amendment, updating, confidentiality, or suppression if it is incorrect. Personal Data Protection Law Number 25,326 (the PDPL), enacted in October 2000, provides much broader protection of personal data closely following Spain's data protection law. On 30-6-2003, the European Commission recognised that Argentina provides an "adequate" level of protection of personal data, in line with the Data Protection Directive No. 95/46/EC.
Thailand	At present, Thailand does not have any general statutory law governing data protection or privacy.

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	However, the Constitution of the Kingdom of Thailand does recognise the protection of privacy rights. In addition, statutory laws in some specific areas (such as telecommunications, banking and financial businesses (Specific Businesses) as well as other non-business related laws, such as certain provisions under Thai Penal Code and the Child Protection Act B.E. 2543 (2003), do provide a certain level of protection against any unauthorised collection, processing, disclosure and transfer of personal data. Recently, the draft Personal Information Protection Act (Draft), which has been reviewed by the Council of State, was given to the Committee for House of Representative Coordination to review and analyse if there are any practical issues on applying the law and how the Data Protection Committee should be formed. The Draft is being reviewed by the Office of the Public Sector Development Commission and will be submitted to the Cabinet for approval later. The current Draft provides protection of personal data by restricting the gathering, using, disclosing and altering of any personal data without the consent of the data owner. The Draft also imposes both criminal penalties and civil liability for any violation of the Draft and calls for the establishment of a Protection of Personal Data Commission to regulate compliance with the Draft.
Colombia	Article 15 of the Colombian Constitution sets forth fundamental rights to intimacy, good name or reputation and data protection. Law 1266/08 (Law 1266), reviewed by the Colombian Constitutional Court in Decision C 1011/08, regulates the collection, use and transfer of personal information regarding monetary obligations related to credit, financial and banking services. Law 1581 of 2012 (Law 1581), reviewed by the Colombian Constitutional Court in Decision C-748/11, contains comprehensive personal data protection regulations. This law is intended to implement the Constitutional right to know, update and rectify information gathered about them in databases or files, enshrined in Article 20 of the Constitution, as well as other rights, liberties and Constitutional guarantees referred to in Article 15 of the Constitution.

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IX. ***Vague concept cannot be elevated to a fundamental right status***

37. It is submitted that before elevation of any concept/statutory right to the status of a "protected and enforceable constitutional fundamental right", it is essential to lay down its contours, so as to enable the State, as well as individuals, to precisely measure as to what aspect/action the said fundamental right seeks to protect. If the said right would not be able to clearly spell out as to what action/aspect it seeks to protect, protection of the same by the State would become impossible and importantly there would be no "judicially discernible and manageable standard" to protect and enforce the said right.

38. If right to privacy (statutorily protected under various statutes with specificities) is conferred a status of constitutionally enforceable and protected and undefined fundamental right, then it would have both *private law* as well as *public law* implications. In such a scenario the State will have to protect such undefined and subjective individual specific right of each individual from other private individuals also. The authorities which are "State" within the meaning of Article 12 including private entities discharging "public functions" will be amenable to and answerable for an alleged violation of a right which an individual — in his own subjective manner — treats to be his right of "Privacy".

39. Protection of the said right of an individual from another individual will become impossible, as, such another individual will not be able to know with reasonable certainty as to what, in this regard, are the limits of his lawful conduct which he must not transgress. Similar would be the position of State inasmuch as in such a situation, State would also not know to as what aspect of human conduct would be constitutionally protected and what aspect can be legitimately regulated by the State. In such an ambiguous state possibility of the State inadvertently violating either privacy of such other individual or perceived subjective privacy of such individuals cannot be ruled out.

40. If this ambiguous, vague and uncertain subjective concept of "privacy" is conferred constitutional status of protected fundamental right then the State will be mandated to enforce it. It is most important to note that if the said right is declared to be a fundamental right, the State may have to provide for penal consequences for breach thereof. Also for breach thereof, the State will have to provide for penal provision.

41. In this context, it has been well settled by a series of judicial decision rendered by this Hon'ble Court that a vague and uncertain law cannot remain in the statute book. Reliance in this regard is placed on the judgment of this Hon'ble Court rendered in *A.K. Roy* v. *Union of India*[59] wherein this Hon'ble Court held as under:

59 (1982) 1 SCC 271 : 1982 SCC (Cri) 152

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61. In making these submissions counsel seem to us to have overstated their case by adopting an unrealistic attitude. *It is the that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law as much as the uncertainty of a punitive law like the Penal Code does.* ***A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application.*** But in considering the question whether the expressions aforesaid which are used in Section 3 of the Act are of that character, we must have regard to the consideration whether the concepts embodied in those expressions are at all capable of a precise definition. *The fact that some definition or the other can be formulated of an expression does not mean that the definition can necessarily give certainty to that expression.* The British Parliament has defined the term 'terrorism' in Section 28 of the Act of 1973 to mean "the use of violence for political ends", which, by definition includes "any use of violence for the purpose of putting the public or any section of the public in fear". *The phrase 'political ends' is itself of an uncertain character and comprehends within its scope a variety of nebulous situations.* Similarly, the definitions contained in Section 8(3) of the Jammu & Kashmir Act of 1978 themselves depend upon the meaning of concepts like "overawe the government". *The formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty.* We do not, of course, suggest that the legislature should not attempt to define or at least to indicate the contours of expressions, by the use of which people are sought to be deprived of their liberty. *The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature.* ***But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of lending to them a definite meaning, can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined.*** Acts prejudicial to the 'defence of India', 'security of India', 'security of the State', and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the straitjacket of a definition. If it is permissible to the legislature to enact laws of preventive detention, a certain amount of minimal latitude has to be conceded to it in order to make those laws effective. That we consider to be a realistic approach to the situation. An administrator acting bona fide, or a court faced with the question as to whether certain acts fall within the mischief of the aforesaid expressions used in Section 3, will be able to find an acceptable answer either way. In other words, though an expression may appear in cold print to be vague and uncertain, it may not

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be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.

62. *The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi*[60]. *The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity.* However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. *Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding.* In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', or 'maintenance of harmony between different religious groups', or likely to cause disharmony or ... hatred or ill will', or 'annoyance to the public' [see Sections 124-A, 153-A(1)(*b*), 153-B(1)(*c*), and 268 of the Penal Code]. These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language. (emphasis supplied)

42. Similarly this Hon'ble Court in *Shreya Singhal* v. *Union of India*[61] held as under:

"55. ***The US Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable.*** Thus, in *Musser* v. *Utah*[62], a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

* * *

85. ***These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing".*** In Collins case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers

60 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

61 (2015) 5 SCC 1 : (2015) 2 SCC (Cri) 449

62 1948 SCC OnLine US SC 20 : 92 L Ed 562 : 68 S Ct 397 : 333 US 95 (1948)

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whereas the Queen's Bench acquitted him. *If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence.* Quite obviously, a prospective offender of Section 66-A and the authorities who are to enforce Section 66-A have absolutely no manageable standard by which to book a person for an offence under Section 66-A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66-A is unconstitutionally vague. (emphasis supplied)

43. The concept of privacy is so inherently vague, uncertain, elastic and subjective that in no circumstance it can convey an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding. Furthermore, it is also clear that even judicially trained minds have also come to diametrically opposite conclusions on the same set of facts, while dealing with the cases of personal privacy that it makes it obvious that expressions "*privacy is so vague that there is no manageable standard by which a person can be said to have committed an breach or not to have committed a breach of the said concept.*"

X. *Privacy is not a fundamental right but only a legitimate claim/interest covered by the Constitutional ethos having sanction of Common Law — Every such claim or interest of the society/individual cannot be elevated to the status of fundamental right*

44. Conceptually, every human desire, if interpreted liberally can be traced to the language used in Article 21 of the Indian Constitution. However, not every human desire can be guaranteed and or protected under the said article. The concept of privacy, both in private law field as well in public law field is at the best a legitimate "claim" or an "interest" having sanction of Common Law. It is respectfully submitted that any such "claim" or "interest" which have sanction of common law and are relatable to any of the guaranteed fundamental rights under our Constitution cannot, by way of judicial interpretation, be elevated to the status of an independent fundamental right enforceable directly by the Constitutional Courts including this Hon'ble Court under Article 32 of the Constitution.

45. That is so, because these common law "interest" or "claims" have both positive, as well as, negative obligation and implication in private as well as public law spheres. That is to say that these common law "interest" or "claims", on occasion can have positive impact on State and society which promotes constructive/positive development of State laws, individuals and society. Whereas, at the same time it can have negative impact/implication on State and society, which thus impairs constructive and positive development of State laws, individuals and society.

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46. It is respectfully submitted that wherever and whenever such "claim" or "interests" have a negative obligation/implication on constructive development of society/individual, it cannot be conferred with the status of protected fundamental right, as it is deemed that guaranteed fundamental rights only have positive obligations qua individuals and State and have no negative impact/implication on constructive development of society/individual.

47. In such circumstances, it becomes a policy decision to ascertain as to which part of the activity has a positive obligation towards State and fellow individuals and thus requires protection and which part of the activity has a negative implication on betterment and constructive development of the State and its citizens and thus requires to be declared as outlawed.

48. Thus ascertainment and delineation of this positive obligation viz. negative implication on State and its citizens, being essentially a policy decision, should be best left to legislature to be protected and or regulated through statutory framework. It is submitted that if such common law claims and interests are conferred the status of an overarching protected fundamental right, by way of judicial interpretation then it would amount to this Hon'ble Court venturing into a policy-making decision, which is impermissible in law. *It is submitted that by application of "doctrine of constitutional implication/limitation" this Hon'ble Court has in past also refrained from declaring any new specie of fundamental right which though was directly relatable to the existing fundamental rights guaranteed under 'Part III of Indian Constitution*. Illustratively the said examples are as under:

48.1. Article 21 expressly provides for positive obligation of "right to life" but the said the guaranteed "right to life" does not include within its gamut "right to die" as it had a negative implication/impact on society and State. It is stated that though this claim of "right to die" can be easily read into or can be said to be inextricably relatable to right to life protected under Article 21) since this "right to die" was considered to be having a negative impact/implication on the society, this Hon'ble Court (though the Constitution Bench of this Hon'ble Court is seized of the said matter) *has left it to the competent legislature to come up with the suitable legislation either expressly accepting such claim and protecting the same through statutory provisions or rejecting the said claim*.

48.2. Similarly, the claim of "right to know" has been traced to Article 19(1)(*a*) of the Constitution, however, since this claim of "right to know" also had a negative application/implication of not to know about the personal information of fellow citizens, therefore, it was left by this Hon'ble Court for competent legislature come up with a statutory framework to statutorily regulate the said right to know. The said "right to know" which can be traced to Article 19(1)(*a*) of the Constitution is therefore now regulated through provisions of the Right to Information Act.

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48.3. Likewise, right to education was read by this Hon'ble Court as a fundamental right guaranteed under Article 21 of the Constitution in *Unni Krishnan, J.P.* v. *State of A.P.*[63] However, in the year 2002 when legislature deemed it fit and proper, it was specifically declared by the legislature as guaranteed fundamental right by way of a constitutional amendment. Furthermore, the said right was conferred subject to condition that the right to free and compulsory education would be extended not to every individual but only to children of age between 6 years to 14 years in such manner as determined by the State through appropriate law.

XI. ***Dangers of expanding the meaning of rights conferred under Part III of our Constitution***

49. It is submitted that there are inherent dangers in conferring an expansive meaning to rights guaranteed under Part III of the Constitution which can be illustratively brought out through following examples.

50. It is submitted that right to life guaranteed under Article 21 also includes "right to defend" one's own body. "Right to defend one's own body" is also a very valuable and natural right. Further, this right has been and established common law right. Thus in this context juxtaposed with the scheme of our Indian constitution, can somebody be permitted to argue that "right to defend" is an inextricably linked facet to right to life guaranteed under Article 21 of the Indian Constitution and to secure his life he has a "right to keep a firearm and/or maintain a militia" on the pretext that the same is a natural right and also a common law right. Thus on this pretext can any person seek creation of a new fundamental right to keep arms and ammunition through judicial interpretation by arguing that the same is a facet of right to life guaranteed under Article 21 and this right is already a recognised common law right and has been specifically guaranteed under other jurisdiction of the worlds e.g. US Constitution by way of Second amendment.

51. Similarly, forensic analysis of genetic material is an accepted mode of criminal investigation. For example, fingerprints analysis of a suspect, semen analysis to identify rape accused are effective procedures which are employed by investigating 'agencies to bring a criminal to book. It is submitted that giving expansive meaning to the rights conferred under Part III, it is possible for a criminal to argue that their biometric and genetic material is private to them and using the same in criminal investigation against them would amount to violation of right against self-incrimination.

52. Thus it is respectfully submitted that any "claim" or "interest" which has a negative implication on the society and which though may appear to be necessary concomitant for exercise of already declared fundamental rights under Part III of our Constitution or are concepts which appears to be relatable to fundamental rights already guaranteed under Part III of our

63 (1993) 1 SCC 645

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Constitution, cannot be conferred with the status of an independent fundamental right enforceable through Article 32 of the Constitution of India.

53. It is submitted that in such scenario it should be best left with the competent legislature to come up with suitable regulatory mechanism for first delineating such legitimate claims or interest which are necessary for constructive development of our constitutional ethos.

54. It is submitted that in this context the doctrine of constitutional implication would squarely apply. Reliance in this regard is placed on judgment of this Hon'ble Court rendered in *Manoj Narula* v. *Union of India*[64], wherein this Hon'ble Court held as under:

> *Doctrine of constitutional implications*
>
> 75. The principle of Constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such amorality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the Constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite Constitutional restraints. Commitment to the Constitution is a facet of Constitutional morality. In this context, the following passage would be apt to be reproduced:
>
> > "*If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed: and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government,' but experience has taught mankind the necessity of auxiliary precautions.* [James Madison as Publius, Federalist 51]" (emphasis supplied)

XII. ***The technological advancement should be used for "good governance" and the privacy issues need to be taken care of by statutes***

55. The rapidly increasing technological advancement globally and more particularly in electronic and communications field has opened several new vistas. At the hands of handful of individuals, no attempt be permitted which defeats positive and constructive efforts for "good governance" in a developing country like India on an ostensible ground of "privacy" which can be adequately taken care of by statutory provisions.

64 (2014) 9 SCC 1

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56. India is a country where substantial number of population either lives below the poverty line or just above the poverty line. Even basic necessities like food, drinking water, seeds, fertilizers, agricultural equipments and banking has not reached them.

57. Though, this Hon'ble Court is not examining validity of Aadhaar, the following facts need to be examined to satisfy the judicial conscience of this Hon'ble Court that if privacy is declared to be a fundamental right (which can always be secured by statutory provisions) all our attempts will be made to stop "good governance" and majority of the deprived population of the country would suffer.

58. Aadhaar card/number is the most widely held form of identity document with the widest coverage amongst the residents/citizens of India. This is evident from the following chart:

Identity Document	*Coverage*
Passport	6.9 Crores.
Pan Card	29 Crores (approx.)
EPIC Card	60 Crores (approx.)
Ration Card	15.17 Crores (approx.)
Driving Licence	17.37 Crores (approx.)
Aadhaar	115.15 Crores

59. The use of Aadhaar is one of the classic case of good governance which can be demonstrated by one illustration. By using Aadhaar Card, the total recorded savings of the Government of India from *just one scheme viz. the Direct Benefit Transfer Scheme (based upon Aadhaar) has been Rs 49,560 crores in just two years i.e. 2014-2015 and 2015-2016*.

60. This not only serves public interest but the intended benefits, subsidies and services offered by the Government as a welfare State (which is its constitutional duty) reaches to correct beneficiaries weeding out fake and duplicate beneficiaries saving thousand and crores of rupees.

61. This Hon'ble Court in *PUCL* v. *Union of India*[65] has approved the recommendations of the High-Powered Committee headed by Justice D.P. Wadhwa, which recommended linking of Aadhaar with PDS and has encouraged State Governments to adopt the same.

62. This Hon'ble Court in *State of Kerala* v. *Parent Teachers Assn. SNVUP School*[66] has directed use of Aadhaar for checking bogus admissions in schools with the following observations:

"18. We are, however, inclined to give a direction to the Education Department, State of Kerala to forth with give effect to a circular dated

65 (2011) 14 SCC 331

66 (2013) 2 SCC 705 : (2013) 2 SCC (Cri) 858 : (2013) 2 SCC (L&S) 444 : 4 SCEC 847

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12-10-2011 to issue UID Card to all the school children and follow the guidelines and directions contained in their circular. Needless to say, the Government can always adopt, in future, better scientific methods to curb such types of bogus admissions in various aided schools."

63. This Hon'ble Court, while monitoring the PILs relating to night shelters for the homeless and right to food through the public distribution system, has lauded and complimented the effort of State Governments for, inter alia, carrying out biometric identification of the head of family of each household to eliminate fictitious, bogus and ineligible BPL/AAY household cards. This is evident from the following extracts in *PUCL* v. *Union of India*[67].

48. In the affidavit, it is mentioned that NGO, Samya had conducted survey and identified 15,000 homeless beneficiaries of which 14,850 which have been approved for giving "homeless cards". These cards are being prepared zonewise and the list is displayed at the office of the Assistant Commissioners/Circle Office for distribution of the special homeless cards to the beneficiaries after obtaining their biometric impressions. The NGO, Samya has also been informed to facilitate delivery of these cards to the beneficiaries and enable them to lift the specified food articles and kerosene oil allocated from the linked fair price shop/kerosene oil depot. The details have been mentioned in the AAY programme.

49. It is mentioned in the affidavit that under the Central Scheme of Food and Supplies Department, Government of NCT of Delhi is carrying out review of BPL/AAY household cards which were issued before 15-1-2009. It is simultaneously carrying out biometric identification of head of family of each household to eliminate fictitious, bogus and ineligible cards and those who have left Delhi.

53. The Delhi Government has very minutely and carefully analysed the problems of homeless people living in these shelters and is trying to provide a comprehensive programme for the homeless. We must compliment the Government of NCT of Delhi for this effort. We would like the Government of NCT of Delhi to file a further affidavit indicating what progress has been made on different fronts.

64. Similarly, this Hon'ble Court in *PUCL (PDS matters)* v. *Union of India*[68] had held *that computerisation is going to help the public distribution system in the country in a big way and encouraged and endorsed the digitisation of database including biometric identification of the beneficiaries*. In fact this Hon'ble Court had requested Mr Nandan Nilekani, the then Chairman, UIDAI to suggest ways in which the computerisation

67 (2010) 13 SCC 45
68 (2013) 14 SCC 368

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process of PDS can be expedited. The following extracts from the abovementioned order is relied upon:

> 2. There seems to be a general consensus that computerisation is going to help the public distribution system in the country in a big way. In the affidavit it is stated that the Department of Food and Public Distribution has been pursuing the States to undertake special drive to eliminate bogus/duplicate ration cards and as a result, 209.55 lakh ration cards have been eliminated since 2006 and the annual saving of foodgrain subsidy has worked out to about Rs 8200 crores per annum. It is further mentioned in the affidavit that end-to-end computerisation of public distribution system comprises creation and management of digitised beneficiary database including biometric identification of the beneficiaries, supply chain management of TPDS commodities till fair price shops.
>
> 3. It is further stated in the affidavit that in the State of Gujarat, the process of computerisation is at an advanced stage where issue of bar coded ration cards has led to a reduction of 16 lakh ration cards. It is expected that once the biometric details are collected, this number would increase further. For the present, a reduction of 16 lakh ration cards would translate into an annual saving of over Rs 600 crores. This is just to illustrate that computerisation would go in a big way to help the targeted population of the public distribution system in the country.
>
> 4. In the affidavit it is further mentioned that the Government of India has set up a task force under the Chairmanship of Mr Nandan Nilekani, Chairman, UIDAI, to recommend, amongst others, an IT strategy for the public distribution system. We request Mr Nandan Nilekani to suggest us ways and means by which computerisation process of the public distribution system can be expedited. Let a brief report/affidavit be filed by Mr Nandan Nilekani within four weeks from today.

65. This Hon'ble Court in *PUCL* v. *Union of India*[69] *has also endorsed biometric identification of homeless persons so that the benefits like supply of food and kerosene oil available to persons who are below poverty line can be extended to the correct beneficiaries.*

66. Recently, this Hon'ble Court in *Lokniti Foundation* v. *Union of India*[70] has approved Aadhaar based verification of existing and new mobile phone number subscribers. *This is a great leap towards anonymous pre-paid sim cards which are being used either for terrorist activities or for such other similar illegal activities.*

67. The fact that food security is one of the most prime concern of the Central Government which is under a mandate of National Food Security

69 (2010) 5 SCC 318
70 (2017) 7 SCC 155

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Act, 2013 also *statutorily incorporates Aadhaar*, would show that not only public interest is involved (as against a perceived and subjective privacy interest of few individuals) but declaration of privacy as fundamental right would open several other statutes to the vulnerability of challenge. *Section 12 of the National Food Security Act, 2013* reads as under:

> "***REFORMS IN TARGETED PUBLIC DISTRIBUTION SYSTEM***
>
> 12. (1) The Central and State Governments shall endeavour to progressively undertake necessary reforms in the Targeted Public Distribution System in consonance with the role envisaged for them in this Act.
>
> (2) The reforms shall, inter alia, include—
>
> (*a*) doorstep delivery of foodgrains to the Targeted Public Distribution System outlets;
>
> (*b*) application of information and communication technology tools including end-to-end computerisation in order to ensure transparent recording of transactions at all levels, and to prevent diversion;
>
> (*c*) leveraging "aadhaar" for unique identification, with biometric information of entitled beneficiaries for proper targeting of benefits under this Act;"

68. Therefore, it is humbly submitted that when Aadhaar has been adopted by several statutes and authorities across the country both pursuant to directions by this Hon'ble Court as well as legislative amendments passed by Parliament of India, this Hon'ble Court may not elevate a statutory right to the level of fundamental right which will open doors for challenge to various public interest enactments.

69. The amended Section 139-AA of the Income Tax Act which intends to expose all shell companies and curb the menace of black money, money laundering and tax evasion is already held to be constitutional by this Hon'ble Court on the challenge of Articles 14 and 19 of the Constitution in *Binoy Viswam* v. *Union of India*[71].

70. The object and purpose of the said amendment is also approved by this Hon'ble Court in the aforesaid judgment. Such a salutary provisions eradicating shell companies, black money and money laundering would also come under the vulnerability of being declared ultra vires. Right to privacy is declared to be a fundamental right. This is more particularly so when otherwise the Income Tax Act provides for sufficient statutory safeguards for protection of privacy.

71. When the technological advancement are taking place globally and virtually on daily basis, the Government(s) as welfare State functioning under the Constitution may come up with several regulations/programmes/ schemes in the direction of good governance. Just to give an illustration, it

71 (2017) 7 SCC 59

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may be pointed out that in large number of rural schools, it is found that qualified teachers appointed never come for teaching. Their fake presence is marked and a local unqualified person staying in the village teaches the students. If, in future, the presence of the qualified teachers is linked with either Aadhaar or such similar identification, it would be a great leap in the direction of imparting education in rural areas.

72. There can be several such areas where the technology can be used for larger public good and in furtherance of "good governance" while protecting the individual privacy based upon each subject being dealt with by way of a statute.

XIII. ***Reliance placed by the petitioners on the case law existing in other jurisdictions to interpret the Indian Constitution merits rejection***

73. It is further submitted that reliance placed by the petitioners on the case law existing in other jurisdictions to interpret the Indian Constitution is liable to be rejected. It is respectfully submitted that in view of the prevailing situation, it will not be in the interest of social fabric of the country and also in the interest of justice that Indian Constitution is interpreted in the light of constitutional law prevailing in USA or any other foreign country, which has expressly provided in its Constitution a right of privacy.

74. It is submitted that in absence of Parliament in its wisdom, creating fundamental right of privacy the said right cannot be read into the Constitution even by application of doctrine of "sub silentio" or "constitutional silence". A fortiori creating a right of privacy by interpreting the Indian Constitution in the light of the case law existing in American or any other foreign jurisdiction, will amount to doing violence with the conscious language of the Constitution.

75. It is submitted that that the thought process of Indian citizens, their societal behaviour, their socio-economic problems, etc. are different from the problems of citizens living in western countries. Their concept of privacy is strikingly different from the privacy standards prevailing in western countries. As such the standards of privacy existing in western countries ought not be embodied in Indian Constitution as the Indian Constitution shall have to be interpreted strictly in Indian context and keeping the citizens of India in mind.

76. The aforesaid principle has been duly recognised in a catena of judgements rendered by this Hon'ble Court, relevant portions of which reads as under:

76.1. In *Joseph Kuruvilla Vellukunnel* v. *RBI*[72], this Hon'ble Court held as under:

> 50. Mr Nambiar, however, joined issue on the use of the American precedents on the ground that banking in America is by grace of

72 1962 Supp (3) SCR 632 : AIR 1962 SC 1371

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legislature, and is either a franchise or a privilege, which has no place in our Constitution. He added that the carrying on of business is not one of the provisions of the American Bill of Rights, nor a fundamental right, as we understand it, though by judicial construction the individual right has been brought within the Fourteenth Amendment. He, therefore, contended that American cases and American laws should not be used. In our opinion, no useful purpose will be served by trying to establish the similarities or discrepancies between the American Constitution and banking laws, on the one hand, and our Constitution and our banking laws, on the other, and we do not wish to rest our decision on the American and Japanese analogies.

75. The aid of American concepts, laws and precedents in the interpretation of our laws is not always without its dangers and they have therefore to be relied upon with some caution if not with hesitation because of the difference in the nature of those laws and of the institutions to which they apply. Mr Nambiyar relied upon these different concepts and submitted that in USA the right to carry on business is not a fundamental right but is a "franchise", though, it has by legal interpretation, been brought within the fourteenth amendment and the doctrine of "franchise" has no place in the Indian Constitution: *C.S.S. Motor Service* v. *State of Madras*[73] approved in *Saghir Ahmad* v. *State of U.P.*[74] Similarly the right to form a corporation is in USA a "franchise" or a "privilege" which can be withdrawn. To apply the analogy of Banks in USA to those in India or the mode of exercise by and extent of the powers of a Controller of Currency or some similar authority will more likely than not lead to erroneous conclusions.

76.2. In *M.C. Mehta* v. *Union of India*[75] *(Shriram - Oleum Gas)*, this Hon'ble Court held as under:

29. We were, during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the courts in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the Constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States

73 1952 SCC OnLine Mad 142 : ILR 1953 Mad 304
74 (1955) 1 SCR 707 at p. 718 : AIR 1954 SC 728
75 (1987) 1 SCC 395 : 1987 SCC (L&S) 37

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is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our Constitutional Jurisprudence. That we in no way consider ourselves bound by American exposition of Constitutional law is well demonstrated by the fact that in *Ramana Dayaram Shetty*[76] this Court preferred the minority opinion of Douglas, J. in *Jackson* v. *Metropolitan Edison Co.*[77] as against the majority opinion of Rehnquist, J. *And again in Air India* v. *Nergesh Meerza*[78] *this Court whilst preferring the minority view in General Electric Co.* v. *Martha V. Gilbert*[79] *said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide. close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different.*

76.3. In *Automobile (Rajasthan) Transport Ltd.* v. *State of Rajasthan*[80], this Hon'ble Court held as under:

8. So far we have set out the factual and legal background against which the problem before us has to be solved. *We must now say a few words regarding the historical background. It is necessary to do this. because extensive references have been made to Australian and American decisions. Australian decisions with regard to the interpretation of Section 92 of the Australian Constitution and American decisions with regard to the Commerce clause of the American Constitution. This Court pointed out in the Atiabari Tea Co. case*[81] *that it would not be always safe to rely upon the American or Australian decisions in interpreting the provisions of our Constitution. Valuable as those decisions might be in showing how the problem of freedom of trade, commerce and intercourse was dealt with in other federal constitutions, the provisions of our Constitution must be interpreted against the historical background in which our Constitution was made; the background of problems which the Constitution-makers tried to solve according to the genius of the Indian people whom the Constitution-makers represented in the Constituent Assembly. The first thing to be*

76 *Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489

77 1974 SCC OnLine US SC 224 : 42 L Ed 2d 477 : 419 US 345 (1974)

78 (1981) 4 SCC 335 : 1981 SCC (L&S) 599

79 1976 SCC OnLine US SC 207 : 50 L Ed 2d 343 : 429 US 125 (1976)

80 (1963) 1 SCR 491 : AIR 1962 SC 1406

81 *Atiabari Tea Co. Ltd.* v. *State of Assam*, (1961) 1 SCR 809 : AIR 1961 SC 232

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noticed in this connection is that the Constitution-makers were not writing on a clean slate. They had the Government of India Act. 1935 and they also had the administrative set-up which that Act envisaged. India then consisted of various administrative units known as Provinces. each with its own administrative set-up. There were differences of language, religion etc. Some of the Provinces were economically more developed than the others. Even inside the same. Province, there were under developed, developed and highly developed areas from the point of view of industries. communications etc. The problem of economic integration with which the Constitution-makers were faced was a problem with many facets.

76.4. In *State of Bihar* v. *Union of India*[82] this Hon'ble Court held as under:

13. Our attention was drawn to some provisions of the American Constitution and of the Constitution Act of Australia and several decisions bearing on the interpretation of provisions which are some what similar to Article 131. But as the similarity is only limited, we do not propose to examine either the provisions referred to or the decisions to which our attention was drawn. *In interpreting our Constitution we must not be guided by decisions which do not bear upon provisions identical with those in our Constitution.*

76.5. In *Ashoka Kumar Thakur* v. *Union of India*[83], this Hon'ble Court held as under:

188. *At the outset it must be stated that the decisions of the United States Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries.* Reference may be made to *Bhikaji Narain Dhakras* v. *State of M.P.*[84] and *A.S. Krishna* v. *State of Madras*[85] *wherein this Court specifically held that the due process clause in the Constitution of the United States of America is not applicable to India.* While considering the scope and applicability of Article 19(1)(*g*) in *Kameshwar Prasad* v. *State of Bihar*[86] it was observed: (AIR p. 1169, para 8)

"8. As regards these decisions of the American courts, it should be borne in mind that though the First Amendment to the Constitution of the United States reading 'Congress shall make no law ... abridging the freedom of speech ...' appears to confer no power on the Congress to impose any restriction on the exercise of

82 (1970) 1 SCC 67
83 (2008) 6 SCC 1
84 AIR 1955 SC 781 : (1955) 2 SCR 589
85 AIR 1957 SC 297 : 1957 Cri LJ 409 : 1957 SCR 399
86 AIR 1962 SC 1166 : 1962 Supp (3) SCR 369

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the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly."

189. In *Kesavananda Bharati case*[87] also, while considering the extent and scope of the power of amendment under Article 368 of the Constitution of India, the Constitution of the United States of America was extensively referred to and Ray, J., held: (SCC p. 615, para 1108)

"1108. The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, sovereignty of several States which came together to form a Confederation, the strains and pressures which induced. them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution."

190. It may also be noticed that there are structural differences in the Constitution of India and the Constitution of the United States of America. Reference may be made to the Fourteenth Amendment to the US Constitution. Some of the relevant portions thereof are as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Whereas in India, Articles 14 and 18 are differently structured and contain express provisions for special provision for the advancement of SEBCs, STs and SCs. Moreover, in our Constitution there is a specific provision under the directive principles of State policy in Part IV of the Constitution requiring the State to strive for justice social, economic and political—and to minimise the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities (Article 38). Earlier, there was a view that Articles 16(4) and 15(5) are exceptions to Articles 16(1) and 15(1) respectively. This view was held in *Southern Railway* v. *Rangachari*[88] and *M.R. Balaji* v. *State of Mysore*[89].

209. The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut

87 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
88 AIR 1962 SC 36 : (1962) 2 SCR 586
89 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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of affirmative action in India is fully supported by Constitutional provisions and we have not applied the principles of "suspect legislation" and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were, sought to be applied and this Court rejected the same in *Saurabh Chaudri* v. *Union of India*[90]. Speaking for the Bench, V.N. Khare, C.J., said: (SCC p. 164, para 36)

> "36. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same."

76.6. In *Pathumma* v. *State of Kerala*[91] this Hon'ble Court held as under:

23. *We have deliberately not referred to the American cases because the conditions in our country are quite different and this Court need not rely on the American Constitution for the purpose of examining the seven freedoms contained in Article 19 because the social conditions and the habits of our people are different.* In this connection, in *Jagmohan Singh* v. *State of U.P.*[92] this Court observed as follows: (SCC p. 27)

> "So far as we are concerned in this country, we do not have, in our Constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply 'the due process' clause."

XIV. ***Remedy for breach of common law right of privacy***

77. It is respectfully submitted that the common law right of privacy has been duly protected by various statutes, subject to reasonable restrictions, as detailed above. In future, in case the Hon'ble Constitutional Courts of the country, finds out that on specific fact situation, privacy of individual is not adequately protected, then the constitutional court can, on case-to-case basis, issue relevant guidelines till the competent legislature steps in as done in

90 (2003) 11 SCC 146
91 (1978) 2 SCC 1
92 (1973) 1 SCC 20 at p. 27 : 1973 SCC (Cri) 169

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Destruction of Public & Private Properties v. *State of A.P.*[93] relevant portion of which reads as under:

"17. The power of this Court also extends to laying down guidelines. In *Union of India* v. *Assn. for Democratic Reforms*[94] this Court observed: (SCC p. 309, paras 19-20)

"19. … it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

20. *However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has Constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted*."

18. This Court has issued directions in a large number of cases to meet urgent situations e.g.

(*i*) *Lakshmi Kant Pandey* v. *Union of India*[95]

(*ii*) *Vishaka* v. *State of Rajasthan*[96]

(*iii*) *Vineet Narain* v. *Union of India*[97]

(*iv*) *State of W.B.* v. *Sampat Lal*[98]

(*v*) *K. Veeraswami* v. *Union of India*[99]

(*vi*) *Union Carbide Corpn.* v. *Union of India*[100]

(*vii*) *Delhi Judicial Service Assn.* v. *State of Gujarat*[101]

(*viii*) *DDA* v. *Skipper Construction Co. (P) Ltd.*[102]

(*ix*) *Dinesh Trivedi* v. *Union of India*[103], *Common Cause* v. *Union of India*[104]

(*x*) *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[105]"

93 (2009) 5 SCC 212 : (2009) 2 SCC (Cri) 629
94 (2002) 5 SCC 294
95 (1984) 2 SCC 244
96 (1997) 6 SCC 241 : 1997 SCC (Cri) 932
97 (1998) 1 SCC 226 : 1998 SCC (Cri) 307
98 (1985) 1 SCC 317 : 1985 SCC (Cri) 62
99 (1991) 3 SCC 655 : 1991 SCC (Cri) 734
100 (1991) 4 SCC 584
101 (1991) 4 SCC 406
102 (1996) 4 SCC 622
103 (1997) 4 SCC 306
104 (1996) 1 SCC 753
105 (1993) 4 SCC 441

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78. It is respectfully submitted that while ascertaining the individual's right of privacy against the State action or against an individual/corporate action the Hon'ble courts would be guided by the test of arbitrariness, test of "reasonable nexus to the purpose sought to be achieved" and the "test of proportionality". It is submitted that the test embodied under Section 8(*j*) RTI Act can also be applied for testing as to whether in a given fact situation, an act/conduct or any other aspect of human life is protected by privacy. As per the said test, a person would have right of privacy if there is no overwhelming public interest in disclosure of the said act/conduct or any other aspect of human life and also the said act has no relationship with any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual. As against this if it is in the larger interest of the nation or in overwhelming public interest not to keep specific kind of information private, its disclosure can be permitted in accordance with the law made by the competent legislature.

79. In nutshell, though each of the citizens of India has an inherent right of privacy, its recognition, definition and protection can be done by statutes and not as fundamental rights.

VIII. Mr Rakesh Dwivedi, Senior Advocate, for the respondents

1. This larger Bench of the Supreme Court of India has assembled to decide the issue of existence of fundamental right of privacy in Article 21 or Part III as a whole and its contours (as far as possible) in the context of an apparent conflict between previous judgments and the matrix of the Aadhar Act. The Aadhar Act requires a limited identity data disclosure for maintaining a database, only and solely, for identification purposes with an express stipulation of non-transferability. Protection and safeguards include punitive measures. In short, limited use for identification and non-transferability with punitive safeguards is the hallmark of the Aadhar Act. It does not seek to profile any person. The question therefore is "Is there a right to privacy in public domain?", "What is the extent?", "Whether data for mere identification would involve a privacy right?", "What are the limitations of the State?".

Two Caveats

2. The majority view in *Kesavananda Bharati* v. *State of Kerala*[1] is that the fundamental rights are not natural rights or inalienable rights. (extracts are enclosed as *Annexure-A) [Compilation RD Vol. III Tab R)*. Even if one goes by the doctrine of basic structure they are certainly important but they can be abridged though they cannot be destroyed or emasculated. *I.R. Coelho* v. *State of T.N.*[2]

1 (1973) 4 SCC 225
2 (2007) 2 SCC 1, para 82

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VIII. Mr Rakesh Dwivedi, Senior Advocate, for the respondents *(contd.)*

3. Reference to "minimal governance" concept should be eschewed. It should be sufficient and appropriate to say governance as per the Constitution. That ensures respect for fundamental rights. Plea for "horizontal protection" and "minimal governance" is somewhat contradictory. *Binoy Viswam* v. *Union of India*[3] [Compilation RD Vol. III Tab UVW)

> "*96*. Having said so, when it comes to exercising the power of judicial review of a legislation, the scope of such a power has to be kept in mind and the power is to be exercised within the limited sphere assigned to the judiciary to undertake the judicial review. This has already been mentioned above. Therefore, unless the petitioner demonstrates that the Parliament, in enacting the impugned provision, has exceeded its power prescribed in the Constitution or this provision violates any of the provision, the argument predicated on 'limited governance' will not succeed. One of the aforesaid ingredients needs to be established by the petitioners in order to succeed."

I. *Dynamics of privacy*

4. Article 21 talks of life and personal liberty in conjunction. Our Court has construed "Life" as not limited to body and limbs. In fact post-birth the most important aspect of life is its protection, growth and development until demise. Therefore the dynamics and dialectics, of "Life" is important. And if "Privacy" is read into Article 21, as it should be to an extent, then the same would be true of "Privacy".

5. Life and Privacy in "Tribal Society", "Feudal Society", "Industrial Society", and "Techno-Industrial Society" would have different dimensions. So also it would vary from a Colonial State to a modern Democratic Welfare State. This is more so in the context of claims of anonymity, autonomy and identity.

6. Primeval societies existed disconnectedly, isolatedly and in small group existence. There was little need for building wide complex relations. But, leaving the tracing of intermediary growth of societies, the modern technological societies afford an opportunity to build wide network of relations which are social, political and economical. Individuals have to relate with the State too. Our growth and development depends on such relations. Today's society is therefore founded on interconnectivity and seeking of opportunities. And today's State also has grown more complex with its welfare activities dimension, need for taxation, and growing use of banks in commerce, as also growing crime and terrorism.

7. In today's society if someone wants to be completely anonymous and autonomous and does not want to disclose his identity at all then he has to turn a recluse. In the modern society the normal proclivity of an individual is to widen his network and enter into a variety of relations and seek the

3 (2017) 7 SCC 59

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VIII. Mr Rakesh Dwivedi, Senior Advocate, for the respondents *(contd.)*

benefits and services both from private service providers and the Government and public bodies. Therein lies his growth and development sanctified by Article 21 of the Constitution. The necessary fallout of the man setting out of his home for the aforesaid purpose is that he has to disclose certain minimum information about his identity. Non-disclosure of identity or complete anonymity in these circumstances is not possible. To illustrate:

(*i*) If someone wishes to marry he/she would have to disclose who they are and what they do. May be they would have to at least state that they are not suffering from communicable or serious diseases.

(*ii*) If someone seeks an employment in the private/public or government sector, he would, per necessity have to disclose his identity and may be antecedents too. He may also have to agree to biometric attendance.

(*iii*) Every professional working in an institution would have to disclose his minimum identity data with photograph for his recognition/identification, and also blood group which would enable the institution to help save his life in the event he needs blood.

(*iv*) Every individual who wants to operate a smart phone or internet and wishes to download/operate applications and engage in e-commerce or e-banking, would have to disclose his minimum identity in the form of name, date of birth, telephone number, email address and the residential address.

(*v*) Every voter has to identify himself before casting his vote by means of showing his voter identity card, which would have certain details of identity of person including his photograph.

(*vi*) Similarly, a candidate seeking to contest has to disclose his personal details such as income, assets and liabilities of himself and that of his spouse, criminal antecedents, etc.

PUCL v. *Union of India*[4] [Compilation RD Vol. III Tab XYZ)

8. The aforesaid are merely some instances to show that the building of social, economic and political relations, engaging in commerce/ e-commerce and engaging with government/public institutions would require minimum identity data for recognition and identification. Disclosure of thumb impressions and photographs has also become indispensable. *In short, there can be no reasonable expectation of privacy in the disclosure of such and other similar data for identification.* In other words, in the modern society the very growth and development of the individual would not admit a privacy claim in disclosure of data for identification.

9. The people with whom an individual relates, also have an identical interest in right to life and personal liberty and Articles 14 & 19 which give them the right to know or right to information. When an individual deals with

4 (2003) 4 SCC 399

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an individual, or deals with a collectivity of individuals under an institutional umbrella then Article 21 also would impose a requirement to disclose identity information.

II. *Constitutional existence of the fundamental right to privacy*

10. Claim to privacy cannot be considered to be a fundamental right under the Constitution of India in generality and abstraction. Every claim to privacy in a non-penumbral zone of a specified fundamental right, must in the first instance be established as a fundamental right under Article 21 of the Constitution. *The establishment would require assessment of whether the subjective expectation of privacy of the claimant is one which the court would objectively consider to reasonably be legitimate.* In this regard this Court will also consider the context and the spatial domain (private or public) in which the claim of privacy is seeking recognition as a fundamental right. This approach is being followed in USA, UK and by the European Court of Human Rights.

11. A reference was made to the Preamble and Part III rights to show that there is a right to privacy under the Constitution. But it is more important to ascertain from the substantive text what is that right outside the penumbra of the specified fundamental right [Articles 14, 19, 20(3), 25]. Where a claim of privacy is asserted to fall within the penumbra of a specified fundamental right enshrined in Part III, like Articles 14, 19, 20(3) and 25(1), the claim would merely be recognised as the specified fundamental right, and the same would have no dehors existence. Its infringement would be tested on the anvil of those fundamental rights alone. Of course, if the claim falls in penumbra of more than one fundamental right then the infringement would have to be tested with respect to limitations regarding both fundamental rights, as per *R.C. Cooper*[5] doctrine. The fact that a privacy claim falls in the penumbra of a specified fundamental right, does not necessarily imply that there is generally a fundamental right to privacy under Article 21 and the same is inalienable.

12. It is instructing to refer to what is held in *Maneka Gandhi* v. *Union of India*[6] in the context of freedom of speech and expression of the Constitution. This Court observed as below:

(pp. 306-307):

> "*29.* It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. *Every activity which facilitates* the exercise of a named fundamental right is *not necessarily comprehended in* that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right.

5 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

6 (1978) 1 SCC 248

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The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is, the *right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression*".

"*33*. We cannot, therefore, accept the theory that a peripheral or concomitant right *which facilitates* the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right".

III. ***Reasonably legitimate expectation of privacy***

13. It follows that there cannot be a broad and general definition of privacy and privacy interest must also be placed in the context of other rights and values. A privacy right claimed in a context must be a fundamental right implicit in the concept of life and personal liberty in Article 21. In *Gobind* v. *State of M.P.*[7], this Court relied on *Griswold* v. *Connecticut*[8], where the US Supreme Court observed as follows:

"*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*."

14. The US Supreme Court has consistently held that the court must first find that a claimed right is entitled to protection as a fundamental privacy right:

14.1. In *United States* v. *Miller*[9] [Bank Documents] [Compilation RD Vol. I Tab A) the Court observed:

"We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate expectation of privacy concerning their contents" (pp. 78-79)

14.2. In *Smith* v. *Maryland*[10] [Pen Register], [Compilation RD Vol. I Tab B) the Court observed "this inquiry as Mr Justice Harlan aptly noted in

7 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
8 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965)
9 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)
10 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 (1979)

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his *Katz*[11] concurrence, normally embraces two discrete questions. *The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy,"* whether, in the words of the *Katz*[12] majority, 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, in the words of the *Katz*[11] majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances." (Pg 226-227).

14.3. In *California* v. *Greenwood*[13] [garbage] [Compilation RD Vol. I Tab C) it was observed "an expectation of privacy does not give rise to IVth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable" (Pg 36)

14.4. In *New York* v. *Class*[14] [car] [Compilation RD Vol. I Tab D) it was observed:

> "Nonetheless, the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth. Amendment violation unless the area is one in which there is a "constitutionally protected reasonable Expectation of privacy".

15. The doctrine of reasonable expectation of privacy has also been consistently applied in the UK (See *R. (Wood)* v. *Commr. of Police of the Metropolis*[15] [Compilation RD Vol. I Tab F); *Kinloch* v. *HM Advocate*[16] [Compilation RD Vol. I Tab G).

16. These cases have been recently followed by the UK Supreme Court in *JR38, In re*[17] [Compilation RD Vol. I Tab H). The majority view supported by Lord Toulson, Lord Hodge and Lord Clark in the context of Article 8 of the European Convention on Human Rights and Fundamental Freedoms has observed as below:

> "*85*. This passage highlights three matters: the width of the concept of private life; the purpose of Article 8, i.e. what it seeks to protect; and the need to examine the particular circumstances of the case in order to decide whether, consonant with that purpose, *the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint*. If so, it is then up to the defendant to justify the interference with the defendant's privacy.
>
> *86*. In an impressive analysis of the scope of Article 8, Laws LJ said in *R. (Wood)* v. *Commr. of Police of the Metropolis*[15]:

11 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 at p. 361 (1967)
12 389 US 347 at p. 351 (1967)
13 1988 SCC OnLine US SC 89 : 100 L Ed 2d 30 : 486 US 35 (1988)
14 1986 SCC OnLine US SC 28 : 89 L Ed 2d 81 : 475 US 106 (1986)
15 (2010) 1 WLR 123 (CA)
16 (2013) 2 WLR 141 (SC)
17 2016 AC 1131 (SC)

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VIII. Mr Rakesh Dwivedi, Senior Advocate, for the respondents *(contd.)*

"20. The phrase 'physical and psychological integrity' of a person (the *Von Hannover case*[18]; *S.* v. *United Kingdom*[19] is with respect helpful. So is the person's 'physical and social identity': see *S.* v. *United Kingdom*[19] and other references there given. These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual …

"21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, *an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction'* (the *Von Hannover case*[18]) between himself and others …

"22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, *is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable*. For this purpose I think that there are three safeguards, or qualifications. *First, the alleged threat or assault to the individual's autonomy must (if Article 8 is to be engaged) attain 'a certain level of seriousness'*. Secondly, the touchstone for Article 8.1's engagement is *whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy*. Thirdly, the breadth of Article 8.1 may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to Article 8.2. I shall say a little in turn about these three antidotes to the overblown use of Article 8."

87. I have set out this passage at length because I agree with it and cannot improve on it. We are concerned in this case with the second of Laws LJ's qualifications—*the "touchstone" of whether the claimant enjoyed on the facts a "reasonable expectation of privacy" or*

18 *Hannover* v. *Germany*, (2005) 40 EHRR 1, para 50
19 (2008) 48 EHRR 1169, para 66

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"legitimate expectation of protection". (I take the expressions to be synonymous.) In support of that part of his analysis Laws LJ cited *Hannover* v *Germany*[18], at para 51 (set out above), *Campbell* v. *MGN, Ltd.*[20] and *Murray* v. *Express Newspapers plc*.[21]"

17. The case *JR 38, In re*[17] involved publishing of photographic images obtained from CCTV footage in journals and leaflets to be distributed *for the purpose of identifying* the young persons participating in riotous activity. Upholding the State action the Court observed:

"**98.** I therefore do not agree with Lord Kerr JSC's suggestion (para 56) that the test of reasonable expectation of privacy (or legitimate expectation of protection), excludes from consideration such factors as the age of the person involved, the presence or absence of consent to publication, the context of the activity or the use to which the published material is to be put. *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 MR said in *Murray case*[21]) *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. Nor am I persuaded by Lord Kerr JSC's reading of *Hannover*[18] (in para 57 of his judgment) that the commission and the court treated dissemination to the general public as a self-standing test."

IV. *Public domain [information knowingly exposed to the public]*

18. The US cases also make a distinction based upon the spatial domain in which right to privacy is claimed, and this is notwithstanding the observation in *Katz* v. *United States*[11] (telephone booth) [Compilation RD Vol. I Tab E) that "the IVth Amendment protects, people and not simply areas, against unreasonable searches and seizures…"(Pg 583). In fact, in *Katz*[11] itself the Court significantly stated "*what a person knowingly exposes to the public even in his own home or office is not a subject of IVth Amendment protection*" (p. 582). In *Katz*[11], the petitioner was making calls from a telephone booth in public place and the officials had placed a device outside the booth for overhearing. This was held entitled to protection of privacy as the petitioner was speaking in privacy, though in a public place. The subsequent cases which grappled with information exposed to public are below:

20 (2004) 2 AC 457 : (2004) 2 WLR 1232 (HL)
21 2009 Ch 481 : (2008) 3 WLR 1360 (CA)

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18.1. In *United States* v. *Miller*[9] [Bank records] [Compilation RD Vol. I Tab A), a case of defrauding the Government of whiskey tax, Miller sought to prevent his documents with the bank from being obtained by the Treasury Department. The Court held that these documents were not private papers and were business records of the bank. Rejecting the contention that the documents were given by him for a limited purpose (p. 78) the Court held that checks were not confidential communication but negotiable instruments and had been voluntarily conveyed to the banks and exposed in the ordinary course of business. In such cases, the depositor takes the risk of conveyance of his information to the Government. It was observed:

> "(5) The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. *United States* v. *White*[22]. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed".

18.2. In *Securities and Exchange Commission* v. *Jerry T. O'Brien Inc.*[23] [Compilation RD Vol. II Tab L) the Court observed, it is established that, when a person communicates information to a third party even on the understanding that information is confidential, he cannot object if the third party conveys that information or record thereof to law enforcement authorities:

> "5. Finally, respondents cannot invoke the Fourth Amendment in support of the Court of Appeals' decision. It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. *United States* v. *Miller*[9], US at p. 443. Relying on that principle, the Court has held that a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the Government from his bank pursuant to allegedly defective subpoenas, despite the fact that he was given no notice of the subpoenas. *Id*, at p. 443 and n. 5. See also *Donaldson* v. *United States*[24] (Internal Revenue summons directed to third party does not trench upon any interests protected by the Fourth Amendment). These rulings disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers."

22 1971 SCC OnLine US SC 70 : 28 L Ed 2d 453 : 401 US 745 at pp. 751-52 (1971)
23 1984 SCC OnLine US SC 146 : 81 L Ed 2d 615 : 467 US 735 (1984)
24 1971 SCC OnLine US SC 18 : 27 L Ed 2d 580 : 400 US 517 at p. 522 (1971)

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18.3. In *Nixon* v. *Administrator of General Services*[25] [Compilation RD Vol. I Tab IJ) the Court held that a person cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public:

> "[*23*] The overwhelming bulk of the 42 million pages of documents and the 880 tape recordings pertain, not to appellant's private communications, but to the official conduct of his Presidency. Most of the 42 million pages *were prepared and seen by others and were widely circulated within the Government*. Appellant concedes that he saw no more than 200,000 items, and we do not understand him to suggest that his privacy claim extends to items he never saw. See *United States* v. *Miller*[9]. Further, it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency. *And, of course, appellant cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public*. *United States* v. *Dionisio*[26], US at p. 14; *Katz* v. *United States*[12]. Therefore, appellant's privacy claim embracing, for example, 'extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictablets and his wife's personal files,' relates only to a very small fraction of the massive volume of official materials with which they are presently commingled."

18.4. In *United States* v. *Dioniso*[26] [Compilation RD Vol. II Tab K) the Court held that no person can have a reasonable expectation of privacy over sound of his voice which is constantly exposed to the public: (pp. 79-80)

> "[*21,22*] "In *Katz* v. *United States*[12], we said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public, even in his own home or office….'. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:
>
> "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection *… the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear*. There is no basis for constructing a wall of privacy against

25 1977 SCC OnLine US SC 152 : 53 L Ed 2d 867 : 433 US 425 (1977)
26 1973 SCC OnLine US SC 23 : 35 L Ed 2d 67 : 410 US 1 (1973)

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the grand jury which does not exist in casual contacts with strangers. *Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large.*' *United States* v. *Doe (Schwartz)*[27], F 2d at pp. 898-99.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.' *Schmerber* v. *California*[28], US at pp. 769-70. Similarly, a seizure of voice exemplars does not involve the 'severe, though brief, intrusion upon cherished personal security,' effected by the 'pat down' in Terry—'surely … an annoying, frightening, and perhaps humiliating experience.' *Terry* v. *Ohio*[29], US at pp. 24-25. Rather, this is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, *we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' Davis* v. *Mississippi*[30], 394 US at p. 727; cf. *Thom* v. *New York Stock Exchange*[31], F Supp at p. 1009."

18.5. In *Smith* v. *Maryland*[10] [Compilation RD Vol. I Tab B) a pen register was installed in the telephone company's office to record the numbers dialled from the telephone at the petitioner's home. This was done on police's request. The claim of privacy was rejected as the Court doubted that people in general entertained any actual expectations in the numbers they dial. All telephone users realise that they must convey phone numbers to the telephone company since it is through telephone company's switching equipment that their calls are completed and based on that monthly bills are prepared. The site of the call being home was held to be immaterial. The Court observed "this Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" (pp. 229).

18.6. In *California* v. *Greenwood*[13] [Compilation RD Vol. I Tab C) garbage had been placed outside the house for collection and the same was seized by the Narcotics Department on a suspicion of use of prohibited substance. The Court held that the garbage had been placed for conveying it to a third party and had been exposed to the public. Therefore, there could be no claim of privacy under the IVth Amendment (pp. 36-37).

27 457 F 2d 895 (2d Cir 1972)
28 1966 SCC OnLine US SC 124 : 16 L Ed 2d 908 : 384 US 757 (1966)
29 1968 SCC OnLine US SC 144 : 20 L Ed 2d 889 : 392 US 1 (1968)
30 1968 SCC OnLine US SC 95 : 22 L Ed 2d 676 : 394 US 721 (1969)
31 306 F Supp 1002 (SDNY 1969)

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18.7. In *Florida* v. *Riley*[32] [Compilation RD Vol. I Tab M), Riley was growing marijuana in a greenhouse which was not enclosed on two sides. The IO discovered the growing of marijuana from a helicopter. Similar was the case in *California* v. *Ciraolo*[33]. The Court observed "what a person knowingly exposes to public even in his own home or office is not a subject of IVth Amendment protection" (pp. 841).

18.8. In *Oliver* v. *United States*[34] [Compilation RD Vol. II Tab N) marijuana was grown in open field. The court held that there could be no legitimate expectation of privacy.

19. Dealing with adult theatres showing pornographic films, the US Supreme Court in *Paris Adult Theatre* v. *Slaton*[35] [Compilation RD Vol. II Tab O) observed as below:

> "(21).Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' *Palko* v. *Connecticut*[36], US at p. 325. *Roe* v. *Wade*[37], US at p. 152. *This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.* Cf. *Eisenstadt* v. *Baird*[38], 405 US at pp. 453–54; *id* at pp. 460, 463–465 (White, J., concurring); *Stanley* v. *Georgia*[39], US at p. 568; *Loving* v. *Virginia*[40], US at p. 12; *Griswold* v. *Connecticut*[8], US at p. 486; *Prince* v. *Massachusetts*[41]; *Skinner* v. *Oklahoma ex rel. Williamson*[42], US at p. 541; *Pierce* v. *Society of Sisters*[43], US at p. 535; *Meyer* v. *Nebraska*[44], US at p. 399. *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*".
>
> "(*22-25*)... the idea of "privacy" right and a place of public accommodation are, in this context mutually exclusive.."

20. The same view was taken in *United States* v. *Orito*[45] [Compilation RD Vol. II Tab PQ) where obscene material was being transported by means of a common carrier. It was observed:

32 1989 SCC OnLine US SC 13 : 102 L Ed 2d 835 : 488 US 445 (1989)
33 1986 SCC OnLine US SC 96 : 90 L Ed 2d 210 : 476 US 207 (1986)
34 1984 SCC OnLine US SC 76 : 80 L Ed 2d 214 : 466 US 170 (1984)
35 1973 SCC OnLine US SC 165 : 37 L Ed 2d 446 : 413 US 49 (1973)
36 1937 SCC OnLine US SC 173 : 82 L Ed 288 : 302 US 319 (1937)
37 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
38 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 405 US 438 (1972)
39 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)
40 1967 SCC OnLine US SC 152 : 18 L Ed 2d 1010 : 388 US 1 (1967)
41 1944 SCC OnLine US SC 27 : 88 L Ed 645 : 321 US 158 (1944)
42 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)
43 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 268 US 510 (1925)
44 1923 SCC OnLine US SC 150 : 67 L Ed 1042 : 262 US 390 (1923)
45 1973 SCC OnLine US SC 154 : 37 L Ed 2d 513 : 413 US 139 (1923)

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"But viewing obscene films in a commercial theatre open to the adult public, see *Paris Adult Theatre*[35] I V Slaton, US at pp. 65-67, L Ed 2d pp. 461-62, or transporting such films in common carriers in interstate commerce, has no claim to such special consideration. It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public".

21. Even our Court has held in *Rajagopal*[46], the case of Auto Shankar that once an information is in public record then there is no privacy right (para 29).

22. In *Veronica School* v. *Acton*[47] [Compilation RD Vol. I Tab A) where children wishing to take part in athletics were subjected to random urinanalysis drug testing, the Court observed:

"The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T.L.O.*[48], US at p. 338. What expectations are legitimate varies, of course, with context, *id.*, at p. 337, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State".

The Court held that the student athletes have a reduced expectation of privacy (p. 577).

23. In *Whalen* v. *Roe*[49] [Compilation RD Vol. II Tab S) the State of New York was recording in a centralised computer file the names and addresses of all persons who obtained certain drugs under doctor's prescription. The Court held that "requiring such disclosure to representatives of the States having responsibility of the health of the community does not amount to an impermissible invasion of privacy." In a concurring judgment, Stewart, J. observed that "*there is no general constitutional right to privacy and that whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information*" (pp. 78-79). With this, the State action was upheld.

V. *Digital data*

24. From the above judgments it is evident that there can be no claim for privacy with regard to personal data and information which has already been voluntarily transferred by a person on account of use of modern technologies comprising the laptops, smartphones, etc. So far, as photographs, thumb

46 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
47 1995 SCC OnLine US SC 78 : 132 L Ed 2d 564 : 515 US 646 (1995)
48 *New Jersey* v. *T.L.O.*, 1985 SCC OnLine US SC 25 : 83 L Ed 2d 720 : 469 US 325 (1985)
49 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977)

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impressions and iris scans are concerned they are already substantially in the public domain and are available with the websites, service providers, application owners, aggregators, etc. These information are being transmitted on a daily basis to the above resources during the course of e-commerce. Much of the data and information is transmitted unconditionally. It is submitted that with respect to such data there could be no claim of privacy.

25. Where the transference of personal data is not merely to a third party for a limited purpose but to several parties on a regular basis the principle of "contextual integrity" (or limited purpose) which a few proponents of privacy in public domain are projecting ["Protecting Privacy in an Information Age: The Problem of Privacy in Public" by Helen Nissenbaum] would also not result in a valid claim of privacy.

VI. ***Identity data***

26. Even otherwise, providing thumb impressions as identity information has been in vogue and have been used in India since long in execution of documents, particularly sale deeds and other similar transfer documents. Of late, it is compulsory to append photographs and to put thumb impressions while getting documents registered. Personal identity data is also required to be disclosed along with photograph (biometrics) in obtaining passport, driving licence, bank account, for checking-in hotels and obtaining identity passes for entering into public institutions. Consequently, there cannot be any claim of fundamental right to privacy in disclosing personal data for identification. There cannot be any claim of anonymity when citizens step out of their homes to enter into various kinds of social, economic and political relations, to obtain benefits and services, to enter into contracts or to discharge legal obligations such as tax. In fact, even to claim fundamental right under Article 19 a person would have to establish that he is a "citizen" and for this he will have to disclose personal data for identification. Rule 12(2)(*i*)(*a*) of the Supreme Court Rules, 2013 dealing with PIL provides that the petitioner shall disclose his full name, complete postal address, email address, phone number, proof regarding personal identification, occupation and annual income, PAN number and national unique identity card number, if any.

27. A survey of the US Supreme Court judgments would show that the Constitution of USA has been understood as protecting the right to privacy of people in their "persons, houses, papers and effects" as early as 1923, in *Hester* v. *United States*[50] [Compilation RD Vol. II Tab T), Holmes, J. observed "the special protection accorded by the IVth Amendment to the people in their persons, houses, papers and effects is not extended to open field". Even Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights only talk about arbitrary and unlawful interference with "his privacy, family, home

50 1924 SCC OnLine US SC 102 : 68 L Ed 898 : 265 US 57 (1924)

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or correspondence." and about protection from "unlawful attacks on his honor and reputation". These instruments therefore do not expand the right to privacy in generality or abstract nor do they extend the right to privacy beyond the domain which is private/private-like and confidential. They do not bring within their coverage that which has been voluntarily and unconditionally exposed to the public domain not to that which pertains to identity disclosure in the context of social, economic and political relations.

VII. ***Human Rights Conventions***

28. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950—European Convention also provides only for respect for his private and family life, his home and his correspondence. Similar is the position with regard to Schedule I of the UK Human Rights Act, 1998. Clearly, these conventions do not extend in the public domain especially when the information has been transmitted to such domain willingly and unconditionally. In the context of Article 8 of the European Convention for the Protection of Fundamental Rights and Human Freedoms, the UK Supreme Court in *Kinloch* v. *HM Advocate*[16] [Compilation RD Vol. I Tab G) held as below:

> *19*. There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: *PG* v. *United Kingdom*[51], EHRR, para 56. *But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category*: *PG* v. *United Kingdom*[51], para 57. A person who walks down a street has to expect that he will be visible to any member of the public who happens also to be present. So too if he crosses a pavement and gets into a motor car. He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent".

Having so observed, the Court held that the appellant was moving openly in the public view and there was nothing in the case to suggest that he could "reasonably have had any such expectation of privacy". He took the risk of being seen and of his movements being noted down so there was infringement of Article 8.

VIII. ***Duality of personal information***

29. As regards personal information of any kind, as long as the information is with the person himself and in his private domain there would be two distinct rights simultaneously embedded. One is his right to privacy which entitles him not to part with the information (barring identity

51 (2001) 46 EHRR 1272

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information). The second is right to property in the said information. To illustrate, a person can pen down all his information in the autobiography which can then be transferred by sale to the public in the form of a book or biopic. But once the person has transmitted his personal information willingly in the public domain by exercising his right to speech and expression then he would definitely lose the first right to privacy. The only issue would be how far and how much right to property he would retain in his own information after transmission but those issues would be only issues of property and not privacy. The fears with regard to data mining and data colonisation as being creative of monopolies, injurious to competition and issues of ownership would all fall in the realm of property rights.

30. It is also to be noted that when a person transmits personal information to the public domain he is actually exercising his fundamental right to speech and expression under Article 19(1)(*a*). Therefore, it is for the person concerned to express himself clearly and ensure that he puts conditions for retaining whatever privacy rights or he should refrain from giving information. Largely, this would be in the realm of contract and it would depend upon mutual bargains as to whether the person would be in a position to put a condition. But where such an information is transmitted willingly and unconditionally in the public domain to third parties and on a regular basis, there would be no right to privacy.

IX. *Clash with other fundamental rights*

31. Yet again, a claim of privacy can get wiped out and overridden in a situation of clash with another person's fundamental right. It has been so ruled in the following cases:

31.1. *'X'* v. *Hospital 'Z'*[52], SCC paras 21-29— In this case our Supreme Court held that right to privacy does exist outside the confines of home and it was not absolute. But this was in the context of a confidential relationship with the hospital and the information was sensitive. The exposure of which would have stigmatised. However, in the context of marriage, SC held that the right to privacy of a person suffering from AIDS would be overridden on account of the right to life of the person with whom marriage was to be solemnised. Both rights were within Article 21.

31.2. *PUCL* v. *Union of India*[53], SCC para 121— This case involved disclosure of assets and liabilities of the spouse by an election candidate. It was held that the claim of right to privacy would be overridden by the right to information of citizens.

32. When a minimal identity disclosure is legislatively required in the context of delivery of benefits and services by the Government or a public body then the seeker of benefit and service would not be entitled to any fundamental right to privacy with regard to identity disclosure. More so if the

52 (1998) 8 SCC 296
53 (2003) 4 SCC 399

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benefit and service is a targeted one, that is to say that it is intended to a defined class of persons. A welfare State is constitutionally obliged to undertake such exercise. The provision of benefits and services would actually enliven the fundamental right to life and personal liberty of the poorer and the weaker section of the society. It is not enough to protect Article 21 of the persons who have the means and the haves it is more important to ensure that the benefits and service those who are truly have-nots and deserving. This involves identification. In context of reservations this court has held evolved the concept of creamy layer in order that benefits of reservation may flow to those who are truly backward. The State has been obliged to undertake identification of the truly backward. *Indra Sawhney* v. *Union of India*[54], SCC paras 792 & 793.

33. It is submitted that even assuming that there is some privacy right even in the minimal identity disclosure for identification. The same would be overridden by the fundamental right of those persons to whom the targeted benefits are meant to flow.

X. *Contours*

34. The plea that the court should refrain from specifying the contours of the fundamental right to privacy and it should be left to be developed on a case-to-case basis ought not to be expected. It is absolutely essential to delineate the right to privacy and the nature of limitations of the State. The modern Indian State faced with complex problems arising from illegal immigration, crime, terrorism, corruption, fraud, etc is also constitutionally charged with securing a social order in which justice, social, economic and political—informs all the institutions of national life, and that the material resources of the community are so distributed as best to subserve the common good (Articles 38 & 39). India is a Welfare State. *Kesavananda Bharati* v. *State of Kerala*[55] (Per Khanna, J.):

> "*1475*. Apart from what has been stated above about the effect of preamble on the power of amendment, let us deal with the provisions of the preamble itself. After referring to the solemn resolution of the people of India to constitute India into a sovereign democratic republic, the preamble makes mention of the different objectives which were to be secured to all its citizens.
>
> These objectives are:
>
> *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;*

54 1992 Supp (3) SCC 212 : 1992 SCC (L&S) Supp 479
55 (1973) 4 SCC 225

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FRATERNITY assuring the dignity of the individual and the unity of the Nation.

It would be seen from the above that the first of the objectives mentioned in the preamble is to secure to all citizens of India Justice, social, economic and political. Article 38 in Part IV relating to the Directive Principles of State Policy recites that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

1476. Since the latter half of the eighteenth century when the idea of political equality of individuals gathered force and led to the formation of democratic Governments, there has been a great deal of extension of the idea of equality from political to economic and social fields. Wide disparaties in the standard of living of the upper strata and the lower strata as also huge concentration of wealth in the midst of abject poverty are an index of social mal-adjustment and if continued for long, they give rise to mass discontent and a desire on the part of those belonging to the lower strata to radically alter and, if necessary, blow up the social order. As those belonging to the lower strata constitute the bulk of the population, the disparities provide a fertile soil for violent upheavals. The prevention of such upheaval is not merely necessary for the peaceful evolution of society, it is also in the interest of those who belong to the upper strata to ensure that the potential causes for violent upheaval are eliminated. Various remedies have been suggested in this connection and the stress has been laid mainly upon having what is called a welfare state. The modern states have consequently to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population. For this purpose the State has to deal with the problems of social security, economic planning and industrial and agrarian welfare. Quite often in the implementation of these policies, the State is faced with the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict is to look upon the rights of the individuals as conditioned by social responsibility. Harold Laski while dealing with this matter has observed in Encyclopaedia of the Social Sciences:

> "The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product … so long as there is inequality, it is argued, there cannot be liberty. The historic inevitability of this evolution was seen a century ago by de

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Tocqueville. It is interesting to compare this insistence that the democratization of political power mean equality and that its absence would be regarded by the masses as oppression with the argument of Lord Acton that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy destroyed individuality, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather towards the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane." (see Vol. IX, p. 445).

1477. I may also refer to another passage on p. 99 of Grammar of Politics by Harold Laski:

"The state, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.

We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of the few is in fact the attainment of those rights, since in no other environment is stability to be assured."

1478. A modern State has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the State acquires the power to subordinate the individual rights to the larger interests of society as a step towards social justice. As observed by Roscoe Pound on p. 434 of Volume I of Jurisprudence under the heading "Limitations on the Use of Property":

"Today the law is imposing social limitations — limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the legal right or liberty or privilege to the bounds of the interest so delimited."

To quote the words of Friedmann in Legal Theory:

"But modern democracy looks upon the right to property as one conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so large in modern jurisprudence, and not as pre-ordained and untouchable private right." (Fifth Edition, p. 406).

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1479. With a view to bring about economic regeneration, the State devises various methods and puts into operation certain socio-economic measures. Some of the methods devised and measures put into operation may impinge upon the property rights of individuals. The courts may sometimes be sceptical about the wisdom behind those methods and measures, but that would be an altogether extraneous consideration in determining the validity of those methods and measures. We need not dilate further upon this aspect because we are only concerned with the impact of the preamble. In this respect I find that although it gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indication in the preamble which stands in the way of abridgement of right to property for securing social, economic and political justice. Indeed, the dignity of the individual upon which also the preamble has laid stress, can only be assured by securing the objective of social, economic and political justice."

35. Therefore, 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 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?

36. 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 the 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.

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(*vi*) Presumption of validity would attach to the legislations.

37. It ought not to be accepted that the right to privacy flows collectively from various fundamental rights, for then the legislation in every case has to satisfy the test in relation to all the fundamental rights. Our Constitution has specified fundamental rights in different articles and the limitations on the State with respect to them have different contours. Hence it is more appropriate to hold that if the claim of privacy is in the penumbra, the specified fundamental right then it must satisfy the test in relation to that specified fundamental right alone. Where a claim of privacy is not within the penumbra of a specified fundamental right then it should first establish itself as being embedded in Article 21 and the test would be whether the expectation of privacy could be considered to be reasonably legitimate, and further is not overridden by any competing fundamental right.

XI. ***Due process and compelling State interest***

38. The test of compelling State interest derived from the US cases should not be adopted. In *Gobind*[7] this Court referred to *Griswold*[8] and *Roe* v. *Wade*[37] and adopted the compelling State interest test. Para 31 is as below:

> "*31*. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. 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 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. Even if we hold that Article 19(1)(d) guarantees to a citizen a right to a privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid".

39. It is submitted that the *"compelling State interest" test* is an evolution from the US Constitution, particularly the XIVth Amendment which injuncts deprivation of "any person of life, liberty or property without due process of law". Based on this due process requirement the US Supreme Court has in the American historical context evolved the test of strict scrutiny of

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compelling State interest, and narrow tailoring or over breath or least drastic means. *Our Constitution of India does not incorporate the due process provision*. The same was specifically discarded by the Constituent Assembly (*enclosed as Annexure C*). In *Mohd. Arif* v. *Supreme Court of India*[56], Justice R.F. Nariman traced the history of Article 21, referred to the Constituent Assembly Debates and *Maneka Gandhi case*[6], and concluded that "substantive due process" is now to be applied to the fundamental right to life and liberty (paras 17-28). But it is notable that this Court has said that in the context of *Maneka Gandhi*[6] test of "reasonable, just and fair". So ever after the judgment of *Maneka Gandhi*[6] the only requirement under Article 21 is that the law should be reasonable, just and fair.

40. In *Maneka Gandhi case*[6] the principle of reasonableness or non-arbitrariness was drawn into Article 21 from Article 14:

> "*7. …* 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."

41. In *Bachan Singh* v. *State of Punjab*[57], a Constitution Bench observed:

> "*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*[6], 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."
>
> Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law."

56 (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408
57 (1980) 2 SCC 684 : 1980 SCC (Cri) 580

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42. In *Sunil Batra* v. *Delhi Admn.*[58] dealing with solitary confinement after conviction and award of death sentence, Desai, J., speaking for the majority observed in para 228 "the word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in *Maneka Gandhi case*[6] that the law must be right, just and fair and not arbitrary, fanciful or oppressive." Krishna Iyer, J., in a concurring judgment observed in para 52 "true, our Constitution has no due process clause or the VIIIth Amendment; but in this branch of law after *Cooper*[5] and *Maneka Gandhi*[6] the consequence is the same".

43. The majority of the judges do not hold so. Subsequently, in *Mithu* v. *State of Punjab*[59] Chandrachud, CJ speaking for a Constitution Bench referred to both the views in *Sunil Batra*[58] and finally observed as below:

> "*6*. 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."

This Constitution Bench does not endorse the equation of Article 21 with due process clause as in the American Constitution.

58 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
59 (1983) 2 SCC 277 : 1983 SCC (Cri) 405

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44. In *State of A.P.* v. *McDowell & Co.*[60] this Court held that the doctrine of substantive due process is inapplicable to our Constitution:

> "*43. …* As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. *We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above.* In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary** — or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom...."

45. Similar view was expressed in *A.K. Roy* v. *Union of India*[61]:

> *35.* The fact that England and America do not resort to preventive detention in normal times was known to our Constituent Assembly and

60 (1996) 3 SCC 709

61 (1982) 1 SCC 271 : 1982 SCC (Cri) 152

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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".*

36. Insofar as our Constitution is concerned, an amendment was moved by Pandit Thakur Dass Bhargava to draft Article 15, which corresponds to Article 21 of the Constitution, for substituting the words "without due process of law" for the words "except according to procedure established by law". Many members spoke on that amendment on 6-12-1948, amongst whom were Shri K.M. Munshi, who was in favour of the amendment, and Sir Alladi Krishnaswamy Ayyar who, while explaining the view of the Drafting Committee, said that he was "still open to conviction". The discussion of the amendment was resumed by the Assembly on 13-12-1948 when Dr Ambedkar, who too had an open mind on the vexed question of 'due process', said:

> "... I must confess that I am somewhat in a difficult position with regard to Article 15 and the amendment moved by my friend Pandit Bhargava for the deletion of the words 'procedure according to law' and the substitution of the words 'due process'.
>
> * * *

The question of 'due process' raises, in my judgment, the question of the relationship between the legislature and the judiciary. In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature.... The 'due process' clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on

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the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law.... The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles.

... 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 therefore would not say anything. I would leave it to the House to decide in any way it likes. (See Constituent Assembly Debates, Vol. VII, pp. 999-1001)

The amendment was then put to vote and was negatived. In view of this background and in view of the fact that the Constitution, as originally conceived and enacted, recognizes preventive detention as a permissible means of abridging the liberties of the people, though subject to the limitations imposed by Part III, we must reject the contention that preventive detention is basically impermissible under the Indian Constitution."

46. This view was also recently endorsed in *Rajbala* v. *State of Haryana*[62]:

64. From the above extract from *McDowell & Co. case*[60] 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 legislative choices unless the legislation is otherwise violative 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. Krishna* v. *State of Madras*[63] *declared that the doctrine of due process has no application under the Indian Constitution.* As pointed out by Frankfurter, J., arbitrariness became a mantra.

62 (2016) 2 SCC 445

63 AIR 1957 SC 297 : 1957 Cri LJ 409 : 1957 SCR 399

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47. Judgments delivered by this Court prior to *Maneka Gandhi*[6] rejecting the American due process are enclosed as *Annexure B [Compilation RD Vol. III Tab T]*.

48. Our Court has in the context of Article 19 explained the test of reasonableness in *State of Madras* v. *V.G. Row*[64], *Bishambhar Dayal Chandra Mohan* v. *State of U.P.*[65], *Bennet Coleman & Co.* v. *Union of India*[66]. All that is to be seen, therefore, in the context of Article 21 is as to whether (*1*) law is competently made, (*2*) it has proximate connection with public interest, (*3*) restriction is not excessive.

49. In *V.G. Row case*[64], Patanjali Sastri, C.J. observed as below:

> "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 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." (*Pathumma* v. *State of Kerala*[67])

50. Our courts have repeatedly cautioned against mechanical implantation of American jurisprudence into our Constitution:

(*i*) *Bhikaji Narain Dhakras* v. *State of M.P.*[68], SCR at p. 599

(*ii*) *A.S. Krishna* v. *State of Madras*[63], SCR at p. 412

(*iii*) *Kameshwar Prasad* v. *State of Bihar*[69], SCR at p. 378

(*iv*) *Pathumma* v. *State of Kerala*[67], para 23

64 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966

65 (1982) 1 SCC 39 : 1982 SCC (Cri) 53

66 (1972) 2 SCC 788

67 (1978) 2 SCC 1

68 (1955) 2 SCR 589 : AIR 1955 SC 781

69 1962 Supp (3) SCR 369 : AIR 1962 SC 1166

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(*v*) *Ashoka Kumar Thakur* v. *Union of India*[70], paras 188,190, 252 & 253

51. That as regards the procedure contemplated by Article 21, this Court observed in *Maneka Gandhi case*[6] as follows (para 7):

> 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."
>
> 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."
>
> Krishna Iyer, J.:
>
> "*82*. 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."
>
> "*85*. To sum up, "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece."

52. In view of *Maneka Gandhi case*[6] the principle for testing the law infringing the right to privacy would only be "is the law reasonable, just and fair, and in the public interest". There is no justification for importing compelling State interest and the other principles associated with it.

53. In *Illinois State Board of Elections* v. *Socialist Workers Party*[71] [Compilation RD Vol. II Tab U), Blackmun, J. while concurring, expressed his deep unease with the test of compelling State interest "least drastic means". He observed (p. 244):

> "Although I join the Court's opinion and its strict-scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." See, ante, at 184, 185, and 186. I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing

70 (2008) 6 SCC 1

71 1979 SCC OnLine US SC 25 : 59 L Ed 2d 230 : 440 US 173 (1979)

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process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification".

Some other Judges concurring with majority only adopted the "rational connection with State interest" test.

54. In fact in *Veronica School* v. *Acton*[47] [Compilation RD Vol. II Tab R) , the petitioner's contention for a less intrusive means was not accepted and the Court observed:

"We have repeatedly refuse to declare that only the least intrusive search practicable can be reasonable under the IVth Amendment".

55. In view of the aforesaid judgment the test of compelling State interest adopted in *Gobind* v. *State of M.P.*[7] needs to be discarded.

XII. *Ordered Liberty*

56. Liberty is not licence for anarchy, chaos and disorder. It assumes for its existence an ordered environment. In *Gobind*[7] our Court talked of "Ordered Liberty".

57. To illustrate, issuance of passes or proximity cards for entry in institutions to enable orderly functioning actually enhances exercise of liberty.

Additional submissions

58. Three constitutional constructs are competing for acceptance:

A. Privacy as a general right is intrinsic or implicit part of Article 21. Hence, all infringements must be backed by law which is reasonable, just and fair [*Maneka Gandhi* v. *Union of India*[6], and that brings in substantive due process [*Mohd. Arif* v. *Supreme Court of India*[56]].

B. There is no fundamental right to privacy under the Constitution of India.

C. (*i*) Every privacy concern with its context must first objectively establish itself as a reasonable legitimate expectation of society in the eyes of the court so as to be considered as implicit in Article 21.

(*ii*) It should not be overridden by another person's right under Article 21 or other fundamental right.

(*iii*) Once held as implicit in Article 21, the State must satisfy that infringement is (*i*) by law, (*ii*) law is for a legitimate public purpose, (*iii*) law is reasonable, just and fair. Due process does not apply.

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"Personal liberty" expansively construed

59. In *Satwant Singh Sawhney* v. *Passport Officer*[72], Subba Rao, CJ, referred to the exposition of personal liberty in *Kharak Singh* and held that it includes within itself "all the varieties of rights which go to make up the personal liberties of man" and observed that it "bears the same comprehensive meaning as is given to the expression "liberty" under the US Constitution". Of course in view of *A.K. Gopalan* v. *State of Madras*[73], the liberties enshrined in Article 19 were stated to be excluded. In *Maneka Gandhi*[6], Bhagwati, J. endorsed the aforesaid with a further expansion that "it is not a valid argument to say that the expression personal liberty in Article 21 must be so interpreted as to avoid overlapping between that Article and Article 19". "Personal liberty" was said to be an expression of widest amplitude, and the procedure prescribed by law should be reasonable, just and fair (having regard to the impact of Article 14) (Pr 5 @ p. 280). *With this, right to go abroad was held to be covered by Article 21, but not integral to Article 19(i)(a) in all situations.* Thus, as regards Article 21 it has to be seen whether privacy in general as claimed by the petitioners, is an attribute of life and personal liberty guaranteed by Article 21.

Privacy is a contextually limited and variable concept with an inherent rading characterstic

60. Privacy exists in contrast to "public" or what is made public. As a person moves out of his castle and the *more he opens the gates of his Castle and personhood, his privacy would fade and dissipate.* As the person relates to others, singularly or in groups, his privacy would get diluted. So also when he relates with institutions of all kinds and also the State. This is where the "context" assumes great significance when adjudging whether a claim qualifies to be judicially recognised as a "Life and Personal Liberty" claim under Article 21. It is largely, if not entirely, a relative and variable concept, and hence amorphous. Therefore, it ought not to be recognised as a general concept to be implicit in Article 21.

61. It is submitted that the court should adopt a cautious approach in recognising a particular privacy claim as implicit in Article 21. *The right to privacy is a jurisprudential realm where globally the courts are still groping amidst confusion to ascertain the extent of privacy concerns which should be recognised as a constitutional right.* Many a times, the court has proceeded on an assumption that a claimed right is a fundamental right under the Constitution. It is noted in *Gobind* v. *State of M.P.*[7] [Mr Shyam Divan's Compilation Pg 123] that the US SC recognises that "a right of personal privacy, or a guarantee of certain areas or zones of privacy does exist under the Constitution". (Pr 19). In para 20 they observed that the framers of our

72 (1967) 3 SCR 525 at p. 540 : AIR 1967 SC 1836

73 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383

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Constitution "must have deemed to have conferred upon an individual as against the Government *a sphere he should be let alone*". Yet, in para 23 they observe against a broad definition of privacy as such a right was not explicit in the Constitution. Thus, the court was against a general recognition of a right to privacy. Further, the court in paras 22 and 24 has stressed, as the only suggestion that the "*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*'. They recommend in para 28 that the right to privacy will have to undergo case-by-case development. Yet again, in para 23, the court has emphasised that "*privacy interest in autonomy must also be placed in the context of other rights and values*." [also, in the context of right to life and personal liberty of others, as *'X'* v. *Hospital 'Z'*[52].]

62. It is safer to say that right to privacy as a part of personal liberty under the Constitution may exist in matters of personal intimacies, home and family life, correspondence, personal health. This is what Charles Warren and Louis D. Brandeis intended in their article "The right to privacy". According to them, the idea of privacy has been understood as "the idea of private space in which man may become and remain himself" (Pr. 90 of *Gobind*[7]). All Human Right Conventions ratified by India talk of respecting the private and family life, home and correspondence. The expanse is in narrow confines. Beyond this, complex issues arise in the domain of informational privacy.

63. Thus, despite the expansive approach sanctified by *Maneka Gandhi case*[6] only a certain zone of privacy contextually determined can get incorporated as implicit in Article 21. The concept of privacy being relative and flexible and of an amorphous kind the same as a generalised concept cannot be said to be integral to Article 21.

Right to choice

64. Article 21 includes the right to choose the way of life. Both "life" and "personal liberty" are individually and conjunctively wide enough to include the right of a person to make his choice with regard to his life and his growth and development. He can choose the space in which he wishes to operate and the manner in which he will operate. It is another matter that the range and extent of choice would depend upon the alternatives which are available considering the stage of development of the society. There is therefore a distinction between the right to choose and the extent of choice. The ability to make the choice would also depend upon the ability of the person to choose and this will include the financial abilities. Equally, the person can choose to act in private space or in public space. He may choose to be "let alone" and be in privacy or he may choose to step out in the open and public. The submission is that the making of choice is distinct from privacy. The right to choose is directly integral to and intrinsic right to life and personal

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liberty in Article 21 [*I.R. Coelho* v. *State of T.N.*[74]]. The petitioner's contention that right to choice or decisional autonomy is contained in right to privacy is clearly erroneous. Right to choice cannot be located in privacy. It is another matter that one can make decisions or choice while being by himself.

Principle of limited purpose

65. In the domain of informational privacy, question arises as to what extent there would be a valid privacy claim implicating "life or personal liberty" when a person chooses to disclose personal information to a third party or several other parties with whom he relates to. It is submitted:

(*i*) Where the information is merely the basic identity information there would be no claim of privacy rights whatsoever under Article 21. Such information is part of identification information and is expected to be commonly and generally disclosed in human relation in the present day society.

(*ii*) Information which is more than basic identity information and pertains to other aspects of personal identity and the disclosure had been made by the person to another in a relationship of confidentiality, a presumption of limited purpose disclosure preventing further transference or utilisation, could be set to arise and implicate Article 21, provided that the further disclosure or transference is likely to cause significant injury or stigma. (*iii*) Where the second kind of information is transmitted to another in a relationship which is not involving confidentiality then the further transference and utilisation of the information, as such or in an aggregated and analysed form, would not involve any implication of Article 21. Non-confidential relationship does not, *without more*, involve any assumption that it has been given for a limited purpose. This is specially so if the transference has been made unconditionally.

(*iv*) Where personal information has been transmitted to the public at large or to a considerably large number of persons/institutions/service providers, then also the claim of privacy would fade out. The concept of privacy is not only relative and contextual but it also has an inherent fading attribute. The more the personal information goes into the public, the more will the informational privacy get diluted and eventually will fade out.

66. In the aforesaid circumstances an arching principle of limited purpose disclosure if at all, should be drawn only with respect to the arch of sensitive personal information transmitted to another person in a confidential relationship disclosure of which could have a real likelihood of causing significant harm or injury. It should be an important condition attached to the

74 (2007) 2 SCC 1

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principle that the information can be further transferred or utilised provided such transference or utilisation is not likely to cause any significant injury or stigma.

67. It is also important that no overarching principle be devised which obstructs the growth of overall knowledge fund available with the society. Data or even meta data needs to be aggregated analysed to produce further knowledge for the benefit of the society. That enriches "life" and "personal liberty" both.

68. We are in an informational, knowledge and technological era. Technology with artificial intelligence is growing rapidly. It helps, facilitates and empowers. We cannot stand with our backs towards the growth of technology. The approach to growth of technology, information and knowledge cannot be allowed to be ostrich-like or Luddite (fear stricken). While we may be entitled to protect ourselves from significant harm and or injury, there should be no obstruction to the use of information collected.

69. Drawing of an overarching principle based on limited purpose disclosure has serious problems:

(*i*) It creates an assumption of limited purpose even where the information has been parted unconditionally and voluntarily.

(*ii*) It creates an assumption of limited purpose disclosure even where a person has freely and deliberately traded off the personal information for superior benefits.

(*iii*) It would actually infringe on the person's right to choice.

(*iv*) It is impossible to implement such a principle for two reasons.

(*a*) The tremendous growth of technology is likely to present a scenario where the computer collects, aggregates and analyses then transmits information simultaneously.

(*b*) The servers may well be located outside India, the aggregation, analysis and utilisation may happen abroad. There is no way to control it. Horizontal regulation is not possible.

(*v*) It also needs to be borne in mind that the overarching principle is very likely to be exploited by criminals, corrupt and terrorist. As an illustration a person having committed a crime may disclose the information confidentially to his close circle of friends or a criminal having got injured while committing a crime approaches a doctor or hospital (which is in confidential domain) then the commission of crime which has become known to a third party cannot be transferred to the State. Identically, a minor rape victim may disclose the information to a teacher would be entitled to transfer the information not only to the family, crime agencies of the State. There can be such instances of disclosure of crime in the context of money laundering and hoarding of black money.

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70. Therefore, nature of information and causation of harm or injury are important aspects and no absolute overarching principles of limited purpose should be devised.

71. Requirement of consent for further transfer and utilisation of personal information, given knowingly and unconditionally, particularly in a non-confidential commercial relationship extends "ownership" idea into a parted information which post-parting assumes property dimensions. This does not flow from privacy or choice.

72. Also notable is the fact that worth of parted information arises upon aggregation and the aggregated information is not the same thing as information of individual received.

Kyllo respects "Reasonable" expectation

73. The test of reasonable expectation of privacy has not been done away with. It continues to be applied consistently in the US. Justice Scalia speaking for the majority in *Kyllo* v. *United States*[75] said that they cannot refine the test laid down in *Katz*[11] but when it comes to searches in homes this test cannot take away what had been traditionally been protected by IVth Amendment.

74. The reasonable expectation of privacy test has been followed consistently even after *Kyllo*[75]. Justice Scalia has himself applied the reasonable expectation test in his subsequent judgments both while speaking for the majority or in dissent. Some of them are as follows:

(*i*) *Samson* v. *California*[76]

(*ii*) *Safford Unified School District* v. *Redding*[77]

(*iii*) *Ontario* v. *Quon*[78]

(*iv*) *United States* v. *Jones*[79]

(*v*) *Maryland* v. *R.*[80]

(*vi*) *City of Los Angeles* v. *Patel*[81]

75 2001 SCC OnLine US SC 61 : 150 L Ed 2d 94 : 533 US 27 (2001)
76 2006 SCC OnLine US SC 57 : 547 US 843 (2006)
77 2009 SCC OnLine US SC 81 : 557 US 364 (2009)
78 2010 SCC OnLine US SC 71 : 560 US 746 (2010)
79 2012 SCC OnLine US SC 13 : 565 US 400 (2012)
80 186 L Ed 2d 1 : 569 US __ (2013)
81 576 US __ (2015)

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(The majority judgment by Sotomayer, J. examined the question whether the warrantless search of records of motels was reasonable and whether it violated IVth Amendment. Justice Scalia in his dissenting judgment held that industry such as motels/inns, etc are highly regulated industries and those who enter such industries have a lesser expectation of privacy.)

IX. Mr Gopal Sankaranarayanan, Advocate, for the respondents

1. The issue

1.1. This Bench of nine Hon'ble Judges has been constituted to ascertain the correctness of the judgments of this Hon'ble Court in *M.P. Sharma*[1] and *Kharak Singh*[2], vis-à-vis their observations concerning the fundamental right to privacy. The petitioners have, inter alia, argued that neither of these judgments deal with the issue of privacy; that the observations therein are obiter; that even if it were part of the ratio, that was in the context of the *Gopalan* compartmentalisation, and in any case, ought to be overruled. In light of these submissions and those made by the respondents, there appear to be three alternatives available to this Hon'ble Court:

1.1.1. To decide that *M.P. Sharma*[1] and *Kharak Singh*[2] are correctly decided *and* that there is no fundamental right to privacy.

1.1.2. To decide that *M.P. Sharma*[1] and *Kharak Singh*[2] are correctly decided *but* as per an earlier legal regime that no longer prevails, and that there is a fundamental right to privacy.

1.1.3. To decide that *M.P. Sharma*[1] and *Kharak Singh*[2] are correctly decided *regardless* of the legal regime, and that only certain aspects of the right to privacy can be protected as fundamental rights, while others are protected as legal rights.

2. The questions

2.1. What is the scope of the right to privacy? How is it to be defined?

2.2. How much of this right to privacy can be elevated to the status of a fundamental right? Are there aspects which are protected as a legal right, without more?

2.3. How would such a fundamental right to privacy be controlled? What tests would be made applicable under Article 21?

2.4. What are the consequences of a declaration of a right as a fundamental right? What obligations follow on the State, and if at all, on non-State actors? Can such a right be waived? Where aspects of these rights are protected by law, what else would follow if they are raised to the level of a fundamental right?

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

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3. The propositions

3.1. *M.P. Sharma*[1] and *Kharak Singh*[2] are correctly decided. The findings concerning privacy being a fundamental right are part of the ratio of these two judgments.

3.2. There has been no change in the constitutional context from *Gopalan*[3] through *Cooper*[4] & *Maneka*[5] till now.

3.3. Privacy is incapable of precise definition and ought not to elevated in all aspects, dimensions and sub-species to the level of a fundamental right.

3.3.1. The *fundamental aspect*: 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.

3.3.2. The *legal aspect*: Those facets which are not protected by Article 21 but have statutory and regulatory protection.

3.3.3. The *unprotected residue*: Those facets which have sociological and philosophical underpinnings but are not presently subject to protection either by Article 21 or by statute.

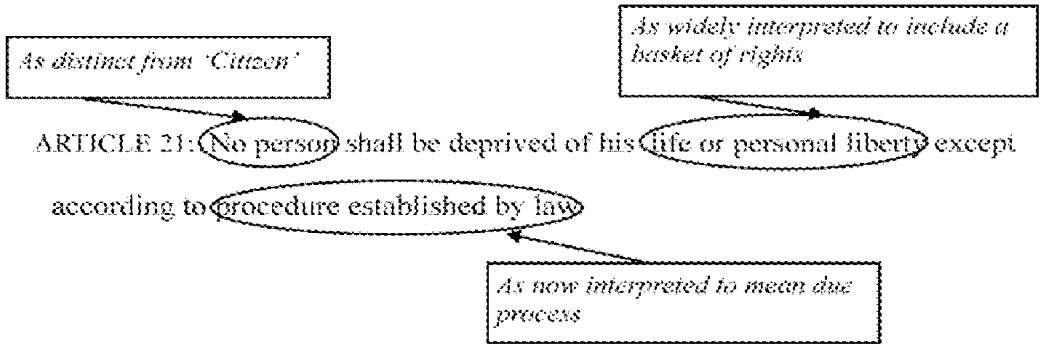
3.4. Two aspects that need to be considered on recognising aspects of the rights to privacy are:

3.4.1. They cannot be waived; and

3.4.2. The test to protect against their invasion is whether such State action is just, fair and reasonable (and not to concern itself with the interest of the State);

3.5. The international legal regime is no different from the Indian experience, but caution ought to be exercised in importing approaches out of context.

A brief backdrop on interpretation



3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : (1950) 51 Cri LJ 1383

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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Detailed submissions

3.1. *M.P. Sharma*[1] & *Kharak Singh*[2] are correctly decided

3.1.1. *M.P. Sharma* v. *Satish Chandra*[1]

3.1.1.1. In the context of search warrants, the Court first considers the proposition placed before it in the following words:

> "It is urged that both search and seizure of a document and a compelled production thereof on notice or summons serve the same purpose of being available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force and has the apparent support of the Supreme Court of the United States of America in *Boyd* v. *United States*[6]."

3.1.1.2. In order to understand the context of *Boyd*[6], the Court then proceeded to extract the 4th and 5th Amendments to the Constitution and then extracted the following phrase from the majority judgment:

> "The compulsory production of a man's *private* papers is search and seizure."

and again thus

> "We have been unable to perceive that the seizure of a man's *private* books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

3.1.1.3. The judgment then proceeds in noting that the majority held that the order for production was vulnerable not only on the ground of the 5th Amendment (self-incrimination) but also the 4th Amendment (illegal search). It then rejects the applicability of *Boyd*[6] to the Indian context and concludes as follows:

> "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*."

3.1.1.4. The "totally different fundamental right" referred to here is obviously Article 20(3) which was relied upon by the petitioner in the case. That in itself makes no difference to the present case where the petitioners contend that the right to privacy is located in Part III of the Constitution. The verdict in *M.P. Sharma*[1] directly negates such a contention, having concluded that the fundamental right to privacy is not recognised in our Constitution.

6 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)

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***3.1.2. Kharak Singh* v. *State of U.P.*[2]**

3.1.2.1. The majority judgment penned by Ayyangar, J proceeds to deal with the challenge to Regulation 236 of the U.P. Police Regulations which had 6 sub-clauses. The Court first records that the challenge raised by the petitioner is also on violation of personal liberty as enshrined in Article 21 and then proceeds to deal with each of the regulations seriatim.

3.1.2.2. In the context of clause (*b*) which dealt with nocturnal domiciliary visits, the Court adverted to the words of Field, J in *Munn* v. *Illinois*[7] speaking in the context of the due process clauses in the 5th and 14th Amendments to say:

> "By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits 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 … By the term liberty, as used in the provision something more is meant than mere freedom from physical restraint or the bounds of a prison."

3.1.2.3. The Court then states that our own Article 21 must be given the widest interpretation and concludes that "life" be given the same interpretation as that given by Field, J. Then, in order to interpret "personal liberty", the Court refers to Frankfurter, J in *Wolf* v. *Colorado*[8], where he said:

> "The security of one's *privacy* against arbitrary intrusion by the police … is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples … 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."

3.1.2.4. It is therefore apparent that the question of privacy squarely arose in the context of interpreting the "personal liberty" clause in the light of American case law. The judgment then draws a contrast after extracting the 4th Amendment to say that "our Constitution does not in terms confer any like Constitutional guarantee".

7 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)

8 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)

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3.1.2.5. This is precisely why, immediately thereafter, when the validity of Clauses (*c*), (*d*) & (*e*) dealing with shadowing and reporting the movements of suspects are concerned, the Court says:

> "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.*

3.1.2.6. The very basis for the majority sustaining Clauses (*c*), (*d*) & (*e*) is that there is no right to privacy in our Constitution. This is the ratio of the ruling, absent which there is no rationale to save the impugned clauses.

3.1.3. Admittedly, several judgments of this Hon'ble Court have attributed the genesis of the discussion on the right to privacy to these two judgments. Hence, there ought not to be much doubt that *indeed* they did deal with the issue. The only misdirection appears to be what the ratio was attributed to be.

3.2. There has been no change in the constitutional context from Gopalan till now

3.2.1. Mr Subramanium's written submissions commence with the following paragraph:

> "It is submitted that the decisions in *M.P. Sharma* v. *Satish Chandra*[1] and *Kharak Singh* v. *State of U.P.*[2] *to the extent they interpret fundamental rights on a distinctive basis* (as recognized in *A.K. Gopalan* v. *State of Madras*[3], are no longer good law. In view of the fact that *A.K. Gopalan case*[3] stands overruled in *R.C. Cooper* v. *Union of India*[4], it follows a fortiori that neither of the above decisions are effective."

3.2.2. It has unfortunately been accepted without question that:

(*a*) *A.K. Gopalan*[3] had decided that all fundamental rights are to be decided on a distinctive basis; and

(*b*) *R.C. Cooper*[4] laid down new law in overruling this proposition of *Gopalan*[3].

3.2.3. Shah, J. speaking for the majority of 10 Judges in *R.C. Cooper*[4] said (and this has been reproduced in Para 9 of Mr Subramanium's submissions):

> "The majority of the Court (Kania, C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.), held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article".

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As a consequence, the judgment went on to conclude that:

> "In our judgment, the assumption in *A.K. Gopalan case*[3] that *certain articles in the Constitution exclusively deal with specific matters* and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."

3.2.4. It is doubtless that on the latter proposition (object vs. effect), *Gopalan* was correctly overruled by *Cooper*[4]. However, on the former (individual rights being complete codes), there appears to be a doubt whether the premise of Shah, J.'s majority judgment is correct. A careful perusal of the individual judgments in *Gopalan*[3] would show that in fact only one of the Judges (Mahajan, J.) had *agreed with the Attorney General's complete code argument*.

3.2.5. The following are the relevant extracts from the judgments in *Gopalan*[3]:

> Kania, C.J.: The learned Attorney General contended that the subject of preventive detention does not fall under Article 21 at all and is covered wholly by Article 22. *According to him, Article 22 is a complete code. I am unable to accept that contention.* [Para 26/P.115]
>
> Fazl Ali. J.: *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. [Para 58]
>
> Sastri, J.: *The learned Attorney General contended that Article 21 did not apply to preventive detention at all, as Article 22 clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view*. [Para 133/ P. 207]
>
> Das, J.: *The learned Attorney General, on the other hand has at one stage of his argument, urged that Article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by Articles 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also.* [Para 291/P. 324]

3.2.6. It is thus evident that the majority in *Gopalan*[3] did not say what the majority in *Cooper*[4] erroneously presumed they did i.e. that the complete code theory was accepted and applied. In fact, on the very facts of the case,

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the detention of the petitioner was examined with reference to Article 22 *and* Article 21 with the latter taken to supplement the former. If the above complete code proposition was correct, there would have been no reason for *Gopalan*[3] judgment to become the *cause celebre* in our constitutional history for its rejection of the due process argument.

Note:—Advertence may also be made to the fact that the arguments on Article 19 were countenanced but rejected, not because of the complete code theory, but because reading Articles 19 and 21 as overlapping would cause the entire penal law to become vulnerable, leading to chaos.

3.2.7. Despite the error, *Cooper*[4] has been repeatedly referred to as having overruled *Gopalan*[3] on the complete code theory, most notably in *Sambhu Nath Sarkar* v. *State of W.B.*[9] and *Khudiram Das* v. *State of W.B.*[10] The same propositions were followed without question by the majority in *Maneka Gandhi* v. *Union of India*[5] speaking through Bhagwati, J:

> "The decision in *A.K. Gopalan case*[3] gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to the protection of distinct rights, but this theory was overturned in *R.C. Cooper case*[4]" [Para 5]

However, it was Kailasam, J. in that very case who entered upon a detailed analysis of the *Gopalan*[3] and *Cooper*[4] verdicts and stated as follows:

> "We are not concerned in this case as to whether the decision in *Bank Nationalisation case*[4] is in the nature of obiter dicta so far as it held that Articles 19(1) and 31(2) are interrelated. But it is necessary to state that the decision proceeded on some erroneous assumptions. At p. 571 of *Bank Nationalisation case*[4] it was assumed : "The majority of the Court (Kania, C.J. and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.) held that Article 22 being a complete code relating to preventive detention the validity of an order of detention must be determined strictly according to the terms and within the four corners of that article." This statement is not borne out from the text of the judgments in *Gopalan case*[3]. ... The Court has not considered the reasoning in *Gopalan case*[3] and overruled it." [Para 158]

3.2.8. It is submitted that in as many as 96 cases from 1950 to 1970, challenges were tested against multiple fundamental rights, without any cloistered approach as has been attributed to the *Gopalan*[3] dictum. It was, therefore, an error on the part of the *Cooper*[4] majority to presume that for the previous two decades the law had been to exercise judicial review on individual fundamental rights without going further.

3.2.9. As a result of the above, the proposition put forward by the petitioners that in view of *Cooper*[4] overruling *Gopalan*[3], the judgments in *M.P. Sharma*[1] and *Kharak*[2] are no longer good law does not hold.

9 (1973) 1 SCC 856 : 1973 SCC (Cri) 618
10 (1975) 2 SCC 81 : 1975 SCC (Cri) 435

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3.2.10. The above submission is quite apart from the fact that the judgments in *M.P. Sharma*[1] and *Kharak*[2] dealt with the *content* of "life and personal liberty" in Article 21 and did not concern itself with the "*complete code*" theory. In fact, this is even acknowledged by Bhagwati, J. in *Maneka Gandhi*[5] in the following words:

> "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*[3] 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 Articles 19 and 21. It was in *Kharak Singh* v. *State of U.P.*[2] 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." [Para 5]

Without prejudice….

3.3. Only certain aspects of the right to privacy can be elevated to fundamental right status.

3.3.1. There does not appear to be any cavil with the fact that a right to privacy exists. However, privacy being an omnibus term which the petitioners have admitted they cannot define, great care must be taken before subjecting the entire genus of privacy rights to a hallowed protection.

3.3.2. Privacy, not strictly being a jural term, appears across many disciplines concerning man—ethics, philosophy, psychology and medicine. Notwithstanding the various forays made in the legal field into understanding its full import, some assistance could be received from the classification available in the medical field. The Winter 2016 Edition of *Stanford Encyclopedia of Philosophy*, in its chapter entitled "Privacy and Medicine" classifies privacy into 5 groups:

(*i*) *Informational privacy* (confidentiality, data, secrecy of diagnosis, anonymity while testing, IVF)

(*ii*) *Physical privacy* (solitude for the sick and dying, bodily modesty, non-consensual testing and imaging)

(*iii*) *Associational privacy* (regulating visitors, levels of access)

(*iv*) *Proprietary privacy* (blood, tissue samples, fluids)

(*v*) *Decisional privacy* (birth control, abortion, gender selection, right to refuse care)

3.3.3. Each of the above groups would equally apply to any aspect of human conduct, even outside the medical realm. In India, many of these are

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protected or regulated by law, with restrictions on their invasion, conditions for their use and liabilities for transgressions. Several other aspects have been specifically recognised as part of the phrases "life" and "personal liberty" under Article 21 of the Constitution, thereby according to them the status of a fundamental right:

3.3.3.1. *The fundamental rights*

Over the course of the last 67 years, Article 21 has been gradually expanded to include a whole host of rights that are essential to individuals. Particularly, the phrase "personal liberty" includes within it the aspects of autonomy, self-determination and personhood. When the right to health, shelter and education are among the dozens of rights that have been read into this compendious term, very little remains, and which probably ought not to be raised to that standard by way of the indirect acceptance of the word "privacy". It would be best to leave the specifics to a case-by-case determination.

In addition, it may be relevant to consider that in the decisions where a right to privacy has been specifically considered by this Hon'ble Court, the contexts are extremely limited and does not encompass the entire width of privacy as is being presently canvassed.

3.3.3.2. *The legal rights*

As correctly submitted by the petitioners, there are several laws and regulations in place which perceive the necessity to protect the privacy of individuals. These provisions, including the Regulations made under the Aadhaar Act, 2016 itself recognise the right to privacy and acknowledge the fact that it requires protection. However, the legislature in its wisdom has chosen certain specific categories of privacy rights and afforded them statutory security, which includes procedural protections and penal consequences in the event of breaches.

It is of note that even the 271st Report of the Law Commission entitled "Human DNA Profiling" submitted as recently as 26-7-2017 acknowledges the existence of such a right very clearly. In its conclusions while enclosing the DNA Based Technology (Use and Regulation) Bill, 2017, the Commission states:

> "**7.5** The Bill of 2017 provides provisions intended to protect the right to privacy. The mechanism provided permits for processing of DNA samples only for 13 CODIS loci which would not violate in any way the privacy of a person and as a result will never go beyond identification of a particular person. The strict adherence to 13 CODIS loci will eliminate the apprehension of revealing genetic traits."

3.3.3.3. It is submitted that the residue of the privacy rights that do not at the moment have protection as fundamental rights via judicial dictum or as legal rights by legislation will have to be specifically enunciated and brought forward in a fit case in order to secure the protection of this Hon'ble Court under Article 21.

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3.3.4. As a result, it is submitted that a careful analysis would be required in specific cases to accord the protection of Article 21 to the various species of privacy rights.

3.4. Once so declared, the fundamental right must withstand the established constitutional norms

3.4.1. Waiver

3.4.1.1. It has been well-established since the celebrated decision in *Basheshar Nath* v. *CIT*[11] that fundamental rights cannot be waived. In fact, the enunciation can be traced back to the following passage from the majority judgment of Mahajan, C.J. in *Behram Khurshid Pesikaka* v. *State of Bombay*[12]:

> "Again, we are not able to subscribe to the view that in a criminal prosecution it is open to an accused person to waive his constitutional right and get convicted. A reference to *Cooley's Constitutional Limitations*, Vol. I, p. 371, makes the proposition clear. Therein the learned professor says that a party may consent to waive rights of property, but the trial and punishment for public offences are not within the province of individual consent or agreement. In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory. The learned Attorney General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. 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. Reference to some of the articles, inter alia, Articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Articles 20 and 21."

11 1959 Supp (1) SCR 528 : AIR 1959 SC 149

12 (1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215

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3.4.1.2. While in *Basheshar Nath*[11], Bhagwati and Subba Rao, JJ. adopted the position that no fundamental right could be waived, Das and Kapur, JJ. restricted that principle only to Article 14. However, in *Olga Tellis* v. *Bombay Municipal Corpn.*[13], SCC at paras 27-29, the Constitution Bench applied the principle to Article 21 and the right to dwell on pavements. This position has remained the law of the land till date without any detraction.

3.4.1.3. This being the position, if this Hon'ble Court were to hold that the right to privacy *as a whole* were a fundamental right, then it would not be possible to waive any part of it. This would lead to the following complications:

(*i*) All the statutory provisions that deal with aspects of privacy as detailed in *Appendix 5* would be vulnerable.

(*ii*) 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.

(*iii*) 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.

3.4.1.4. As a consequence, it is submitted that the best approach would be to recognise that certain aspects of the right to privacy may be a part of Article 21, but that they would be determined on a case by case basis.

3.4.2. The Article 21 test

3.4.2.1. During the arguments before this Hon'ble Court, a question has arisen regarding the test to be applied to a right that emanates from one or more of the fundamental rights and is then located in Article 21.

3.4.2.2. The opinion of the majority in *Maneka Gandhi*[5] was that the procedure prescribed by law has to be "fair, just and reasonable, not fanciful, oppressive or arbitrary". It was precisely this test that was applied in *Mithu* v. *State of Punjab*[14] to strike down Section 303 of the Penal Code [Paras 6 &23 per Chandrachud, C.J. and Para 24 per Reddy, J)

3.4.2.3. It is submitted that merely because privacy is traceable to Articles 14 and 19 of the Constitution does not automatically qualify it to be a fundamental right. This is in fact the view of the majority in *Maneka*[5], speaking through Bhagwati, J. in the following words:

"**29**. …It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may

13 (1985) 3 SCC 545

14 (1983) 2 SCC 277 : 1983 SCC (Cri) 405

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not be possible otherwise to effectively exercise that fundamental right. *The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset.* What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.

33. We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right."

3.4.2.4. It is evident, therefore, that it is only the core (the umbra) of the facilitating unnamed right which would be recognised as protected by Article 21 and not what has been often referred to as the *penumbral* right of privacy.

3.4.2.5. It is submitted that the concepts of "legitimate State interest" and "compelling State interest" are concepts alien to the Indian constitutional scheme and therefore find no mention within it. It would be inappropriate to place an additional burden on the State by testing whether the State's interest is at all involved—a question that is in fact properly left to the legislature as the people's representative. For example, if, based on military intelligence that enemy incursions are possible at the border, the State enacts law mandating border residents to compulsorily register themselves at the district headquarters, the legitimacy of the State's action ought not to be examined by this Hon'ble Court.

3.4.2.6. Thus, if and when any aspect of privacy is read into Article 21, the only test that would apply is the one enunciated in *Maneka*[5] and followed till date.

3.5. The international legal regime is as limited as India (if not more so) in the recognition of a fundamental right to privacy

3.5.1. It is clear that the American case law has evolved in a completely different context, hailing from a bare bones constitutional text with a context-specific interpretation emanating from its Supreme Court. The decisions which have touched upon privacy over the last century fall broadly into the few categories of surveillance, search & seizure, bodily autonomy and sexual choice. It is difficult to conclude from these few instances that a wide right to privacy exists in the United States.

3.5.2. The House of Lords in *Wainwright* v. *Home Office*[15] was very clear in enunciating that there existed no common law right to privacy and no

15 2003 UKHL 53 : (2004) 2 AC 406 : (2003) 3 WLR 1137 (HL)

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remedy could be granted in tort. In fact, it was specifically stated that the remedies would lie in other actions (battery, trespass, etc.) or via statutory remedies provided in the Interception of Communications Act, 1985 and Police Act, 1997. This is not unlike the Indian context as has been detailed above.

3.5.3. Care must be taken not to confuse the issue of the right to privacy as a tort as against its existence as a fundamental right. Even the celebrated Harvard article of Warren and Brandeis dealt exclusively with the existence of the private right with no advertence to its public law element.

3.5.4. It is submitted that the foreign experiences in the context of the right to privacy pale in significance to the robust development of constitutional law in India. It would be apposite to apply the dicta of the Indian courts which reflect the Indian societal experience rather than to import without a context.

X. Dr Arghya Sengupta, Advocate, for the respondents

1. These written submissions are presented for the kind perusal of this Hon'ble Court.

2. The reference order dated 18-7-2017[1] from which the present proceedings arise, states:

> "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* v. *Satish Chandra*[2], by an eight-Judge Constitution Bench, and also, in *Kharak Singh* v. *State of U.P.*[3] by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position."

3. If the Court finds the two aforementioned cases correctly decided, then no question of a fundamental right to privacy arises in the first place. However, if the Court finds the two cases wrongly decided or is able to distinguish them, the Court would have to lay down whether there is a right to privacy in Part III of the Constitution; if so, what are its contours and if not, then whether any aspects of privacy are already protected by Part III.

4. Without prejudice to the arguments made earlier regarding the correctness of *M.P. Sharma* v. *Satish Chandra*[2] ("*M.P. Sharma*") (8 Judges)

1 *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 641
2 1954 SCR 1077 : AIR 1954 SC 300 : 1954 Cri LJ 865
3 (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329

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and *Kharak Singh* v. *State of U.P.*[3] ("*Kharak Singh*") (6 Judges), our submission is as follows:

4.1. No general fundamental right to privacy ought to be read in to Part III of the Constitution:

4.1.1. The United States Supreme Court, on whose judgments, reliance has been placed by the petitioners, no longer uses the right to privacy to test laws that might have been tested on this ground, were it a well-established part of American constitutional law.

4.1.2. Reading in a right to privacy from certain privacy interests that may inhere in Part III of the Constitution is conceptually unsound.

4.1.3. An analysis of existing case law decided on the ground of right to privacy will demonstrate that they either relate to protections already granted under Article 21 or Article 19 or should not be protected under the Constitution at all.

4.2. Several concerns relating to privacy breaches raised by the petitioners are the rightful subject-matter of a data protection law:

4.2.1. Data protection and privacy per se are overlapping but distinct issues.

4.2.2. Only a comprehensive data protection legislation can effectively address such concerns.

4.2.3. The Government of India is alive to the need for such a law.

4.1. ***No general fundamental right to privacy ought to be read in to Part III of the Constitution***

4.1.1. ***The United States Supreme Court, on whose judgments, reliance has been placed by the petitioners, no longer uses the right to privacy to test laws that might have been tested on this ground, were it a well-established part of American constitutional law.***

5. The petitioners have placed reliance on the decision of the United States Supreme Court in *Katz* v. *United States*[4] ("*Katz*") to contend that the United States Constitution recognises a right to privacy. In *Katz*[4], the question before the Supreme Court was whether eavesdropping on a conversation through a device placed outside a public phone booth was an unreasonable search and seizure offending the Fourth Amendment. The Fourth Amendment to the US Constitution provides,

> "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." (emphasis supplied)

4 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 389 US 347 (1967)

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6. Till *Katz*[4], it was held that such protection was only available for personal property, akin to common law trespass (see Scalia, J.'s opinion in *United States* v. *Jones*[5], for precedents). In *Katz*[4], it was held by Potter Stewart, J. (at pp. 350-352):

> "In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' *Secondly, the Fourth Amendment cannot be translated into a general constitutional right to privacy. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.*"
>
> "... But this effort to decide whether or not a given "area", viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. *For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.* See *Lewis* v. *United States*[6]; *United States* v. *Lee*[7]. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States*[8]; *Jackson, ex p*[9].
>
> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye-it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen..." (emphasis supplied).

7. Thus in *Katz*[4], it was held that privacy protection in the Fourth Amendment extended to public places, moving beyond common law trespass, but did not entail a general right of privacy. It is instructive to note that *Katz*[4] was decided two years after *Griswold* v. *Connecticut*[10], widely viewed as first incorporating the right to privacy into US constitutional law. In *Griswold*[10], the question before the Court was whether a Connecticut

5 181 L Ed 2d 911 : 565 US 400 (2012)
6 1966 SCC OnLine US SC 177 : 17 L Ed 2d 312 : 385 312 : 385 US 206 at p. 210 (1966)
7 1927 SCC OnLine US SC 147 : 71 L Ed 1202 : 274 US 559 at p. 563 (1927)
8 1960 SCC OnLine US SC 125 : 4 L Ed 2d 1688 : 364 US 253 (1960)
9 24 L Ed 877 : 96 US 727 at p. 733 (1877)
10 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965)

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statute that forbade the use of contraceptives by married couples was unconstitutional. It was struck down by the Court ostensibly for violating the right to privacy. Douglas, J. speaking for the Court held (at pp. 485-486),

> "*The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees*. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*[11]. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."
>
> (emphasis supplied)

8. However Stewart, J., who provided the opinion for the Court two years later in *Katz*[4], dissented. He said (at p. 530),

> "What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

9. It is thus clear that Justice Stewart's dissenting view in *Griswold*[10] decided in the context of the Fourteenth Amendment and the right to privacy became the controlling view of the Court when it came to the Fourth Amendment, viz. that this Amendment, or the Constitution generally did not espouse any general right to privacy.

10. The law relating to a general right to privacy appeared to be reinstated in the seminal decision of the Supreme Court in *Roe* v. *Wade*[12]. In *Roe*[12], the question before the Court was whether a Texas statute which criminalised abortion except for limited grounds relating to the health of the

11 1964 SCC OnLine US SC 112 : 12 L Ed 2d 325 : 377 US 288 at p. 307 (1964)

12 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)

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mother was constitutional. It was struck down with the majority holding (at p. 154),

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."

11. Interestingly, Stewart, J. wrote a concurring opinion in *Roe* v. *Wade*[12] which held that the Texas statute is unconstitutional because it violated the due process clause since a decision fundamental to the individual such as whether to bear or beget a child is central to her liberty, much more than whether children should be allowed to learn a foreign language or not (earlier held to be constitutionally protected). The opinion strikes down the statute for violating liberty in the Fourteenth Amendment and not any general right to privacy. He holds (at pp. 168-170),

> " "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents* v. *Roth*[13]. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schware* v. *Board of Bar Examiners*[14]; *Pierce* v. *Society of Sisters*[15]; *Meyer* v. *Nebraska*[16]. *Shapiro* v. *Thompson*[17]; *United States* v. *Guest*[18]; *Carrington* v. *Rash*[19]; *Aptheker* v. *Secy. of State*[20]; *Kent* v. *Dulles*[21]; *Boilling* v. *Sharpe*[22]; *Truax* v. *Raich*[23].
>
> *Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving* v. *Virginia*[24]; *Griswold* v. *Connecticut*[10]; *Pierce* v. *Society of Sisters*[15]; *Meyer* v. *Nebraska*[16]. See also *Prince* v. *Massachusetts*[25]; *Skinner* v. *Oklahoma*[26]. As recently as last Term, in *Eisenstadt* v. *Baird*[27],

13 1972 SCC OnLine US SC 174 : 33 L Ed 2d 548 : 408 US 564 at p. 572 (1972)
14 1957 SCC OnLine US SC 56 : 1 L Ed 2d 796 : 353 US 232 at pp. 238-39 (1957)
15 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 268 US 510 at pp. 534-35 (1925)
16 1923 SCC OnLine US SC 150 : 67 L Ed 1042 : 262 US 390 at pp. 399-400 (1923)
17 1969 SCC OnLine US SC 82 : 22 L Ed 2d 600 : 394 US 618 at pp. 629-30 (1969)
18 1966 SCC OnLine US SC 59 : 16 L Ed 2d 239 : 383 US 745 at pp. 757-58 (1966)
19 1965 SCC OnLine US SC 33 : 13 L Ed 2d 675 : 380 US 89 at p. 96 (1965)
20 1964 SCC OnLine US SC 163 : 12 L Ed 2d 992 : 378 US 500 at p. 505 (1964)
21 1958 SCC OnLine US SC 113 : 2 L Ed 3d 1204 : 357 US 116 at p. 127 (1958)
22 1954 SCC OnLine US SC 45 : 98 L Ed 884 : 347 US 497 at pp. 499-500 (1954)
23 1915 SCC OnLine US SC 225 : 60 L Ed 131 : 239 US 33 at p. 41 (1915)
24 1967 SCC OnLine US SC 152 : 18 L Ed 1010 : 388 US 1 at p. 12 (1967)
25 1944 SCC OnLine US SC 27 : 88 L Ed 645 : 321 US 158 at p. 166 (1944)
26 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 at p. 541 (1942)
27 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 405 US 438 at p. 453 (1972)

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> we recognised 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. That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce* v. *Society of Sisters*[15], or the right to teach a foreign language protected in *Meyer* v. *Nebraska*[16]." *Abele* v. *Markle*[28].
>
> *Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment*."
>
> (emphasis supplied)

12. It is clear that Justice Stewart's view protects the interests of the pregnant woman to bear or beget a child, not as an instance of a general right to privacy not found in the constitutional text, but an instance of liberty that is worthy of protection in the Fourteenth Amendment to the Constitution. It is apparent from the future development of case law in the United States that this is the prevalent point of view. This will become apparent from a discussion of three cases below.

13. In *Whalen* v. *Roe*[29], the issue before the Supreme Court was whether a New York Statute that required disclosure of certain personal information relating to patients and doctors to whom a particular scheduled drug, which had both a lawful and unlawful market, was prescribed, in order to check abuse, was constitutional. Upholding Justice Stewart's reasoning, it was held by the Court: (at pp. 598-600)

> "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*. Appellees argue that both of these interests are impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health

28 351 F Supp 224 at p. 227 (Conn 1972)

29 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977)

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is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation." [emphasis supplied]

The Court speaking through Stevens, J. held: (at pp. 603-604)

"We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.[30]"

14. In fact, Justice Stevens has consistently advocated the return to a wider understanding of 'liberty' in the Fourteenth Amendment in place of reading in new rights such as privacy (the words 'liberty', 'freedom' and 'autonomy' entail the same idea and are used interchangeably). In *Fitzgerald* v. *Porter Memorial Hospital*[31], when he was a Judge in the US Court of Appeals in the Seventh Circuit he held (in a case that asked for a husband's right to be in the hospital room at the time of delivery of his baby) (at pp. 719-720),

"5. Plaintiffs characterize the right they assert as an aspect of the "right of marital privacy." The source of its constitutional protection is either the so-called penumbra of various provisions of the Bill of Rights or the word "liberty" in the Due Process Clause of the Fourteenth Amendment.

6. *It is somewhat unfortunate that claims of this kind tend to be classified as assertions of a right to privacy. For the group of cases that lend support to plaintiffs' position do not rest on the same privacy concept that Brandeis and Warren identified in their article in the 1890 Edition of the Harvard Law Review. These cases do not deal with the*

30 "The Roe appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in *Terry* v. *Ohio*, 392 US 1 at p. 9 (1968), at a point where it quotes from *Katz* v. *United States*, 389 US 347 (1967). But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.

Likewise the patient appellees derive a right to individual anonymity from our freedom of association cases such as *Bates* v. *Little Rock*, 361 US 516 at pp. 522-23 (1960) and *NAACP* v. *Alabama*, 357 US 449 at p. 462 (1958). But those cases protect "freedom of association for the purpose of advancing ideas and airing grievances," *Bates* v. *Little Rock*, 361 US 516, at p. 523, not anonymity in the course of medical treatment. Also, in those cases there was an uncontroverted showing of past harm through disclosure, *NAACP* v. *Alabama*, 357 US 449 at p. 462, an element which is absent here." (Per Stevens, J., p. 604)

31 523 F 2d 716 (7th Cir 1975)

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> *individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny.* The Court has referred to such decisions as implicating "basic values", as being "fundamental", and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases. But can it fairly be said that this is such a case?" (footnotes omitted)
>
> (emphasis supplied)

Then at para 12 (at p. 721):

> "12. We hold that the so-called right of marital privacy does not include the right of either spouse to have the husband present in the delivery room of a public hospital which, for medical reasons, has adopted a rule requiring his exclusion."

Justice Stevens' jurisprudence and how he was the key Judge on the Supreme Court in moving away from a right to privacy to "the long arm of liberty" in the Fourteenth Amendment has been described in Jamal Greene, The So-Called Right to Privacy' 43 UC Davis Law Review 715-747, at pp. 731-747 (2010) [Professor Jamal Greene is Professor Law, Columbia Law School. The title is taken from a memorandum from then Justice Department Attorney John Roberts to the Attorney General on 11-12-1981 where Roberts wrote of the 'so-called right to privacy'. Roberts is the present Chief Justice of the Supreme Court of the United States of America.]

15. Stewart, J. in concurrence held: (at pp. 608-609)

> "The first case referred to, *Griswold* v. *Connecticut*[10], held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home. Although the broad language of the opinion includes a discussion of privacy, see id., at 484-485, the constitutional protection there discovered also related *to (1) marriage*, see id., at 485-486; id., at 495 (Goldberg, J., concurring); id., at 500 (Harlan, J., concurring in judgment), citing *Poe* v. *Ullman*[32] (Harlan, J., dissenting); *Griswold*[10], US at pp. 502-503 (WHITE, J., concurring in judgment); (2) *privacy in the home*, see id., at 484-485 (majority opinion); id., at 495 (Goldberg, J., concurring); id., at 500 (Harlan, J., concurring in judgment), citing *Poe* v. *Ullman*[32], US at p. 522 (Harlan, J., dissenting); and (3) *the right to use contraceptives*, see *Griswold*[10], US at

32 1961 SCC OnLine US SC 133 : 6 L Ed 2d 989 : 367 US 497 at p. 522 (1961)

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p. 503 (WHTE, J., concurring in judgment); see also *Roe* v. *Wade*[12], US at pp. 169-170 (STEWART, J., concurring). Whatever the ratio decidendi of *Griswold*[10], it *does not recognize a general interest in freedom from disclosure of private information*." (emphasis supplied)

16. Thus it is clear that the Court followed an incremental approach to understanding which facets of liberty in the Fourteenth Amendment would be entitled to protection rather than recognising a general right to privacy. Alternatively put, it was apparent to the Court that when a privacy claim was made, the rationale underlying the same was the need to protect liberty in various critical facets of human life.

17. It is our humble submission that in cases concerning the right to privacy in the Fourteenth Amendment that followed, it was liberty and not privacy that was the controlling interest.[33] Thus in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey, Governor of Pennsylvania*[34], the Supreme Court in its first significant abortion judgment after *Roe* v. *Wade*[12], held: (at pp. 846, 851)

"Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." *The controlling word in the cases before us is "liberty."* Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler* v. *Kansas*[35], the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*[36]....

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey* v. *Population Services International*[37]. Our cases recognize "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." *Eisenstadt* v. *Baird*[27], US at p. 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*[25], US at p. 166

33 Even in Fourth Amendment cases, the relevance of the 'reasonable expectation of privacy' test in the age of technology has been criticised and a move to a liberty-based rationale advocated. Thomas P. Crocker, "From Privacy to Liberty: The Fourth Amendment after Lawrence" 57 UCLA Law Review 1-69 (2009-10).

34 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833 (1992)

35 1887 SCC OnLine US SC 282 : 31 L Ed 205 : 123 US 623 at pp. 660-61 (1887)

36 1986 SCC OnLine US SC 12 : 88 L Ed 2d 662 : 474 US 327 at p. 331 (1986)

37 1977 SCC OnLine US SC 103 : 52 L Ed 2d 675 : 431 US 678 at p. 685 (1977)

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(1944). *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."

(emphasis supplied)

18. It is evident that *Casey*[34] involved a creative reinterpretation of *Roe*[12], and the controlling interest was liberty and not privacy. In fact, the word "privacy" occurs only twice in the opinion of the Court, once while citing a precedent and another time not linked to protecting a sphere of decision-making, as had been the case in *Roe*[12].

19. Finally, the falling into desuetude of the right to privacy was confirmed in *Lawrence* v. *Texas*[38]. If there were a right to privacy in the Constitution then surely it would have been the primary ground for invalidating a statute that criminalised intimate conduct of same-sex couples. However, the opinion makes it clear that liberty was the controlling interest in this case too. Though the respect for private life was mentioned, the ground for striking down this law was violation of liberty. The lead opinion of Kennedy, J. begins with the words: (at p. 562)

"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."

20. Again, (at p. 567):

"It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice*." (emphasis supplied).

21. A catena of decisions in the United States have thus refused to follow the understanding of a right to privacy upheld in *Griswold*[10] and *Roe*[12]. *Katz*[4], relied upon by the petitioners, was the first to recognise that there was no such general right to privacy. Subsequent cases, such as Whalen, Casey

38 2003 SCC OnLine US SC 73 : 156 L Ed 2d 508 : 539 US 588 (2003)

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and Lawrence which could have been decided on privacy grounds were instead tested on liberty grounds. On this test, the laws in Whalen and Casey passed muster, whereas the one in Lawrence did not. For a full list of such cases and the argument as to why the right to privacy is "no more", see the article by Professor Jamal Greene [Jamal Greene, 'The So-Called Right to Privacy' 43 UC Davis Law Review 715-747 (2010)].

22. Further, this move away from privacy to liberty is not limited to any particular ideological viewpoint prevalent in the United States Supreme Court. In fact, the loosely described "liberal wing" of the Court, certainly pro-choice in abortion matters, have also jettisoned privacy in favour of liberty. This is clear from the dissenting opinion of Justice Ginsburg in *Gonzales* v. *Carhart*[39], which involved a challenge to the prohibition of a particular technique of abortion (the partial birth abortion ban) which had made no exception for the health of the mother. The Court upheld the prohibition. Ginsburg, J., in dissent, wrote for herself and Breyer, Souter and Stevens, JJ.:

> "As *Casey*[34] comprehended, at stake in cases challenging abortion restrictions is a woman's control over her [own] destiny. *Casey*[34], US at p. 869 (plurality opinion). See also id., at 852 (majority opinion). There was a time, not so long ago when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Id., at 896-897 (quoting *Hoyt* v. *Florida*[40]). Those views, this Court made clear in Casey, are no longer consistent with our understanding of the family, the individual, or the Constitution. *Casey*[34] US at p. 897. Women, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Id., at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to their ability to control their reproductive lives. Ibid. *Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature*. See, e.g., Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan L Rev 261 (1992); Law, Re-thinking Sex and the Constitution, 132 U Pa L Rev 955, 1002ñ1028 (1984)."

23. This move by Justice Ginsburg, away from a general notion of the right to privacy, vindicates the approach followed by Justice Stewart through his dissenting view in *Griswold*[10], lead opinion in *Katz*[4] and concurring views in *Roe*[12] and *Whalen*[29]. It will be instructive for the Court to note that Justice Stewart's views have been cited by the Indian Supreme Court and

39 2007 SCC OnLine US SC 25 : 167 L Ed 2d 480 : 550 US 124 (2007)

40 1961 SCC OnLine US SC 159 : 7 L Ed 2d 118 : 368 US 57 at p. 62 (1961)

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High Courts in at least twenty cases, including prominently in *Maneka Gandhi* v. *Union of India*[41], *Indra Sawhney* v. *Union of India*[42] and *Bachan Singh* v. *State of Punjab*[43]. A full list of these cases is annexed [See Annexure 1].

24. On the evidence of the development of the right to privacy in American constitutional law and its falling into disuse with decades of experience, it is humbly submitted that no analogous general fundamental right to privacy ought to be declared as part of the Constitution of India by the Supreme Court in the present proceedings.

4.1.2. Reading in a right to privacy from certain privacy interests that may inhere in Part III of the Constitution is conceptually unsound.

25. It is evident from American constitutional law that there may be certain zones of privacy which inhere in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution. These zones of privacy appear to be nothing but certain interests of immunity from interference which are protected in order to protect the substantive rights in question. As the petitioners have argued, this may also be the position in Indian constitutional law. But the fallacy of translating these zones of privacy into a self-standing and free-floating right has been clearly pointed out by Robert Bork in his seminal work *The Tempting of America*. Bork writes:

> "*It is important to understand Justice Douglas' argument both because the method, though without merit, continually recurs in constitutional adjudication and because the "right of privacy" has become a loose canon in the law*. Douglas began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." There is nothing exceptional about that thought, other than the language of penumbras and emanations. Courts often give protection to a constitutional freedom by creating a buffer zone, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution. Douglas cited *NAACP* v. *Alabama*[11], in which the Supreme Court held that the State could not force the disclosure of the organisation's membership lists since that would have a deterrent effect upon the members' first amendment rights of political and legal action. That may well have been part of the purpose of the statute. But for this anticipated effect upon guaranteed freedoms, there would be no constitutional objection to the required disclosure of membership. *The right not to disclose has no life of its own independent of the rights specified in the first amendment.*

41 (1978) 1 SCC 248

42 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1

43 (1980) 2 SCC 684 : 1980 SCC (Cri) 580

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Douglas named the buffer zone or "penumbra" of the first amendment a protection of "privacy," although, in *NAACP* v. *Alabama*[11], of course, confidentiality of membership was required not for the sake of individual privacy but to protect the public activities of politics and litigation. Douglas then asserted that other amendments create "zones of privacy." These were the First, Third (soldiers not to be quartered in private homes), Fourth (ban on unreasonable searches and seizures) and Fifth (freedom from self-incrimination). *There was no particularly good reason to use the word "privacy" for the freedom cited, except for the fact that the opinion was building toward those "sacred precincts of marital bedrooms." The phrase "areas of freedom" would have been more accurate since the provisions cited both private and public behaviour....*

The Court majority said there was now a right of privacy but did not even intimate an answer to the question, "privacy to do what?" People often take addictive drugs in private, some men physically abuse their wives and children in private, executives conspire to fix prices in private, Mafiosi confer with their button men in private. If these sound bizarre one professor at a prominent law school has suggested that the right of privacy may create a right to engage in prostitution. Moreover, as we shall see, the Court has extended the right of privacy to activities in no sense can be said to be done in private. The truth is that "privacy" will turn out to protect those activities that enough justices to form a majority think ought to be protected and not activities with which they have little sympathy.

If one called the zones of the separate rights of the Bill of Rights zones of "freedom" which would be more accurate, then, should one care to follow Douglas's logic, the zones would add up to a general right of freedom independent of any provision of the Constitution..."

(emphasis supplied)

[Robert H. Bork, *The Tempting of America*, Free Press (1990), pp. 97-99]

26. In the same vein, Professor Louis Henkin writes (in the immediate aftermath of *Roe* v. *Wade*[12]):

"In our day the Justices have newly recognized the "right of privacy." I think that denomination is misleading, if not mistaken. To date, at least, the right has brought little new protection for what most of us think of as "privacy"—freedom from official intrusion. What the Supreme Court has given us, rather, is something essentially different and farther-reaching, an additional zone of autonomy, of presumptive immunity to governmental regulation. Appreciating what the Supreme Court has wrought suggests the need for new inquiries into our sense of public good, into the comparative weights of different goods in the balances of constitutional jurisprudence, indeed into the very purposes of our constitutional government."

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[Louis Henkin, 'Privacy and Autonomy' 74 Columbia Law Review 1410-1433, at pp. 1410-1411 (1974)]

27. Thus privacy at its core is nothing but a zone of freedom. This can be stated differently—privacy at its most basic has been understood to be the right to be let alone (Samuel Warren and Louis Brandeis, 'Right to Privacy' IV(5) Harvard Law Review 193-220 (1890)). Such a right essentially places a correlative duty on everyone else to stay off. In Hohfeldian terms, this is the exact conception of a liberty. Hohfeld writes,

> "*In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place*. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best...
>
> *In the example last put, whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land*; or in equivalent words, X does not have a duty to stay off. *The privilege of entering is the negation of a duty to stay off*."

[Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as applied in Judicial Reasoning" 23 Yale Law Journal 16-59, at p. 32 (1914)]

28. Please note that in Hohfeldian terms, the term "privilege" is the same as "liberty". See, Hohfeld (at p. 36):

> "On grounds already emphasized, it would seem that the line of reasoning pursued by Lord Lindley in the great case of *Quinn* v. *Leathern*[44], is deserving of comment:
>
> > "The plaintiff had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."
>
> *A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege and certainly that is the fair connotation of the term as used the first three times in the passage quoted*") (emphasis supplied)

44 1901 AC 495 at p. 534 (HL)

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29. This is consistent with the philosophical understanding of privacy as protecting liberty,

> "Besides giving us control over the context in which we act, privacy has a more defensive role in protecting our liberty. We may wish to do or say things not forbidden by the restraints of morality, but which are nevertheless unpopular or unconventional. If we thought that our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes."

[Charles Fried, 'Privacy' 77(3) Yale Law Journal 475-493, at p. 483 (January 1968)]

30. In this sense privacy achieves nothing more than serving as a substitute for freedom/liberty since at its conceptual core it essentially is a command to others to "stay off". It is thus a purely formal conceptualisation that does not answer any substantive question ("privacy to do what?"). This is evident from the oral observation made by Nariman, J. in this case, summarising the position of the petitioners that privacy extends over the body and mind, with the mind aspect having two facets—information and decisions. It is our humble submission that this principle is overbroad and formal. In a formal sense, privacy over body and mind means little but prescribing that others should stay off matters relating to the body and mind since the individual should have the liberty to do as she pleases in these matters. However this cannot mean that the individual can slash her wrists (a facet of a right over her body) or take drugs (an individual choice) or refuse to give her relationship status when asked on her form (information). This is best exemplified by a question posed by Chandrachud, J. in his oral observations that it may not be a constitutional problem if a woman is asked on a form about the number of children she has, but it will be a problem if she is asked the number of abortions she has had. Privacy over information should have made both these instances a violation—but given that the former appears to be a violation and the latter does not, it is clear that there is a substantive notion at play i.e. the nature of personal liberties which deserve constitutional protection. This cannot be explained simply by reference to "privacy". Instead it is a substantive notion of a constitutionally protected liberty that provides the answer. According to Joseph Raz, this determination of what counts as constitutionally protected rights is done by courts with utmost caution in constitutional review:

> "We now have an outline of an account of the proper role of constitutional review in most liberal democracies, in matters of fundamental civil and political rights. Since these fundamental rights inextricably combine issues of individual interest with questions of the public interest, they can and should, like other issues of individual rights, be dealt with by the courts. But at the same time they inevitably involve

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the courts in politics, since they cannot be settled except by deciding questions concerning the public interest. Since, controversial though these issues are, they are relatively free from conflict of interests and are to be settled on the basis of the central tenets of the political tradition of the country concerned, it is fitting that they should be removed from the ordinary democratic process and be assigned to a separate political process.

This means that the courts are political, but the political issues they deal with in constitutional review of fundamental rights differ for the most part in kind from the stuff that democratic politics is mostly concerned with. This does not mean, of course, that the job of the courts is to arrest the march of time and freeze the process of change which affects a country's political culture, and its common good, just as it affects everything else. All that is meant is that, in responding to change and in encouraging change, the courts should be attuned to the community's political traditions and to changes, which are normally continuous and gradual, in its common good, and not to short-term swings, however violent, in democratic politics."

[Joseph Raz 'Rights and Individual Well-being' in, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995), at pp. 57-58]

31. It is for this reason that while conceptually privacy essentially protects a liberty interest, several privacy interests have little to do with constitutionally protected liberties (when the question "privacy to do what?" is asked (for e.g., appropriation of someone's image). Further, liberty is broader in content than privacy itself (for e.g. the freedom to travel abroad has no discernible privacy component). Thus the discussion above evidences a fundamental philosophical conception that privacy is purely formal and does no conceptual work that liberty cannot do, and does not do in the context of constitutionally protected personal liberty.

32. On the basis of the arguments above, even if the petitioners are right that there might be zones of privacy in the Constitution, these are first, not all-pervasive in the Constitution but limited to where liberties exist (there is no necessary zone of privacy in Article 14, for example) and second, they are conceptually zones of liberty. Insofar as they exist in Article 19 (and other freedoms), their site of protection is a constitutionally protected liberty per se and insofar as they exist in Article 21, their site of protection may be dignity (protection of medical records), property (unauthorised intrusion into the home) or personal liberty per se (freedom of association). Thus reading in a right to privacy from a zone of privacy is conceptually unsound and does not protect anything that is not already protected under Part III.

33. On the contrary, such an expansive and putatively free-floating understanding of the right to privacy might be over-broad in its conceptualisation. Privacy itself at its core does not, and it is our humble

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submission, cannot answer the question, privacy to do what. As a result, privacy may lead to insulating certain spaces from necessary intervention. This has been the feminist critique of privacy which deserves particular attention:

> "But feminist consciousness has exploded the private. For women, the measure of the intimacy has been the measure of the oppression. To see the personal as political means to see the private as public. On this level, women have no privacy to lose or to guarantee. We are not inviolable.
>
> Our sexuality, meaning gender identity, is not only violoble, it is (hence we are) our violation. Privacy is everything women as women have never been allowed to be or to have; at the same time the private is everything women have been equated with and defined in terms of men's ability to have. To confront the fact that we have no privacy is to confront our private degradation as the public order. *To fail to recognize this place of the private in women's subordination by seeking protection behind a right to that privacy is thus to be cut off from collective verification and state support in the same act. The very place (home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy, selfhood) that feminism finds central to women's subjection form the core of privacy doctrine. But when women are segregated in private, one at a time, a law of privacy will tend to protect the right of men "to be let alone" to oppress us one at a time.* A law of the private, in a state that mirrors such a society, will translate the traditional values of the private sphere into individual women's right to privacy, subordinating women's collective needs to the imperatives of male supremacy. It will keep some men out of the bedrooms of other men." (emphasis supplied)

[Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' 8(4) Signs 635-658, at p. 656 (Summer 1983)]

34. It is our humble submission that the instant case is the *Griswold*[10] moment in Indian constitutional law. The experience of the United States of America counsels us to be cautionary about creating a free-standing right to privacy, a conceptually unsound and practically meaningless interpretive exercise.

As Hyman Gross wrote of *Griswold*[10],

> "*The word "privacy" is put to torture until it confesses a constitutional guaranty for everything it designates in household parlance.* The encroachment upon solitude and disturbance of repose occasioned by the salesman at the front door is said to involve the matter of privacy, as does the disruption of repose by a loudspeaker on a bus, and loss of autonomy through application of a sterilization law. In this way a verbal groundwork is provided for deciding that something called

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"privacy" is offended by a state law regulating marital intimacies, an area of accustomed autonomy.

Though we may counsel the avoidance of ambiguity, we cannot question that the Supreme Court may fashion whatever words it chooses to comprehend what it has in mind to protect; and that therefore the word "privacy" may be used to designate particular things said to be protected by the Constitution-including freedom from legislative regulation of marital intimacies. *But what the Supreme Court cannot do is make an eccentricity in common word usage do the job of legal reasoning in constitutional interpretation. It cannot give autonomy protection under constitutional rights of privacy simply because the word "privacy" is sometimes loosely used to designate autonomy. That is what has been attempted in Griswold*[10]." (emphasis supplied)

[Hyman Gross, The Concept of Privacy' 42 New York University Law Review 34-54, at p. 43-44 (1967)]

35. In Indian constitutional law, the broad import of the term "personal liberty" is well-established. The Supreme Court has held it to include the right to travel abroad and consequently return to India (*Satwant Singh Sawhney* v. *Passport Officer*[45]), to have interviews with family and friends while imprisoned (*Francis Coralie Mullin* v. *UT of Delhi*[46]), for women to make reproductive choices (*Suchita Srivastava* v. *Chandigarh Admn.*[47]), for self-determination of gender (*National Legal Services Authority* v. *Union of India*[48]), amongst others. Thus when any State action is challenged on this ground, it will be ascertained first, whether it affects a liberty interest, secondly, whether the liberty in question is within the sphere on constitutionally protected liberties and thirdly, whether the interference with such interest is justified by a countervailing legitimate State interest.

36. For the aforesaid reasons, a general fundamental right to privacy should not be read into Part III of the Constitution.

4.1.3. An analysis of existing case law decided on the ground of right to privacy will demonstrate that they either relate to aspects of privacy already protected under Article 21 or Article 19 or should not be protected under the Constitution at all.

37. The conceptual conclusion above will be made good by an analytical exercise. Three Supreme Court cases that have made a determination regarding the right to privacy will be taken and it will be demonstrated that either the same could be decided on alternate grounds, if the privacy interests are constitutional, or should not be decided as a constitutional matter at all, if the privacy interests are not worthy of constitutional protection.

45 (1967) 3 SCR 525 : AIR 1967 SC 1836
46 (1981) 1 SCC 608 : 1981 SCC (Cri) 212
47 (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570
48 (2014) 5 SCC 438

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38. In *PUCL* v. *Union of India*[49], it was held that Section 5(2) of the Indian Telegraph Act, 1885 which allowed for wire-tapping of phones was violative of privacy. Several procedural safeguards were read in to prevent such a violation. The Court held (per Kuldip Singh, J.):

> "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 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, in fact Article 21 of the Constitution of India unless it is permitted under the procedure established by law."

39. On this basis, a series of procedural safeguards were read in to ensure that telephone tapping is narrowly tailored to comply with Article 21. However it is clear that conversations on the telephone, irrespective of their content, if tapped, would interfere with the liberty of individuals to speak freely. Further, the opinion in PUCL appears to only protect telephone conversation in the privacy of one's home or office, despite recognising the prevalence of mobile phones. Personal liberty provides a clearer ground for testing any phone tapping, not being tied to any particular place, subject of course to any legitimate State interest in doing so.

40. Again, in *R. Rajagopal* v. *State of T.N.*[50], the question before the Court was whether a direction issued by the Tamil Nadu Police to the editor and publisher of a Tamil weekly that was slated to publish the life-story of a notorious criminal Auto Shankar was constitutional. While the case ought to have been decided simply on whether the restriction was reasonable as per Article 19(2), the Court formulated four questions:

> "8. Whether a citizen of this country can prevent another person from writing his life-story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(*a*) entitle the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a

49 (1997) 1 SCC 301
50 (1994) 6 SCC 632

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citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?"

This was owing to the fact that there was an allegation that unauthorised publication of the life-story of the criminal would lead to the violation of his privacy. Regarding the right to privacy, the Court held (per Jeevan Reddy, J.):

> "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. 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.

41. On this basis, the Court decided:

> "29. Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life-story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life-story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove."

42. It is humbly submitted that this case did not require any discussion of the constitutional right to privacy. There was no claim by the criminal himself (he was not a party to the case) that any aspect critical to his personhood or liberty would be violated by the publication. On the contrary, as the judgment makes clear, the publication would appear to show corruption in the ranks of the Tamil Nadu Police. It cannot be anybody's claim that there is a constitutional privacy interest in protecting such activities from disclosure. This is simply a case of testing the reasonableness of the restriction imposed by the State on publication. Even in the hypothetical case that there was a privacy claim, the same would be a horizontal claim made by the convict against the publisher claiming that publication might affect his reputation. This could either be a tortious claim or an action for defamation. Given the facts, no constitutional question of privacy ought to have arisen in this case. This represents a privacy interest that ought not to be entitled to constitutional protection and is a cautionary sign against reading in a general right to privacy in the Constitution.

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43. Finally, in *Mr 'X'* v. *Hospital 'Z'*[51], the question before the Court was whether the right to privacy of the patient was violated when his blood test results showing he was HIV+ were disclosed by the hospital to his future wife thereby leading to cancellation of marriage. It was held by the Court (per Saghir Ahmad, J.):

> "28. 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."

44. On this basis, the Court held that the patient's right to privacy would be outweighed by the future wife's right to a healthy life. The merits of such a decision aside, the framing of the issue as a privacy issue, disguises the issue at its core—that the patient should have liberty to decide with whom, when and how we would like to disclose his medical record. This is a liberty interest which is protected by ensuring the dignity of the individual. It is clear from the judgment that disclosure of medical records would certainly lead to disturbance and psychological difficulties. Thus it would affect the patient's sense of dignity, the basis of his personhood. Thus a claim based on privacy, as significant as it may be in this case, is a liberty interest which has individual dignity as the site of its protection.

45. In the final analysis, the history and development of the law relating to privacy shows an inductive movement from four distinct tortious offences to one consolidated category, a facet of which was deemed worthy of protection, not just in private law, but in constitutional law. As Dean William Prosser wrote in his seminal article on the subject,

> "What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.

51 (1998) 8 SCC 296

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3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

[William L. Prosser, 'Privacy', 48(3) California Law Review 383-422, at p. 389 (1960)]

It is only a facet of category (1) that has been elevated to constitutional status when it affects a constitutionally protected right, both in the United States and in India. The remaining aspects of privacy continue to be protected in common law or in statute (e.g. protection for privileged communications in Sections 123-131 of the Indian Evidence Act, 1872). Reading in a general fundamental right to privacy has the potential to erode these critical distinctions.

46. Reading in such a general fundamental right to privacy suffers from two further difficulties. First, the Court would be creating a redundancy, since as explained above, privacy is nothing but a liberty interest of an individual. In other words, it is "personal liberty" which is already protected by the Constitution. In a well-established line of precedent, the Court has held while interpreting statutes that Parliament should not be intended to have created redundancies while drafting statutes (See, *Grasim Industries Ltd.* v. *Collector of Customs*[52]; *State of Maharashtra* v. *Marwanjee F. Desai*[53]. Similarly the Court too should not create a redundancy itself by using a synonym for what is essentially a "personal liberty" interest. Creating such a new category would also fall foul of the cardinal philosophical principle of Occam's razor that plurality should not be resorted to in explanation except by necessity. This has been explained by C. Delisle Burns in the leading philosophy journal, *Mind*:

"It seems clear, as Mr Thorburn has shown (MIND, vol. xxiv., N.S., No. 94), that Ockham, even if he ever used the phrase "Entia non sunt multi-plicanda," etc., certainly preferred "Pluralitas non est ponenda". The usual form of the razor' seems very clumsy. I have never myself found it in any work of Ockham's; but it is quite possible that he did use it. In any case his preference for the form "Pluralitas non est ponenda" is very reasonable, in view of his complaint against Scotus that the 'doctor subtilis' created imaginary things which did not exist. "Entia non sunt multiplicanda" seems to be a rule about "real things": it seems to imply that one could "multiply" them. But, Ockham might say, if you try as 'hard as you like,' the mind cannot bring any object into existence nor, by knowing it, make any difference to the object known.

52 (2002) 4 SCC 297, para 10

53 (2002) 2 SCC 318, para 11

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> "*Pluralitas non est ponenda" would mean "You must not suppose that more things exist" than you have evidence for. And in the same way "Frustra fit per plura quod potest fieri per pauciora" means that an explanation is useless of what is already explained.* This phrase, by the way, may be found in the treatise "de Sacramento altaris" (p. 3) besides the places referred to by Mr Thorburn." (emphasis supplied)
>
> [C. Delisle Burns, 'Occam's Razor' 24(96) *Mind* 592, at p. 592 (1915)]

47. On the basis of the aforesaid arguments, it is our submission that privacy interests are purely formal interests that seek to protect liberty. "Personal liberty" in Article 21 is capacious enough to protect such interests. Other privacy interests (that may protect liberties, but not those that in our political and legal culture ought to enjoy constitutional protection) ought not to be read in to Article 21. This distinction is best preserved by not reading in a general right to privacy in the Constitution—a conclusion that follows from comparative experience in the United States of America, philosophical foundations of privacy and a close study of precedents on this subject in Indian constitutional law. Further, given that reading in a derivative right in this case will do no conceptual work, the fundamental tenet that the law must not create a redundancy should be upheld.

48. It is important to note however that contrary to the arguments made by Mr C. Aryama Sundaram, learned counsel for the State of Maharashtra, our submission in this regard is not a critique of the judicial trend of reading in "unenumerated rights" into Part III of the Constitution, as the petitioners have contended. It is our humble submission that the major premise of this contention, that there are unenumerated rights in the Constitution, itself is mistaken. Writing on this subject, Ronald Dworkin said:

> "*So the distinction between enumerated and unenumerated rights is widely understood to pose an important constitutional issue: the question whether and when courts have authority to enforce rights not actually enumerated in the Constitution as genuine constitutional rights. I find the question unintelligible, however, as I said at the outset, because the presumed distinction makes no sense.* The distinction between what is on some list and what is not is of course genuine and often very important. An ordinance might declare, for example, that it is forbidden to take guns, knives, or explosives in hand luggage on an airplane. Suppose airport officials interpreted that ordinance to exclude canisters of tear gas as well, on the ground that the general structure of the ordinance, and the obvious intention behind it, prohibits all weapons that might be taken aboard and used in hijacks or terrorism. We would be right to say that gas was not on the list of what was banned, and that it is a legitimate question whether officials are entitled to add "unenumerated" weapons to the list. But the distinction between officials excluding pistols, switch-

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> blades and hand-grenades on the one hand, and tear gas on the other, depends upon a semantic assumption: that tear gas falls within what philosophers call the reference of neither "guns" nor "knives" nor "explosives." No comparable assumption can explain the supposed distinction between enumerated and unenumerated constitutional rights. *The Bill of Rights, as I said, consists of broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right. The key issue in applying these abstract principles to particular political controversies is not one of reference but of interpretation, which is very different.*"
>
> (emphasis supplied).

[Ronald Dworkin, "Unenumerated Rights: Whether and how Roe should be overruled" 59 University of Chicago Law Review 381-432, at p. 387 (1992)].

49. Thus when dealing with constitutional provisions such as Articles 14, 19 and 21 which deal with abstract principles, any interpretation is subject to the charge of creating an unenumerated right. However it is our humble submission that when such an interpretive exercise is resorted to, it is critical that the interest that is now found protected must conceptually be substantive in nature (which is not the case for privacy as a concept) and constitutionally be within the contours of the right it is derived from (which is not the case for the right of privacy, derived from the right to personal liberty in Article 21). Neither of these conditions is met in the case of right to privacy and thus it is conceptually unsound to read it into Part III of the Constitution.

4.2. Several concerns relating to privacy breaches raised by the petitioners will be effectively redressed by a data protection law

4.2.1. Data protection and privacy per se are overlapping but distinct concerns

50. In the current digital era, several privacy concerns relate to processing of data. The analysis of very large and complex sets of data is done today through 'Big Data' analytics. Employment of such analytics enables organizations and governments to gain remarkable insights in areas such as health, food security, intelligent transport systems, energy efficiency and urban planning [European Commission, "European Data Protection Reform and Big Data: Factsheet", (2016) available at: <http://ec.europa.eu/ justice/data-protection/files/data-protection-big-data_factsheet_web_en.pdf>].

51. For instance, companies such as Google have developed spell-checking systems by applying 'Big Data' analytics to correlate mistyped queries with their correct forms [Viktor Mayer-Schönberger & Kenneth Cukier, Big Data: A Revolution that will transform how we live, work and think (Houghton Mifflin Harcourt 2013) 112].

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52. However, much of this data is personal data and has the possibility of infringing privacy interests of individuals. As a result of this, over 100 jurisdictions now have data protection laws and over 40 other jurisdictions have pending bills and initiatives [David Banisar, "National Comprehensive Data Protection/Privacy Laws and Bills 2016," available at <https://papers.ssrn.com/sol3/paper.cfm?abstract_id=1951416>]

53. Data protection laws govern the processing of "personal data", which is understood as data relating to an individual who can be identified through such information [See for instance, European Union General Data Protection Regulation adopted by the European Parliament in April 2016, Articles 2 and 4(1); UK Data Protection Act, 1998; Canada's Personal Information Protection and Electronics Documents Act, assented to on 13-4-2000; South Africa Protection of Personal Information Act, 2013].

54. While often used synonymously with privacy, conceptually the two are distinct [Herbert Burkert, 'Towards a New Generation of Data Protection Legislation' in Gutwirth et al (ed.), Reinventing Data Protection (Springer 2009), at p. 335]. It is not as an intervener contends, a subset of privacy. This is best exemplified in Articles 7 and 8 of the EU Charter of Fundamental Rights. They read:

> 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.

55. It is clear that data protection and privacy are two distinct fundamental rights in the EU. This distinction was the product of recognition over a period of time of the independent importance of data protection. Explaining the distinction, Raphael Gellert and Serge Gutwirth write:

> "All in all, data protection and privacy overlap on a mode whereby data protection is both broader and narrower than privacy. It is narrower because it only deals with the processing personal data, whereas the scope of privacy is wider. It is broader, however, because it applies to the

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processing of personal data, even if the latter does not infringe upon privacy. Privacy also is broader and narrower: it might apply to a processing of data which are not personal but nevertheless affects one's privacy, while it will not apply upon a processing of personal data which is not considered to infringe upon one's privacy. It can be said as well that a processing of personal data can have consequences not only in terms of privacy, but also in terms of other constitutional rights, and most obviously, when the processing of data relating to individuals bears risks in terms of discrimination."

[Raphael Gellert and Serge Gutwirth, 'The legal construction of privacy and data protection' 29 Computer Law & Security Review 522-530, at p. 526 (2013)]

56. Data protection is narrower than privacy since it is limited to data alone and does not extend to aspects of privacy that are not informational. At the same time it is broader than privacy since it covers all data relating to an identifiable individual and not just information relatable to an individual's private life [Julianne Kokott & Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' 3(4) International Data Privacy Law 222-228, at p. 225 (2013)]. The difference in scope is apparent from international instruments relating to data protection and national data protection laws—these contain provisions that are aimed at facilitating data flows and not just protecting privacy. It is pertinent to note that the OECD principles for processing of personal data, which have formed the basis of several data protection laws, were primarily developed to ensure uniformity in laws so as to facilitate trans-border data flows and "allow a full exploitation of the potentialities of modern data processing technologies insofar as this is desirable" [Explanatory Memorandum to the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data (1980)]. The OECD principles are:

"*Collection Limitation Principle*

There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the Knowledge or consent of the data subject.

Data Quality Principle

Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

Purpose Specification Principle

The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not

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incompatible with those purposes and as are specified on each occasion of change of purpose.

Use Limitation Principle

Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with (the purpose specification principle) except:

(*a*) with the consent of the data subject; or

(*b*) by the authority of law.

Security Safeguards Principle

Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

Openness Principle

There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

Individual Participation Principle

An individual should have the right:

(*a*) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;

(*b*) to have communicated to him, data relating to him within a reasonable time;

at a charge, if any, that is not excessive;

in a reasonable manner; and

in a form that is readily intelligible to him;

(*c*) to be given reasons if a request made under subparagraphs (*a*) and (*b*) is denied, and to be able to challenge such denial; and

(*d*) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.

Accountability Principle

A data controller should be accountable for complying with measures which give effect to the principles stated above.

57. It is apparent that some practices such as ensuring adequate data quality and openness have little to do with privacy but are rather aimed at ensuring accuracy such that the data can be effectively used. The aim of data protection is to ensure fairness in processing of data and it is sought to be achieved through the principles stated above. Thus, neither is the correlation between data protection and privacy exact nor is the former a subset of the

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latter. Privacy interest protection is an important rationale of data protection law, though it has other rationales; while privacy is not limited to data protection related issues alone.

4.2.2. A comprehensive data protection legislation can address privacy concerns relating to data

58. Arguing for an intervener, a counsel cited *United States* v. *Jones*[5] to recommend that privacy protection in the Constitution ought to extend to public information as well. He quoted Justice Sotomayor's concurring view:

> "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

Irrespective of the merits of such a view, the reason why in the United States such information that is already public is not protected is owing to the absence of a comprehensive data protection legislation. The Privacy Act, 1974 only governs personal data in federal government databases. There is no law that governs collection, use and disclosure of data made by individuals to private sector data processors. This is a deliberate regulatory choice, as explained by a White House Report on the subject:

> "Despite some important differences, the privacy frameworks in the United States and those countries following the EU model are both based on the FIPPs. The European approach, which is based on a view that privacy is a fundamental human right, generally involves top-down regulation and the imposition of across-the-board rules restricting the use of data or requiring explicit consent for that use. The United States, in contrast, employs a sectoral approach that focuses on regulating specific risks of privacy harm in particular contexts, such as health care and credit. *This places fewer broad rules on the use of data, allowing industry to be more innovative in its products and services, while also sometimes leaving unregulated potential uses of information that fall between sectors*."

[John Podesta et al, Executive Office of the President, 'Big Data: Seizing Opportunities, Preserving Values, May 2014]

59. Thus in fact, Justice Sotomayor's call for constitutional privacy protection for publicly available data is a response to the absence of a comprehensive data protection legislation in the United States of America. This however is not a model that deserves emulation. As stated above, a majority of countries regulate the collection, use, disclosure and other processing of data through data protection legislation. This is because it is recognised that rules relating to data protection promote accountability and safeguard against harms from collection, use, sharing, retention, etc. of personal data.

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60. It is humbly submitted that the Constitution cannot provide detailed provisions of this nature. The Supreme Court has recognised that matters of detail cannot be provided in the Constitution itself, given it is the basic law of the land, or statutes flowing from the Constitution. In *D.S. Garewal* v. *State of Punjab*[54], while speaking in the context of regulation of recruitment and conditions of service by means of rules, the Supreme Court held per Wanchoo, J. (as he then was):

> "7.... Regulation of recruitment and conditions of service requires numerous and varied rules, which may have to be changed from time to time as the exigencies of public service require. *This could not be unknown to the Constitution makers and it is not possible to hold that the intention of the Constitution was that these numerous and varied rules should be framed by Parliament itself and that any amendment of these rules which may be required to meet the difficulties of day-to-day administration should also be made by Parliament only with all the attending delay which passing of legislation entails*. We are, therefore, of opinion that in the circumstances of Article 312 it could not have been the intention of the Constitution that the numerous and varied provisions that have to be made in order to regulate the recruitment and the conditions of service of all-India services should all be enacted as statute law and nothing should be delegated to the executive authorities...."
>
> (emphasis supplied)

61. This has been recognised most clearly in the European Union. Despite the Charter of Fundamental Rights containing privacy and data protection rights, the EU has formulated detailed directives on data protection. The law governing the field has been the EU Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. However on 27-4-2016, the EU adopted a revised framework—Regulation (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Commonly known as the European Union General Data Protection Regulation (GDPR) its date of entry into force is 25-5-2018.

62. In its Preamble, the GDPR provides:

> "(6) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their

54 AIR 1959 SC 512

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activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.

(7) Those developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced."

63. It is a comprehensive regulation covering 99 provisions that deal with scope of application, legitimate grounds for processing, substantive obligations on data controllers and processors, rights of individuals to access, rectification, erasure and objections and establishment of appropriate enforcement machinery together with imposition of fines which extend up to 20,000,000 EUR, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher [Article 83(5)]. It thus comprehensively covers the fair information practices laid down by the OECO and builds on them to ensure greater protection of data.

64. The EU GDPR is testament to the proposition that data protection related concerns are best dealt with comprehensively by legislation irrespective of whether a right exists in the Constitution in this regard or not. This is because potential harms to individuals from collection and use of data could happen in multiple ways and specific procedural and substantive rules are necessary in order to protect against the same.

4.2.3. Parliament is alive to such data protection concerns

65. The issue of protection of data has been, and continues to be a topic of consideration in Parliament. A key example of this may be found in the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 ("the Aadhaar Act"). The Aadhaar Act contains key data protection principles of informed consent, collection limitation, purpose specification, use limitation, access and correction, accountability and data security. The following provisions are relevant:

8. (1) The Authority shall perform authentication of the Aadhaar number of an Aadhaar number holder submitted by any requesting entity, in relation to his biometric information or demographic information, subject to such conditions and on payment of such fees and in such manner as may be specified by regulations.

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X. Dr Arghya Sengupta, Advocate, for the respondents *(contd.)*

(2) A requesting entity shall—

(*a*) unless otherwise provided in this Act, obtain the consent of an individual before collecting his identity information for the purposes of authentication in such manner as may be specified by regulations; and

(*b*) ensure that the identity information of an individual is only used for submission to the Central Identities Data Repository for authentication.

(3) A requesting entity shall inform, in such manner as may be specified by regulations, to the individual submitting his identity information for authentication, the following details with respect to authentication, namely:

(*a*) the nature of information that may be shared upon authentication; (*b*) the uses to which the information received during authentication may be put by the requesting entity; and (*c*) alternatives to submission of identity information to the requesting entity."

[Collection Limitation, Use Limitation]

28. (1) The Authority shall ensure the security of identity information and authentication records of individuals.

(2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.

(3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or regulations made thereunder, and against accidental or intentional destruction, loss or damage.

(4) Without prejudice to sub-sections (1) and (2), the Authority shall—(*a*) adopt and implement appropriate technical and organisational security measures;

(*b*) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and

(*c*) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.

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(5) Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:

Provided that an Aadhaar number holder may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by regulations."

[Security Safeguards Principle]

"29. (1) No core biometric information, collected or created under this Act, shall be—

(*a*) shared with anyone for any reason whatsoever; or

(*b*) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.

(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by regulations.

(3) No identity information available with a requesting entity shall be—

(*a*) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or

(*b*) disclosed further, except with the prior consent of the individual to whom such information relates.

(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.

[Use Limitation; Purpose Specification]

"31. (1) In case any demographic information of an Aadhaar number holder is found incorrect or changes subsequently, the Aadhaar number holder shall request the Authority to alter such demographic information in his record in the Central Identities Data Repository in such manner as may be specified by regulations.

(2) In case any biometric information of Aadhaar number holder is lost or changes subsequently for any reason, the Aadhaar number holder shall request the Authority to make necessary alteration in his record in the Central Identities Data Repository in such manner as may be specified by regulations.

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(3) On receipt of any request under sub-section (1) or sub-section (2), the Authority may, if it is satisfied, make such alteration as may be required in the record relating to such Aadhaar number holder and intimate such alteration to the concerned Aadhaar number holder.

(4) No identity information in the Central Identities Data Repository shall be altered except in the manner provided in this Act or regulations made in this behalf."

[Data Quality Principle; Individual Participation Principle]

"32. (1) The Authority shall maintain authentication records in such manner and for such period as may be specified by regulations.

(2) Every Aadhaar number holder shall be entitled to obtain his authentication record in such manner as may be specified by regulations.

(3) The Authority shall not, either by itself or through any entity under its control, collect, keep or maintain any information about the purpose of authentication."

[Accountability Principle]

66. At the same time, both Parliament and the Union of India are alive to the fact that concerns relating to data protection go beyond Aadhaar. Thus a Private Member's Bill was introduced recently on 21-7-2017 on the subject of data privacy and protection. Further, the Attorney-General for India mentioned in open court on 18-4-2017 that the Union of India is actively considering a comprehensive data protection legislation which should be enacted soon [*Karmanya Singh Sareen* v. *Union of India*[55]]. Since then, the Government has taken several steps towards this end.

67. The aforementioned arguments are only in response to the argument made by the petitioners and an intervener that significant data protection concerns necessitate a reading in of a right to privacy in the Constitution. Such an argument is flawed since data protection concerns require a comprehensive legislation to be fully tackled. Thus no right ought to be read into the Constitution on this basis. Without prejudice, the horizontality of data protection issues means that the manner of implementing and enforcing any constitutional dimensions of the right be left to Parliament to decide by law as it is only a comprehensive statute that can ensure necessary protection.

4.3. Conclusion

68. For the aforementioned reasons, it is humbly submitted that the Hon'ble Supreme Court be pleased to not read in a general fundamental right to privacy in the Constitution of India.

55 (2017) 10 SCC 638

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The Judgments* of the Court were delivered by

DR D.Y. CHANDRACHUD, J. (*On behalf of Khehar, C.J., Agrawal, J., himself and Nazeer, J.; Chelameswar, J., Bobde, J., Nariman, J., Sapre, J. and Kaul, J. concurring*)— This judgment has been divided into sections to facilitate analysis. They are:

A.	The reference
B.	Decision in *M.P. Sharma*[1]
C.	Decision in *Kharak Singh*[2]
D.	*Gopalan*[3] doctrine: Fundamental rights as isolated silos
E.	*Cooper*[4] and *Maneka*[5]: Interrelationship between rights
F.	Origins of privacy
G.	Natural and inalienable rights
H.	Evolution of the privacy doctrine in India
I.	The Indian Constitution (*i*) Preamble (*ii*) Jurisprudence on dignity (*iii*) Fundamental Rights cases (*iv*) No waiver of fundamental rights (*v*) Privacy as intrinsic to freedom and liberty (*vi*) Discordant Notes: (*i*) *ADM, Jabalpur*[6] (*ii*) *Suresh Koushal*[7]
J.	India's commitments under international law
K.	Comparative law on privacy (*i*) the UK decisions (*ii*) The US Supreme Court decisions (*iii*) Constitutional right to privacy in South Africa (*iv*) Constitutional right to privacy in Canada (*v*) Privacy under the European Convention on Human Rights and the European Charter (*vi*) Decisions of the Inter-American Court of Human Rights
L.	Criticisms of the privacy doctrine (*a*) Thomson's Reductionism (*b*) Posner's Economic critique (*c*) Bork's critique (*d*) Feminist critique

* **Ed.**: Chandrachud, J. delivered the leading opinion of the Court on behalf of Khehar, C.J., Agrawal, J., himself, and Nazeer, J. Chelameswar, J., Bobde, J., Nariman, J., Sapre, J. and Kaul, J. each delivered their separate concurring opinions.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207
7 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1

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M.	Constituent Assembly and privacy: limits of originalist interpretation
N.	Is the statutory protection to privacy reason to deny a constitutional right?
O.	Not an elitist construct
P.	Not just a Common law right
Q.	Substantive due process
R.	Essential nature of privacy
S.	Informational privacy
T.	Conclusions

A. *The reference*

2. 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.

3. 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.

4. 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 11-8-2015 (infra footnote 11) that the norms for and compilation of demographic biometric data by the 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 to privacy is in doubt in view of two decisions: the first—*M.P. Sharma* v. *Satish Chandra*[1] ("*M.P. Sharma*") was rendered by a Bench of eight Judges and the second, in *Kharak Singh* v. *State of*

1 AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

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U.P.[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*[1] and *Kharak Singh*[2] were founded on principles expounded in *A.K. Gopalan* v. *State of Madras*[3] ("*Gopalan*"). *Gopalan*[3], 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 Bench in *Rustom Cavasjee 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 Subba Rao, J. in *Kharak Singh*[2] was specifically approved of and the decision of the majority was overruled.

5. 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 M.P.*[8] ("*Gobind*"), *R. Rajagopal* v. *State of T.N.*[9] ("*Rajagopal*") and *PUCL* v. *Union of India*[10] ("*PUCL*"). These subsequent decisions which affirmed the existence of a constitutionally protected right to privacy, were rendered by the Benches of a strength smaller than those in *M.P. Sharma*[1] and *Kharak Singh*[2]. 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 11-8-2015[11]: (*K.S. Puttaswamy case*[11], SCC p. 741, paras 12-13)

> "*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*[1] and *Kharak Singh*[2] 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

2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
3 AIR 1950 SC 27 : 1950 SCR 88
4 (1970) 1 SCC 248
5 (1978) 1 SCC 248
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
9 (1994) 6 SCC 632
10 (1997) 1 SCC 301
11 *K.S. Puttaswamy* v. *Union of India*, (2015) 8 SCC 735

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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*[1] and *Kharak Singh*[2] is scrutinised 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."

6. On 18-7-2017, 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[12] of the Constitution Bench reads thus: (*K.S. Puttaswamy case*[12], SCC pp. 641-42, paras 1-2)

"*1*. During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right to privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in *M.P. Sharma* v. *Satish Chandra*[1] by an eight-Judge Constitution Bench, and also, in *Kharak Singh* v. *State of U.P.*[2] by a six-Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.

2. 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 19-7-2017."

7. 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.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
12 *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 641

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8. The correctness of the decisions in *M.P. Sharma*[1] and *Kharak Singh*[2], 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*[1]

9. 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 organised attempt to embezzle its funds and to conceal the true state of its affairs from the shareholders 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[13] of the US 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 the Indian legislation, this Court observed that provisions for search were contained in successive enactments of the Criminal Procedure Code. Jagannadhadas, J. speaking for the Bench, held that a search or seizure does not infringe the constitutional right guaranteed by Article 20(3) of the Constitution: (*M.P. Sharma case*[1], AIR p. 306, para 18 : SCR p. 1096)

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
13 *Boyd* v. *United States*, 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)

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"*18.* … 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."

Having held that the guarantee against self-incrimination is not offended by a search and seizure, the Court observed that: (AIR pp. 306-07, para 18 : SCR pp. 1096-97)

"*18.* 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 protection under Article 20(3) would be defeated by the statutory provisions for searches." (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 to 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*[2]

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: (AIR p. 1299, para 7)

"(*a*) Secret picketing of the house or approaches to the houses of suspects;

(*b*) domiciliary visits at night;

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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(*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;

(*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."

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".

12. When the decision in *Kharak Singh*[2] was handed down, the principles governing the interrelationship 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*[3]. *Gopalan*[3] considered each of the articles in the Chapter on Fundamental rights as embodying distinct (as opposed to overlapping) freedoms. Hence in *Kharak Singh*[2], the Court observed: (AIR p. 1301, para 15 : SCR p. 345)

"*15.* ... 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 Articles 19(1)(*a*) and (*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*[3]."

13. The decision in *Kharak Singh*[2] held that clause (*b*) of Regulation 236 which provided for domiciliary visits at night was violative of Article 21. The Court observed: (AIR p. 1302, para 17 : SCR pp. 347-48)

"*17.* ... 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 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

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

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and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories."

14. In taking this view, Rajagopala Ayyangar, J. speaking for a majority of five Judges, relied upon the judgment of Frankfurter, J. speaking for the US Supreme Court in *Wolf* v. *Colorado*[14], which held: (*Kharak Singh case*[2], AIR p. 1302, para 17 : SCR p. 348)

> "*17.* … '*6.* The *security of one's privacy* against arbitrary intrusion by the police … is basic to a free society.
>
> *7.* … 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.' (*Wolf case*[14], SCC OnLine US SC paras 6-7)" (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: (*Kharak Singh case*[2], AIR pp. 1302-03, para 18 : SCR p. 349)

> "*18.* … Nevertheless, these extracts would show that any *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 civilisation. An English Common Law maxim asserts that "*every man's house is his castle*" and in *Semayne case*[15] 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*[15] 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." (emphasis supplied)

15. *Kharak Singh*[2] regards the sanctity of the home and the protection against unauthorised 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 unauthorised 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: (AIR p. 1303, para 20 : SCR p. 351)

14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
15 (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194

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"*20.* … 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 to 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.*" (emphasis supplied)

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

16. Subba Rao, J. dissented. Subba Rao, J. 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. Subba Rao, J. held that: (*Kharak Singh case*[2], AIR p. 1305, para 30 : SCR pp. 356-57)

"*30.* … 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."

17. Subba Rao, J. 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: (*Kharak Singh case*[2], AIR pp. 1305-06, para 31 : SCR pp. 358-59)

"*31.* … In an uncivilised society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilisation advances the psychological restraints are more effective than physical

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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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*[14] *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." (emphasis supplied)

18. Significantly, both Rajagopala Ayyangar, J. for the majority and Subba Rao, J. in his dissent rely upon the observations of Frankfurter, J. in *Wolf* v. *Colorado*[14] 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 to privacy as a constitutional protection. Subba Rao, J. recognised a constitutionally protected right to privacy, considering it as an ingredient of personal liberty.

D. *Gopalan*[3] *doctrine: Fundamental rights as isolated silos*

19. When eight Judges of this Court rendered the decision in *M.P. Sharma*[1] in 1954 and later, six Judges decided the controversy in *Kharak Singh*[2] in 1962, the ascendant and, even well-established, doctrine governing the fundamental rights contained in Part III was founded on *Gopalan*[3] principle. In *Gopalan*[3], Kania, C.J. 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

14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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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. 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 *Gopalan*[3] 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. Kania, C.J. held: (AIR pp. 36-37, para 11)

> "*11*. 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"."

"Procedure established by law" under Article 21 was, in this view, not capable of being expanded to include the "due process of law". Fazl Ali, J. dissented. The dissent adopted the view that the fundamental rights are not isolated and separate but protect a common thread of liberty and freedom: (*Gopalan case*[3], AIR pp. 52-53, para 58)

> "*58*. 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*). … It seems

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

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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."

20. In *Satwant Singh Sawhney* v. *D. Ramarathnam*[16] ("*Satwant Singh Sawhney*"), Hidayatullah, J. speaking for himself and R.S. Bachawat, J. in the dissenting view noticed the clear lines of distinction between the dissent of Subba Rao, J. and the view of the majority in *Kharak Singh*[2]. The observations of Hidayatullah, J. 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*[2]: (*Satwant Singh case*[16], AIR pp. 1851-52, para 61 : SCR p. 554)

"*61*. 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 19(2) insofar as the specific rights in 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 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*[2]. … This view obviously clashes with the reading of Article 21 in *Kharak Singh case*[2], 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*[2] above the majority view stated in that case."

16 (1967) 3 SCR 525 : AIR 1967 SC 1836
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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E. *Cooper*[4] *and Maneka*[5]: *Interrelationship between rights*

21. The theory that the fundamental rights are watertight compartments was discarded in the judgment of eleven Judges of this Court in *Cooper*[4]. *Gopalan*[3] 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. Legislations on preventive detention did not, in this view, have to meet the touchstone of Article 19(1)(*d*). The dissenting view of Fazl Ali, J. in *Gopalan*[3] was noticed by J.C. Shah, J. speaking for this Court, in *Cooper*[4]. The consequence of the *Gopalan*[3] 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*[4] held thus: (SCC p. 289, para 52)

> "*52.* ... 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.*" (emphasis supplied)

22. The abrogation of *Gopalan*[3] doctrine in *Cooper*[4] was revisited in a seven-Judge Bench decision in *Maneka*[5]. P.N. Bhagwati, J. who delivered the leading opinion of three Judges held that the judgment in *Cooper*[4] affirms the dissenting opinion of Subba Rao, J. (in *Kharak Singh*[2]) as expressing the valid constitutional position. Hence in *Maneka*[5], the Court held that: (SCC pp. 278-79, para 5)

> "*5.* ... It was in *Kharak Singh* v. *State of U.P.*[2] that the question as to the proper scope and meaning of the expression "personal liberty" came up

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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pointedly for consideration for the first time before this Court. The majority of the Judges took the view: (AIR p. 1302, para 17)

> '*17.* ... 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: (AIR p. 1305, para 30)

> '*30.* ... 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 Rustom Cavasjee Cooper v. *Union of India*[4] the minority view must be regarded as correct and the majority view must be held to have been overruled." (emphasis supplied)

23. Following the decision in *Maneka*[5], the established constitutional doctrine is that the expression "personal liberty" in Article 21 covers a variety of rights, some of which "have been raised to the status of distinct fundamental rights" and given additional protection under Article 19. Consequently, in *Satwant Singh Sawhney*[16], 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*[5] carried the constitutional principle of the overlapping 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

4 (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
16 *Satwant Singh Sawhney* v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836

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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*[1] and *Kharak Singh*[2] adopted a doctrinal position on the relationship between Articles 19 and 21, based on the view of the majority in *Gopalan*[3]. This view stands abrogated particularly by the judgment in *Cooper*[4] and the subsequent statement of doctrine in *Maneka*[5]. The decision in *Maneka*[5], in fact, expressly recognised that it is the dissenting judgment of Subba Rao, J. in *Kharak Singh*[2] which represents the exposition of the correct constitutional principle. The jurisprudential foundation which held the field sixty-three years ago in *M.P. Sharma*[1] and fifty-five years ago in *Kharak Singh*[2] 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*[1] and *Kharak Singh*[2] 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.

26. *M.P. Sharma*[1] 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*[1] would rest at that. The observations in *M.P. Sharma*[1] 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 to privacy (like the US Fourth Amendment), and that there was no justification to import it into a "totally different fundamental right" are at the highest, stray observations.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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27. The decision in *M.P. Sharma*[1] 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*[1] 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.

28. The decision in *Kharak Singh*[2] 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 unauthorised 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 Frankfurter, J. speaking for the US Supreme Court in *Wolf* v. *Colorado*[14] (the extract from *Wolf*[14] cited in the majority judgment specifically adverts to "privacy" twice). Having relied on this doctrine to invalidate domiciliary visits, the majority in *Kharak Singh*[2] proceeded to repel the challenge to other clauses of Regulation 236 on the ground that the right to privacy is not guaranteed under the Constitution and hence Article 21 had no application. This part of the judgment in *Kharak Singh*[2] is inconsistent with the earlier part of the decision. The decision of the majority in *Kharak Singh*[2] suffers from an internal inconsistency.

F. *Origins of privacy*

29. 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 recognise 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.

30. 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"[17]. 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

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
17 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 p. 261

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other hand, activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination"[18].

31. 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.

32. *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."[19]

While speaking of a "struggle between liberty and authority"[20], 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.

33. *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.

34. *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

18 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 p. 262.
19 John Stuart Mill, *On Liberty*, Batoche Books (1859), at p. 13.
20 *Id*, at p. 6.

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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."[21]

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.

35. In an article published on 15-12-1890 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"[22]. As legal rights were broadened, the right to life had "come to mean the right to enjoy life—*the right to be let alone*". Recognising 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 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 civilisation, 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."[23]

21 James Madison, "Essay on Property", in Gaillard Hunt (Ed.), *The Writings of James Madison* (1906), Vol. 6, at pp. 101-103.

22 Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1890), Vol. 4, No. 5, at p. 193.

23 *Id*, at pp. 195-196.

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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*."[24] (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.

36. The ringing observations of Warren and Brandeis on the impact of technology have continued relevance today in a globalised world dominated by the internet and information technology. As societies have evolved, so have the connotations and ambit of privacy.

37. 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*[25]. 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".[26]

38. *Roscoe Pound* described the Warren and Brandeis article as having done "nothing less than add a chapter to our law"[27]. 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"."[28]

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.

39. The right to privacy was developed by Warren and Brandeis in the backdrop of the dense urbanisation 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

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24 Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1890), Vol. 4, No. 5, at p. 205.
25 Thomas Cooley, *Treatise on the Law of Torts* (1888), 2nd Edn.
26 *Id*, at p. 29.
27 Dorothy J. Glancy, "The Invention of the Right to Privacy", *Arizona Law Review* (1979) Vol. 21, No. 1, at p. 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* (1956) 70.
28 *Id*, at pp. 2-3.

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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 recognised 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."[29]

Coupled with this was the trend towards "newspaperisation"[30], 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 realistic remedy for protecting privacy against intrusion, save and except "by the cudgel or the horsewhip"[31]. It was Warren and Brandeis who advocated the use of the Common law to vindicate the right to privacy.[32]

40. 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"[33]. 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.[34] 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.[35] The right to privacy evolved as a "*leitmotif*" representing "the long tradition of American individualism".[36]

29 Dorothy J. Glancy, "The Invention of the Right to Privacy", *Arizona Law Review* (1979) Vol. 21, No. 1, at pp. 7-8.
30 *Id* at p. 8.
31 *Id* at p. 9.
32 *Id* at p. 10.
33 *Id* at p. 12.
34 *Id* at p. 14.
35 *Id* at pp. 15-16.
36 *Id* at pp. 21-22.

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41. Conscious as we are of the limitations with which comparative frameworks[37] of law and history should be evaluated, the above account is of significance. It reflects the basic need of every individual to live with dignity. Urbanisation 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 interconnected lives.

G. *Natural and inalienable rights*

42. 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 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.

43. 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:

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37 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 within Classical Hindu Law", The Centre for Internet and Society <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 <https://cis-india.org/internet-governance/blog/identifying-aspects-of-privacy-in-islamic-law>.

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"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)

44. 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."[38]

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."[39] (emphasis supplied)

45. 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

38 Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones Company, 1921) at p. 92.

39 Roscoe Pound, "The Revival of Natural Law", *Notre Dame Lawyer* (1942), Vol. 27, No 4, at p. 330.

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prefer to 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."[40]

46. 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.

47. 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 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."[41]

48. 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*[42] (1977), he states that:

40 Edwin W. Patterson, "A Pragmatist Looks At Natural Law and Natural Rights", in Arthur L. Harding (Ed.), *Natural Law and Natural Rights* (1955), at pp. 62-63.

41 Craig A. Ster and Gregory M. Jones, "The Coherence of Natural Inalienable Rights", *UMKC Law Review* (2007-08), Vol. 76(4), at pp. 971-972.

42 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).

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> "*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."[43] (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 as equally entitled to concern and respect, or some other personal value of like consequence*."[44] (emphasis supplied)

49. 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[45]…
>
> If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned[46]…
>
> If the Government does not take rights seriously, then it does not take law seriously either[47]…"

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 be an activist court, in the sense that it must be prepared to frame and answer questions of political morality …"[48]

43 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) at p. xi.
44 *Id*, at p. 199.
45 *Id*, at p. 203.
46 *Id*, at p. 204.
47 *Id*, at p. 205.
48 *Id*, at p. 147.

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50. 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*

51. Among the early decisions of this Court following *Kharak Singh*[2] was *R.M. Malkani* v. *State of Maharashtra*[49]. In that case, this Court held that Section 25 of the Indian Telegraph Act, 1885 was not violated because: (*R.M. Malkani case*[49], SCC p. 476, para 20)

> "*20.* ... 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."[50]

This Court followed the same line of reasoning as it had in *Kharak Singh*[2] while rejecting a privacy-based challenge under Article 21. Significantly, the Court observed that: (*R.M. Malkani case*[49], SCC p. 479, para 31)

> "*31.* ... 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 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."[51]

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.

52. In *Gobind*[8], 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*[2] and to the validation of the Police Regulations (other than domiciliary visits at night). By the time the decision was handed down in *Gobind*[8] the law in the US had evolved and this Court took note of the decision

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
49 (1973) 1 SCC 471 : 1973 SCC (Cri) 399
50 *Id*, at p. 476, para 20.
51 *Id*, at p. 479, para 31.
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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in *Griswold* v. *Connecticut*[52] ("*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 *Roe* v. *Wade*[53] in which the Court upheld the right of a married woman to terminate her pregnancy as a part of the right of personal privacy. The following observations of Mathew, J. who delivered the judgment of the Court do indicate a constitutional recognition of the right to be let alone: (*Gobind case*[8], SCC p. 155, para 20)

> "*20*. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realised as Brandeis, J. said in his dissent in *Olmstead* v. *United States*[54], 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."

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.

53. Yet a close reading of the decision in *Gobind*[8] 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 *if* 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: (SCC pp. 155-56, para 22)

> "*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." (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 to privacy "is not

52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
53 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
54 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)

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explicit in the Constitution". Observing that the concept of privacy overlaps with liberty, this Court noted thus: (*Gobind case*[8], SCC p. 156, para 23)

> "*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 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." (emphasis supplied)

54. Mathew, J. in *Gobind*[8] proceeded to explain what any right to privacy must encompass and protect and found it to be implicit in the concept of ordered liberty: (SCC p. 156, para 24)

> "*24*. … Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-bearing. 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 to 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."

In adverting to ordered liberty, the judgment is similar to the statement in the judgment of Rajagopala Ayyangar, J. in *Kharak Singh*[2] which found the intrusion of the home by nightly domiciliary visits a violation of ordered liberty.

55. The Court in *Gobind*[8] 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 to privacy emanating from personal liberty, the right to movement and free speech, the right is not absolute: (SCC p. 157, para 28)

> "*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 to privacy* as an emanation from them which one can

8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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characterise as a fundamental right, we do not think that the right is absolute." (emphasis supplied)

Again a similar "assumption" was made by the Court in the following observations: (SCC pp. 157-58, para 31)

"*31.* ... 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 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." (emphasis supplied)

The Court declined to interfere with the Regulations.

56. The judgment in *Gobind*[8] does not contain a clear statement of principle by the Court of the *existence* of an independent right to 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*[2]. Whatever be the reason, it is evident that in several places Mathew, J. 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*[8] assumes significance because subsequent decisions of smaller Benches have proceeded on the basis that *Gobind*[8] 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.

57. *Malak Singh* v. *State of P&H*[55] ("*Malak Singh*") dealt with the provisions of Section 23 of the Punjab Police Rules under which a surveillance register 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*[2] and *Gobind*[8]. The Rules provided for modalities of surveillance. O. Chinnappa Reddy, J. speaking for a Bench of two Judges of this Court recognised the need for surveillance on habitual and potential offenders. In his view: (*Malak Singh case*[55], SCC pp. 424-25, para 6)

"*6.* Prevention of crime is one of the prime purposes of the constitution of a police force. The Preamble to the Police Act, 1861 says:

8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
55 (1981) 1 SCC 420 : 1981 SCC (Cri) 169

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'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.' " (emphasis supplied)

58. The Court in *Malak Singh*[55] 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: (SCC p. 426, para 9)

* **Ed.**: The matter between two asterisks has been emphasised in original.

55 *Malak Singh* v. *State of P&H*, (1981) 1 SCC 420 : 1981 SCC (Cri) 169

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"*9*. 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 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."

The observations in *Malak Singh*[55] 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.

59. *State of Maharashtra* v. *Madhukar Narayan Mardikar*[56] 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 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, A.M. Ahmadi, J. (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: (SCC p. 63, para 8)

"*8*. 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.

55 *Malak Singh* v. *State of P&H*, (1981) 1 SCC 420 : 1981 SCC (Cri) 169
56 (1991) 1 SCC 57 : 1991 SCC (Cri) 1

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> 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." (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.

60. The decision in *LIC* v. *Manubhai D. Shah*[57], incorrectly attributed to the decision in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[58] 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*[58] cited a UN Report but did no more.

61. The decision which has assumed some significance is *Rajagopal*[9]. 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 unauthorised publication infringes the citizen's right to privacy. Jeevan Reddy, J. speaking for a Bench of two Judges recognised that the right to 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*[2] and *Gobind*[8]. This appears from the following observations: (*Rajagopal case*[9], SCC pp. 639-40, para 9)

> "*9.* ... The first decision of this Court dealing with this aspect is *Kharak Singh* v. *State of U.P.*[2] A more elaborate appraisal of this right took place in a later decision in *Gobind* v. *State of M.P.*[8] wherein Mathew, J. speaking

57 (1992) 3 SCC 637
58 (1985) 1 SCC 641 : 1985 SCC (Tax) 121
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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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*[52] and *Roe* v. *Wade*[53]."

The decision in *Rajagopal*[9] considers the decisions in *Kharak Singh*[2] and *Gobind*[8] thus: (*Rajagopal case*[9], SCC p. 643, para 13)

"*13.* ... *Kharak Singh*[2] 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*[8] was also a case of surveillance under M.P. Police Regulations. *Kharak Singh*[2] was followed even while at the same time elaborating the right to privacy...."

62. The Court in *Rajagopal*[9] held that neither the State nor can its officials impose prior restrictions on the publication of an autobiography of a convict. In the course of its summary of the decision, the Court held: (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. 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

52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
53 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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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." (emphasis in original)

63. The judgment of Jeevan Reddy, J. regards privacy as implicit in the right to life and personal liberty under Article 21. In coming to the conclusion, the judgment in *Rajagopal*[9] notes that while *Kharak Singh*[2] had referred to the right to 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.

64. 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*[9] 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.[59] In the view of the author, *Rajagopal*[9] 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 criticised on the ground that *Rajagopal*[9] was about an action between private parties and, therefore, ought to have dealt with privacy in the context of Tort law.[59] While it is true that in *Rajagopal*[9] it was 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 State and its prison officials. That is, in fact, how Article 32 was invoked by the publisher.

65. The intersection between privacy and medical jurisprudence has been dealt with in a series of judgments of this Court, among them being *'X'* v. *Hospital 'Z'*[60]. 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

9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
59 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 pp. 138-139.
60 (1998) 8 SCC 296

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HIV+. The appellant claiming to have been socially ostracised 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 unauthorisedly disclosed his HIV status resulting in his marriage being called off and in social opprobrium. Saghir Ahmad, J. 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 to privacy under Article 21 and other provisions of the Constitution relating to the fundamental rights and the directive principles: (SCC p. 305, para 21)

> "*21*. 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.*[2] that police surveillance of a person by domiciliary visits would be violative of Article 21 of the Constitution. This decision was considered by Mathew, J. in his classic judgment in *Gobind* v. *State of M.P.*[8] in which the origin of "right to privacy" was traced and a number of American decisions, including *Munn* v. *Illinois*[61], *Wolf* v. *Colorado*[14] and various articles were considered...."

66. The Court in *'X'* v. *Hospital 'Z'*[60] read the decision in *Malak Singh*[55] as reiterating the view taken earlier, on privacy in *Kharak Singh*[2] and *Gobind*[8]. The Court proceeded to rely on the decision in *Rajagopal*[9]. 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: (*Mr 'X' case*[60], SCC p. 307, para 28)

> "*28*. 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 to 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

2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
61 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
60 (1998) 8 SCC 296
55 *Malak Singh* v. *State of P&H*, (1981) 1 SCC 420 : 1981 SCC (Cri) 169
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632

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of crime, disorder or protection of health or morals or protection of rights and freedom of others."

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

b **67.** The decision in *'X'* v. *Hospital 'Z'*[60] fails to adequately appreciate that the latter part of the decision in *Kharak Singh*[2] 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*[8] proceed on an assumption: if there is a right to privacy, it would comprehend certain matters and would be subject to a regulation to protect
c compelling State interests.

68. In a decision of a Bench of two Judges of this Court in *PUCL*[10], 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
d transmission in the following terms: (SCC pp. 305-06, para 3)

> "**5. (2)** 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
e 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 telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the
f 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."

69. The submission on the invalidity of the statutory provision authorising
g telephone tapping was based on the right to privacy being a fundamental right under Articles 19(1) and 21 of the Constitution. Kuldip Singh, J. adverted to the observations contained in the majority judgment in *Kharak Singh*[2] which led to the invalidation of the provision for domiciliary visits at night

60 (1998) 8 SCC 296
h 2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
10 *PUCL* v. *Union of India*, (1997) 1 SCC 301

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under Regulation 236(b). *PUCL*[10] cited the minority view of Subba Rao, J. 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: (SCC p. 310, para 14)

> "*14*. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in *Kharak Singh case*[2] (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."

Gobind[8] was construed to have upheld the validity of the 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, Kuldip Singh, J. held as follows: (*PUCL case*[10], SCC p. 311, para 17)

> "*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"."

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": (SCC p. 311, para 18)

> "*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 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."

The Court also held that telephone tapping infringes the guarantee of free speech and expression under Article 19(1)(*a*) unless authorised 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)

10 *PUCL* v. *Union of India*, (1997) 1 SCC 301
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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which, in its view, must be an interpretative tool for 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.

70. The judgment in *PUCL*[10] construes the earlier decisions in *Kharak Singh*[2] (especially the majority view on the invalidity of domiciliary visits), *Gobind*[8] and *Rajagopal*[9] 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 recognises 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*[10], the Court consciously established the linkages between various articles conferring guarantees of fundamental rights when it noted that wiretapping 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.

71. 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*[62] held: (SCC p. 82, para 15)

> "*15*. Sexual violence apart from being ... dehumanising ... is an unlawful intrusion of the right to privacy and sanctity.... It ... offends her ... dignity."

10 *PUCL* v. *Union of India*, (1997) 1 SCC 301
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
62 (2000) 4 SCC 75 : 2000 SCC (Cri) 755

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Similar observations were made in *Sudhansu Sekhar Sahoo* v. *State of Orissa*[63].

72. In *Sharda* v. *Dharmpal*[64], the appellant and the 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 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. S.B. Sinha, J. 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: (SCC p. 513, paras 52-53)

> "*52*. 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.
>
> *53*. 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."

73. The second question considered by the Court in *Sharda*[64] was whether a compulsive subjecting of a person to a medical examination violates Article 21. After noticing the observations in *M.P. Sharma*[1] and *Kharak Singh*[2] where it was held that the Constitution has not guaranteed the right to privacy, the Court held that in subsequent decisions, such a right has been read into Article 21 on an expansive interpretation of personal liberty. In the course of its judgment, the Court adverted to the decisions in *Rajagopal*[9], *PUCL*[10], *Gobind*[8] and *'X'* v. *Hospital 'Z'*[60] 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

63 (2002) 10 SCC 743 : 2003 SCC (Cri) 1484
64 (2003) 4 SCC 493
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
10 *PUCL* v. *Union of India*, (1997) 1 SCC 301
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
60 (1998) 8 SCC 296

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is the only way in which an allegation could be proved. In such a situation: (*Sharda case*[64], SCC p. 523, para 76)

> "*76.* ... 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."

The right to privacy was held not to be breached.

74. In *District Registrar and Collector* v. *Canara Bank*[65] ("*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: (SCC p. 504, para 3)

> "**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[13] to a right associated with the individual[54], Lahoti, C.J. referred to the penumbras created by the Bill of Rights resulting in a zone of privacy[52] leading up eventually to a "reasonable expectation of privacy"[66]. Lahoti, C.J. considered the decision in *M.P. Sharma*[1] to be "of limited help" to the discussion on privacy. However, it was *Kharak Singh*[2] which invalidated nightly domiciliary visits that provided guidance on the issue. The evaluation

64 *Sharda* v. *Dharmpal*, (2003) 4 SCC 493
65 (2005) 1 SCC 496 : AIR 2005 SC 186
13 *Boyd* v. *United States*, 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)
54 *Olmstead* v. *United States*, 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)
52 *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
66 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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of *Kharak Singh*[2] was in the following terms: (*District Registrar case*[65], SCC p. 516, para 36)

> "*36.* ... In ... *Kharak Singh* v. *State of U.P.*[2] the U.P. Regulations regarding domiciliary visits were in question and *the majority referred to Munn* v. *Illinois*[61] *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 violated the fundamental right to privacy. In the discussion the learned Judge referred to *Wolf* v. *Colorado*[14]. *In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.*" (emphasis supplied)

The decision in *Gobind*[8] is construed to have implied the right to privacy in Articles 19(1)(*a*) and 21 of the Constitution: (SCC p. 518, para 39)

> "*39. We have referred in detail to the reasons given by Mathew, J. in Gobind*[8] *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." (emphasis supplied)

75. The Court in *Canara Bank*[65] 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: (SCC p. 523, para 53)

> "*53.* Once we have accepted in *Gobind*[8] 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*[67] 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

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186
61 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)
* **Ed.**: The matter between two asterisks has been emphasised in original.
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
67 *United States* v. *Miller*, 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)

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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."

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.

76. The second part of the ruling of the Court in *Canara Bank*[65] 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 authorise any person to seek inspection, would be unenforceable. In the view of the Court: (SCC p. 524, para 54)

"*54*. 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 "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."

77. The significance of the judgment in *Canara Bank*[65] 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*[2] and *Gobind*[8] and the

65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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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 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*[65] has thus important consequences for recognising informational privacy.

78. After the decision in *Canara Bank*[65], 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. *CIT*[68] 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 Act[69] were construed by this Court in *Directorate of Revenue* v. *Mohd. Nisar Holia*[70]. Adverting to *Canara Bank*[65], 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.

79. 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 liquor or an intoxicating drug is consumed by the public. The provision was also challenged in *Anuj Garg* v. *Hotel Assn. of India*[71] on the ground that it violates the right to privacy. While holding that the provision is ultra vires, the two-Judge Bench observed: (SCC pp. 15, 16-17 & 19, paras 35, 43 & 51)

65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186
68 (2007) 1 SCC 789
69 Narcotic Drugs and Psychotropic Substances Act, 1985
70 (2008) 2 SCC 370 : (2008) 1 SCC (Cri) 415
71 (2008) 3 SCC 1

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"*35. Privacy rights prescribe autonomy to choose profession* whereas **security concerns** texture methodology of delivery of this assurance. But it is a reasonable proposition 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.

* * *

43. 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 the 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**.*

* * *

51. 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." (emphasis supplied)

80. In *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*[72] ("*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 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: (SCC pp. 46-47, para 27)

"*27.* 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*

* **Ed.**: The matter between two asterisks has been emphasised in original.
** **Ed.**: The matter between two asterisks has been emphasised in original as well.
72 (2008) 5 SCC 33

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Constitution as held by several decisions of this Court. In *R. Rajagopal* v. *State of T.N.*[9] (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"." (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.

81. The decision in the *State of Maharashtra* v. *Bharat Shanti Lal Shah*[73] deals with the constitutional validity of Sections 13 to 16 of the Maharashtra Control of Organised Crime Act (MCOCA) which inter alia contains provisions for intercepting telephone and wireless communications. Upholding the provision, the Court observed: (SCC p. 28, para 61)

> "*61*. 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."

The safeguards that the Court adverts to in the above extract include Section 14, which requires details of the organised crime that is being committed or is about to be committed, before surveillance could be authorised. 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"[74].

82. 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. *UT of Chandigarh*[75] ("*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

9 (1994) 6 SCC 632
73 (2008) 13 SCC 5
74 Gautam Bhatia, "State Surveillance and the Right to Privacy in India: A Constitutional Biograph", at p. 148
75 (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570

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directed[76,77] 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, Balakrishnan, C.J. 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: (*Suchita case*[75], SCC p. 15, para 22)

> "*22*. 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 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." (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.

83. The decision in *Suchita Srivastava*[75] 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.

76 *UT of Chandigarh* v. *Nemo*, 2009 SCC OnLine P&H 6154 : (2009) 3 RCR (Cri) 676
77 *UT of Chandigarh* v. *Nemo*, 2009 SCC OnLine P&H 6879
75 *Suchita Srivastava* v. *UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570

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84. In *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*[78], this Court dealt with a challenge to the validity of an arrest warrant issued by a the 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 CBI, by coordinating with INTERPOL had breached the petitioner's right to privacy. However, during the course of the discussion, this Court held as follows: (SCC pp. 584-85, paras 102-03)

> "*102*. … 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.*[2] was held to be an essential ingredient of "personal liberty".
>
> *103*. This Court, however, in *Gobind* v. *State of M.P.*[8] 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 wherefor reasonable restrictions could be placed in terms of clause (5) of Article 19."

85. In *Selvi* v. *State of Karnataka*[79] ("*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 administration of these tests are within the scope of a testimonial, attracting the protective shield of Article 20(3) of the Constitution. Balakrishnan, C.J. 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: (SCC pp. 369-70, paras 225-26)

> "*225*. … 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

78 (2009) 9 SCC 551 : (2010) 1 SCC (Cri) 47
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
79 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1

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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.

226. 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"."

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*[1] 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*[79] indicates how the right to privacy can straddle the ambit of several constitutional rights — in that case, Articles 20(3) and 21.

86. In *Bhabani Prasad Jena* v. *Orissa State Commission for Women*[80], 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: (SCC p. 642, para 21)

"*21*. 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."

87. In *Amar Singh* v. *Union of India*[81], a Bench of two Judges of this Court dealt with a petition under Article 32 alleging that the fundamental right to privacy of the petitioner was being breached by intercepting his conversations on telephone services provided by a service provider. The Court held: (SCC p. 84, para 39)

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
79 *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1
80 (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501 : (2010) 3 SCC (Cri) 1053
81 (2011) 7 SCC 69 : (2011) 3 SCC (Civ) 560

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"*39*. 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." (emphasis supplied)

88. In *Ram Jethmalani* v. *Union of India*[82] ("*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: (SCC pp. 35-36, paras 83 & 84)

"*83*. 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 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.

84. 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

82 (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310

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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.*" (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.

89. In *Hindustan Times* v. *High Court of Allahabad*[83], 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: (SCC p. 156, para 6)

"*6*. The unbridled power of the media can become dangerous if checks and balances are 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.*" (emphasis supplied)

90. In *Ramlila Maidan Incident, In re*[84], B.S. Chauhan, J. in a concurring judgment held that: (SCC pp. 119-20, para 312)

"*312*. 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 to privacy. However, right to privacy may not be absolute and in exceptional circumstances particularly surveillance in consonance with the statutory provisions may not violate such a right."

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 the judgment on the decision in *Kharak Singh*[2] 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*[10].

83 (2011) 13 SCC 155
84 (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
10 *PUCL* v. *Union of India*, (1997) 1 SCC 301

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91. The judgment of a Bench of two Judges of this Court in *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi*[85] 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[86] disclosure. Section 8(1)(*g*) provides an exemption from disclosure of information of the following nature: (*Saiyed Hussain case*[85], SCC p. 72, para 21)

> "*21*. … '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.' "

Swatanter Kumar, J. speaking for the Court, held thus: (SCC p. 74, para 23)

> "*23*. … 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 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." (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.

92. The decision in *Lillu* v. *State of Haryana*[87] emphasised the right of rape survivors to privacy, physical and mental integrity and dignity. The Court held thus: (SCC p. 649, para 13)

85 (2012) 13 SCC 61 : (2014) 2 SCC (Civ) 131
86 *Saiyed Hussain Abbas Rizwi* v. *State Information Commission*, 2011 SCC OnLine Pat 1247 : (2011) 2 PLJR 663
87 (2013) 14 SCC 643 : (2014) 4 SCC (Cri) 311

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"*13*. 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, the rape survivors are entitled to legal recourse that does not re-traumatise 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 their privacy.*" (emphasis supplied)

93. In *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[88], 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 recognised 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: (SCC pp. 112 & 114, paras 57 & 64)

"*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 penalisation for violation of such rights and matters connected therewith, is pending. In several judgments including *Kharak Singh* v. *State of U.P.*[2], *R. Rajagopal* v. *State of T.N.*[9], *PUCL* v. *Union of India*[10] and *State of Maharashtra* v. *Bharat Shanti Lal Shah*[73] this Court has recognised the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.

* * *

88 (2013) 16 SCC 82
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
9 (1994) 6 SCC 632
10 (1997) 1 SCC 301
73 (2008) 13 SCC 5

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64. 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 safeguards to protect the rights under Section 8(*j*), as already indicated."

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

94. In *Manoj Narula* v. *Union of India*[89], a Constitution Bench of this Court was hearing a petition filed in the public interest complaining of the increasing criminalisation of politics. Dealing with the provisions of Article 75(1) of the Constitution, Dipak Misra, J. 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: (SCC pp. 47-48, paras 69-70)

"*69*. 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.*[9], *right to privacy has been inferred from Article 21*. Similarly, in *Joginder Kumar* v. *State of U.P.*[90], 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*[91], has observed that freedom of speech and expression includes freedom of propagation of ideas.

70. 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. … 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." (emphasis supplied)

95. In *National Legal Services Authority* v. *Union of India*[92] ("*NALSA*"), a Bench of two Judges, while dealing with the rights of transgenders, adverted to international conventions acceded to by India including 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 harmonises the fundamental rights

89 (2014) 9 SCC 1
9 (1994) 6 SCC 632
90 (1994) 4 SCC 260 : 1994 SCC (Cri) 1172
91 AIR 1950 SC 124 : (1950) 51 Cri LJ 1514
92 (2014) 5 SCC 438

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contained in Articles 14, 15, 19 and 21 with India's international obligations. K.S. Radhakrishnan, J. held that: (SCC p. 490, para 72)

> "*72*. 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 India and the State is bound to protect and recognise those rights."

Explaining the ambit of Article 21, the Court noted: (SCC pp. 490-91, paras 73 & 75)

> "*73*. … 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*[93] (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.
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> * * *
>
> *75*. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg* v. *Hotel Assn. of India*[71] (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."

Dr A.K. Sikri, J. wrote a lucid concurring judgment.

93 (1981) 1 SCC 608 : 1981 SCC (Cri) 212
71 (2008) 3 SCC 1

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96. *NALSA*[92] 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*[92] 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.

97. In *ABC* v. *State (NCT of Delhi)*[94], 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: (SCC p. 18, para 28)

> "28. … *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 her to furnish an affidavit to this effect, and must thereupon issue the birth certificate, unless there is a court direction to the contrary*." (emphasis supplied)

98. 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 Madan B. Lokur, J. in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[95] 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, Lokur, J. noted that the latter is an "implicit fundamental right that all people enjoy". Lokur, J. observed thus: (SCC p. 676, para 953)

> "*953*. 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

92 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438
94 (2015) 10 SCC 1 : (2016) 1 SCC (Civ) 1 : 7 SCEC 383
95 (2016) 5 SCC 1

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of NJAC will be completely transparent and any one can have access to information that is available with NJAC. *This is a rather sweeping generalisation 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, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance." (emphasis supplied)

99. 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*[1] — *Kharak Singh*[2] — *Gobind*[8] upon which subsequent decisions including those in *Rajagopal*[9], *PUCL*[10], *Canara Bank*[65], *Selvi*[79] and *NALSA*[92] have contributed. Reconsideration of the doctrinal basis cannot be complete without evaluating what the trilogy of cases has decided.

100. *M.P. Sharma*[1] dealt with a challenge to a search on the ground that the statutory provision which authorised 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 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.*

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
10 *PUCL* v. *Union of India*, (1997) 1 SCC 301
65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186
79 *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1
92 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438

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Sharma[1] 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.

101. *Kharak Singh*[2] does not contain a reference to *M.P. Sharma*[1]. The decision of the majority in *Kharak Singh*[2] 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*[14], 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*[2] 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*[2]. Several of them rely on the protection of interests grounded in privacy in the first part, under the conceptual foundation of ordered liberty.

102. *Gobind*[8] 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*[8] underlines that the right would be intrinsic to ordered liberty and would cover intimate matters such as family, marriage and procreation. *Gobind*[8], while recognising 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

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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to meet the needs of a compelling interest. The Bench which decided *Gobind*[8] adverted to the decision in *Kharak Singh*[2] (though not *M.P. Sharma*[1]). Be that as it may, *Gobind*[8] 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*[2] or *Gobind*[8] (or both). Evidently, it is the first part of the decision in *Kharak Singh*[2] which is construed as having recognised 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*[1] and *Kharak Singh*[2] formulations. They had to weave a jurisprudence of privacy as new challenges emerged from a variety of sources: wiretapping, narco-analysis, gender-based identity, medical information, informational autonomy and other manifestations of privacy. As far as the decisions following upon *Gobind*[8] 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*[8] has been construed by subsequent Benches as affirming the right to privacy.

103. 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.[96] 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*[10]), prior restraints on publication of material on a death row convict (*Rajagopal*[9]), inspection and search of confidential documents involving the banker-customer relationship (*Canara Bank*[65]), disclosure of HIV status (*'X'* v. *Hospital 'Z'*[60]), food preferences and animal slaughter (*Hinsa Virodhak*

8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
96 *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.
10 *PUCL* v. *Union of India*, (1997) 1 SCC 301
9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186
60 (1998) 8 SCC 296

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Sangh[72]), medical termination of pregnancy (*Suchita Srivastava*[75]), scientific tests in criminal investigation (*Selvi*[79]), disclosure of bank accounts held overseas (*Ram Jethmalani*[82]) and the right of transgenders (*NALSA*[92]). 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.

104. 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*[1] need not have answered the question; *Kharak Singh*[2] dealt with it in a somewhat inconsistent formulation while *Gobind*[8] rested on assumption. *M.P. Sharma*[1] 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

105. 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;"

106. In *Sajjan Singh* v. *State of Rajasthan*[97], Mudholkar, J. 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 precision. This was suggestive, in the words of the Court, of the special significance attached to the Preamble by the Framers of the Constitution.

107. In *Kesavananda Bharati* v. *State of Kerala*[98] ("*Kesavananda Bharati*"), Sikri, C.J. 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

72 *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33
75 *Suchita Srivastava* v. *UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570
79 *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1
82 *Ram Jethmalani* v. *Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310
92 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
97 (1965) 1 SCR 933 : AIR 1965 SC 845
98 (1973) 4 SCC 225

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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.

Jurisprudence on dignity

108. 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).

109. In *Prem Shankar Shukla* v. *UT of Delhi*[99], which arose from the handcuffing of the prisoners, Krishna Iyer, J. speaking for a three-Judge Bench of this Court held: (SCC pp. 529-30 & 537, paras 1 & 21)

> "*1.* … 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 dehumanise him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security.
>
> * * *
>
> *21.* The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

110. A Bench of two Judges in *Francis Coralie Mullin* v. *UT of Delhi*[93] ("Francis Coralie") while construing the entitlement of a detenue under the Conservation of Foreign Exchange and Prevention of Smuggling Activities

99 (1980) 3 SCC 526 : 1980 SCC (Cri) 815
93 (1981) 1 SCC 608 : 1981 SCC (Cri) 212

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(COFEPOSA) Act, 1974 to have an interview with a lawyer and the members of his family held that: (SCC pp. 618-19, paras 6-8)

> "*6.* ... 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.
>
> *7.* ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.
>
> *8.* ... 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 oneself 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 established by law which stands the test of other fundamental rights."

111. In *Bandhua Mukti Morcha* v. *Union of India*[100], a Bench of three Judges of this Court while dealing with individuals who were living in bondage observed that: (SCC p. 183, para 10)

> "*10.* ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (*e*) and (*f*) of Article 39 and Articles 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 no State — neither the Central Government nor any State Government — has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

112. Dealing with an allegation that activists of an organisation 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.*[101] held that: (SCC pp. 262-63 & 271, paras 10 & 31)

> "*10.* ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an

100 (1984) 3 SCC 161 : 1984 SCC (L&S) 389
101 (1994) 6 SCC 260 : 1994 SCC (Cri) 1643

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investigation, determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities. …

* * *

31. If dignity or honour vanishes what remains of life!"

113. Human dignity was construed in *M. Nagaraj* v. *Union of India*[102] 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: (SCC pp. 243 & 247-48, paras 26 & 42)

"*26*. … 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* (sic be given). *It simply is. Every human being has dignity by virtue of his existence*. …

* * *

42. 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 realised 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 realised." (emphasis supplied)

114. In *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*[103], this Court held that the dignity of the individual is a core constitutional concept. In *Selvi*[79], this Court recognised that: (SCC p. 376, para 244)

"*244*. … we must recognise 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."

115. In *Mehmood Nayyar Azam* v. *State of Chhattisgarh*[104], this Court noted that when dignity is lost, life goes into oblivion. The same emphasis on dignity finds expression in the decision in *NALSA*[92].

102 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013
103 (2010) 3 SCC 786 : (2010) 1 SCC (L&S) 894
79 *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1
104 (2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449
92 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438

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116. The same principle was more recently reiterated in *Shabnam* v. *Union of India*[105] in the following terms: (SCC p. 713, para 14)

> "*14.* 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 harmed. 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." (emphasis in original)

117. The recent decision in *Jeeja Ghosh* v. *Union of India*[106] construed the constitutional protection afforded to human dignity. The Court observed: (SCC p. 792, para 37)

> "*37.* …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[107] (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.' "

118. 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 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.

119. 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

105 (2015) 6 SCC 702 : (2015) 3 SCC (Cri) 355
106 (2016) 7 SCC 761 : (2016) 3 SCC (Civ) 551
107 Aharon Barak, *Human Dignity—The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015).

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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

120. In *Golak Nath* v. *State of Punjab*[108], 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. Subba Rao, C.J. 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 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 Subba Rao, C.J.: (AIR p. 1655, para 15 : SCR p. 788)

> "*15.* ... 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." (emphasis supplied)

The learned Judge emphasised the position of the fundamental rights thus: (AIR p. 1656, para 16 : SCR p. 789)

> "*16.* ... 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 at all times ought to have simply because of the fact that in contradistinction with other beings, he 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." (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.

121. In *Kesavananda Bharati*[98], a Bench of 13 Judges considered the nature of the amending power conferred by Article 368 and whether the exercise of the

108 (1967) 2 SCR 762 : AIR 1967 SC 1643
98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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amending power was subject to limitations in its curtailment of the fundamental freedoms. Sikri, C.J. 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: (SCC pp. 367-68, paras 300-301)

"*300*. Various decisions of this Court describe fundamental rights as 'natural rights' or 'human rights'. Some of these decisions are extracted below:

(*i*) '*108*. 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 *A.K. Gopalan* v. *State of Madras*[3], AIR p. 72, para 108 : SCR pp. 198-99.)

(*ii*) '*6*. … 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 W.B.* v. *Subodh Gopal Bose*[109], AIR p. 95, para 6 : SCR p. 596.)

'*6*. … 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)….' (*Subodh case*[109], AIR p. 95, para 6 : SCR p. 597)

'*8*. … 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….' (*Subodh case*[109], AIR p. 96, para 8 : SCR p. 600)

(*iii*) '*107. 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

3 AIR 1950 SC 27 : 1950 SCR 88
109 AIR 1954 SC 92 : 1954 SCR 587

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of Government with their power and authority, at the same time kept back these rights of citizens and also sometimes 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 *Ujjam Bai* v. *State of U.P.*[110], AIR p. 1662, para 107 : SCR pp. 926-27)

301. The High Court Allahabad has described them as follows:

(*iv*)'*220*. ... *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*. ...

221. Suffice it to say that they represent a trend in the democratic thought of our age.' (*Moti Lal* v. *State of U.P.*[111], SCC OnLine All paras 220 & 221)" (emphasis in original and supplied)

This was the doctrinal basis for holding that the fundamental rights could not be "amended out of existence".

122. Elaborating all those features of the Constitution which formed a part of the basic structure, Sikri, C.J. held that: (*Kesavananda Bharati case*[98], SCC p. 366, para 292)

"*292*. 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."

123. Shelat and Grover, JJ. 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" (*Kesavananda Bharati case*[98], SCC p. 454, para 582) constituted a part of the basic structure. Hegde and Mukherjea, JJ. emphasised that the primary object before the Constituent Assembly were: (*i*) to constitute India into a sovereign, democratic republic and (*ii*) to secure

110 (1963) 1 SCR 778 : AIR 1962 SC 1621
111 1950 SCC OnLine All 197 : AIR 1951 All 257
98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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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": (*Kesavananda Bharati case*[98], SCC pp. 486-87, para 666)

> "*666*. On a careful consideration of the various aspects of the case, we are convinced that *Parliament has no power to abrogate* or 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 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*." (emphasis supplied)

Jaganmohan Reddy, J. held that: (SCC p. 666, para 1212)

> "*1212*. (*2*) … 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…."

Khanna, J. in the course of the summation of his conclusions held, as regards the power of amendment, that: (SCC p. 824, para 1537)

98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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"*1537.* (*vii*) 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."

Significantly, even though Mathew, J. was in the minority, the learned Judge in the course of his decision observed the importance of human dignity: (SCC pp. 866-67, para 1676)

"*1676.* 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."

124. In *Indira Nehru Gandhi* v. *Raj Narain*[112], Khanna, J. clarified that his view in *Kesavananda Bharati*[98] 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 provisions of the fundamental rights and in respect of matters other than the fundamental rights: (SCC p. 115, para 251)

"*251.* … 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."

Khanna, J. noted that the right to property was held by him not to be a part of the basic structure. Khanna, J. 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.

125. Chandrachud, C.J., in the course of his judgment for the Constitution Bench in *Minerva Mills Ltd.* v. *Union of India*[113], 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 intertwined, without a distinction

112 1975 Supp SCC 1
98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
113 (1980) 3 SCC 625

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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: (SCC p. 654, para 57)

> "*57.* ... 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."

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

126. In *Behram Khurshid Pesikaka* v. *State of Bombay*[114], Mahajan, C.J. 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 of the Founding Fathers and, as a matter of doctrine, the rights guaranteed were held not to be capable of being waived. Mahajan, C.J., observed: (AIR p. 146, para 52 : SCR pp. 653-54)

> "*52.* ... 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

114 (1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215

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policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."

Privacy as intrinsic to freedom and liberty

127. 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 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.

128. In *Olga Tellis* v. *BMC*[115], 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: (SCC p. 572, para 32)

> "*32.* ... 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 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

115 (1985) 3 SCC 545

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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."

129. In *Unni Krishnan, J.P.* v. *State of A.P.*[116], Jeevan Reddy, J. 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*[5], it has been stated that: (SCC p. 280, para 5)

> "*5.* ... 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...."

130. 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 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.

131. 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*[6]

132. In *ADM, Jabalpur* v. *Shivakant Shukla*[6] ("*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

116 (1993) 1 SCC 645
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207

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submission of the detenues in this Court was 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 (H.R. Khanna, J. dissenting) held that: (SCC p. 571, para 33)

> "*33*. 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."

133. 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 Beg, J. 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. Beg, J. held that: (*ADM, Jabalpur case*[6], SCC p. 604, para 183)

> "*183*. … 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 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*." (emphasis supplied)

A similar position was adopted by Chandrachud, J.: (SCC p. 664, para 379)

> "*379. … 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

6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207

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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*." (emphasis supplied)

In his view: (SCC p. 666, para 383)

"*383*. 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 enforcement will stand suspended if it is mentioned in the Presidential Order issued under Article 359(1)."

Bhagwati, J. held as follows: (SCC p. 701, para 459)

"*459*. 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*." (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: (SCC pp. 723-24, para 487)

"*487*. … 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 the feminine

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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 27-6-1975 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."

134. In his dissenting opinion, Khanna, J. 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: (*ADM, Jabalpur case*[6], SCC p. 747, para 525)

> "*525*. … 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."

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: (SCC pp. 749-50, para 530)

> "*530*. 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

6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207

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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 the 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."

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: (SCC p. 751, para 531)

"*531.* ... 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."

135. Khanna, J. 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: (*ADM, Jabalpur case*[6], SCC p. 767, para 574)

"*574.* ... 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."

136. The judgments rendered by all the four Judges constituting the majority in *ADM, Jabalpur*[6] are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in *Kesavananda Bharati*[98], 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 civilised 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

6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207
98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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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 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. Khanna, J. 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.

137. 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 Khanna, J. must be accepted, and accepted in reverence for the strength of its thoughts and the courage of its convictions.

138. 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*[117] ranks amongst the latter. It was a decision in which Oliver Wendell Holmes Jr., J. accepted the forcible sterilisation by tubular ligation of Carrie Bucks as part of a programme of State sponsored eugenic sterilisation. Holmes, J. while upholding the programme opined that: "three generations of imbeciles is enough"[118]. In the same vein was the decision of the US Supreme Court in *Korematsu* v. *United States*[119], upholding the imprisonment of a citizen in a concentration camp solely because of his Japanese ancestry.

139. *ADM, Jabalpur*[6] must be and is accordingly overruled. We also overrule the decision in *Union of India* v. *Bhanudas Krishna Gawde*[120], which followed *ADM, Jabalpur*[6].

117 1927 SCC OnLine US SC 105 : 71 L Ed 1000 : 274 US 200 (1927)

118 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) pp. 78-85.

119 1944 SCC OnLine US SC 135 : 89 L Ed 194 : 323 US 214 (1944)

6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207

120 (1977) 1 SCC 834 : 1977 SCC (Cri) 208

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140. In *I.R. Coelho* v. *State of T.N.*[121], this Court took the view that *ADM, Jabalpur*[6] has been impliedly overruled by various subsequent decisions: (*I.R. Coelho case*[121], SCC p. 76, para 29)

> "*29*. During emergency, the fundamental rights were read even more restrictively as interpreted by the majority in *ADM, Jabalpur* v. *Shivakant Shukla*[6]. The decision in *ADM, Jabalpur*[6] about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions."

We now expressly do so.

141. 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 Kumar Koushal*[7]

142. 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*[7] ("*Koushal*"). The proceedings before this Court arose from a judgment[122] of the Delhi High Court holding that Section 377 of the 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: (*Naz Foundation case*[122], SCC OnLine Del para 48 : Cri LJ p. 110, para 48)

> "*48*. The sphere of privacy allows persons to develop human relations without interference from the outside community or from 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 to privacy both are recognised as dimensions of Article 21."

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

121 (2007) 2 SCC 1
6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207
7 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1
122 *Naz Foundation* v. *State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94

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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.

143. When the matter travelled to this Court, Singhvi, J. 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: (*Koushal case*[7], SCC pp. 69-70, para 66)

> "*66.* ... the Division Bench of the High Court overlooked that *a miniscule fraction of the country's population constitutes 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." (emphasis supplied)

The privacy and dignity based challenge was repelled with the following observations: (SCC p. 78, para 77)

> "*77. 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." (emphasis supplied)

144. 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 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

7 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1

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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.

145. The view in *Koushal*[7] 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.

146. The decision in *Koushal*[7] 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*[7] 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*[7] has dealt with the privacy-dignity based claims of LGBT persons on this aspect.

147. 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*

148. 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

7 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1

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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"[123]. Article 12 of the Universal Declaration of Human Rights, recognises the right to privacy:

> "**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 16-12-1979 and came into effect on 23-3-1976. India ratified it on 11-12-1977. 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."

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

> "**2. (1)(*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;"

Section 2(1)(*f*) defines "international covenants":

> "**2. (1)(*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 16-12-1966 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".

150. 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 the 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."

123 Article 51(*c*) of the Indian Constitution.

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Significantly, while acceding to 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:

'**1**. 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:

'**9**. 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:

'**13**. The Government of the Republic of India reserves its right to apply its law relating to foreigners.' "

151. On 30-6-2014, a report was presented by the office of the United Nations High Commissioner for Human Rights.[124] The report underscores that:

"*13*. … 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."

152. In *Bachan Singh* v. *State of Punjab*[125] ("*Bachan Singh*"), this Court considered in relation to the death penalty, the obligations assumed by India in international law, following the ratification of ICCPR. The Court held that the requirements of Article 6 of 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*[93], this Court, while explaining the ambit of Article 21, held that: (SCC p. 619, para 8)

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124 "The Right to Privacy in the Digital Age", Report of the Office of the United Nations High Commissioner for Human Rights (30-6-2014) at p. 5, para 13.

125 (1980) 2 SCC 684 : 1980 SCC (Cri) 580

93 *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212

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"*8.* ... 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."

153. In *Vishaka* v. *State of Rajasthan*[126], this Court observed that in the absence of domestic law, the Convention on the Elimination of Discrimination Against Women (CEDAW) is applicable. In *NALSA*[92], 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.

154. 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 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*

155. 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

126 (1997) 6 SCC 241 : 1997 SCC (Cri) 932
92 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438

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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) The UK decisions

156. The first Common law case regarding protection of privacy is said to be *Semayne case*[15] (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: (ER p. 195)

> "1. 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...."

157. Then, in *Entick* v. *Carrington*[127] (1765), Entick's house had been forcibly entered into by agents of the State/King. Lord Camden, C.J. 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."

158. Privacy jurisprudence developed further in the 19th century. In 1849, in *Albert* v. *Strange*[128] (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: (ER p. 1179)

> "... 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 *Albert case*[128] took a different turn in *Kaye* v. *Robertson*[129] (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."

159. The decision in *R.* v. *Director of Serious Fraud Office, ex p Smith*[130] (1993) discussed the question of the right to silence. The applicant (the Chairman and Managing Director of a company) was charged of doing acts

15 (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194
127 (1765) 19 St Tr 1029 : 95 ER 807
128 (1849) 1 Mac & G 25 : 41 ER 1171
129 1991 FSR 62 (CA)
130 1993 AC 1 : (1992) 3 WLR 66 (HL)

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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 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: (AC p. 31)

> "[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."

160. 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".[131] This approach was diluted in *Wainwright* v. *Home Office*[132] (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 of the incident, the Human Rights Act, 1998 (HRA) had not yet come into force. When the case reached before the House of Lords, it was argued that: (AC p. 418, para 11)

> "*11.* ... the law of tort should give a remedy for any kind of distress caused by an infringement of the right to 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, L.J. in *Douglas* v. *Hello! Ltd.*[133] (2001), where it was said that: (*Wainwright case*[132], AC p. 422, para 28)

> "*28.* ... '*126. 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*

131 Lord Neuberger, "Privacy in the 21st Century", the UK Association of Jewish Lawyers and Jurists' Lecture (28-11-2012).
132 (2004) 2 AC 406 : (2003) 3 WLR 1137 (HL)
133 2001 QB 967 : (2001) 2 WLR 992 (CA)

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itself as a legal principle drawn from the fundamental value of personal autonomy.' (*Douglas case*[133], QB p. 1001, para 126)" (emphasis supplied)

However, Lord Hoffman in *Wainwright*[132] rejected all the contentions and held that: (AC p. 422, para 30)

"*30*. I do not understand Sedley, L.J. 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: (AC pp. 419 & 423, paras 19, 31 & 32)

"*19*. What the courts have so far refused to do is to formulate a general principle of "invasion of privacy"....

* * *

31. 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 the notion of underlying values—principles only in the broadest sense—which direct its development. ...

32. 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)."

161. 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.[134]

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133 *Douglas* v. *Hello! Ltd.*, 2001 QB 967 : (2001) 2 WLR 992 (CA)

132 *Wainwright* v. *Home Office*, (2004) 2 AC 406 : (2003) 3 WLR 1137 (HL)

134 The UK Human Rights Act incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Preamble to the Act states that it "gives further effect to rights and freedoms guaranteed" under the ECHR. Under the Act (Section 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>.

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162. In *Campbell* v. *MGN Ltd.*[135] (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: (AC p. 480, para 85)

> "[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."

In holding so, Lord Hope relied upon the following statement of Lord Woolf in *A* v. *B plc*[136] [QB p. 207, para 11(*ix*)] (2003): (*Campbell case*[135], AC p. 480, para 85)

> "*85*. … 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" (AC p. 480, para 85).

163. Baroness Hale wrote a concurring judgment and held that: (*Campbell case*[135], AC pp. 494-95, para 132)

> "*132*. … 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, C.J. held in *A* v. *B plc*[136]: (QB p. 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

135 (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)
136 2003 QB 195 : (2002) 3 WLR 542 : (2002) EWCA Civ 337 (CA)

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giving a new strength and breadth to the action so that it accommodates the requirements of these articles.' "

164. Later, in *Douglas* v. *Hello! Ltd. (No. 3)*[137], it was held that: (QB p. 157, para 82)

"*82*. ... What the House [in *Campbell*[135]] 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."

165. Subsequent cases establish the contribution the HRA has made in jurisprudence on privacy in the UK. In *Prince of Wales* v. *Associated Newspapers Ltd.*[138] (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 was brought about when *The Mail on Sunday* published extracts of a dispatch by the Prince of Wales. The Court held that: (Ch pp. 125 & 128, paras 70 & 83)

"*70*. 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.

* * *

83. ... Prince Charles has a valid claim based on breach of confidence and interference with his Article 8 rights...."

166. In *Murray* v. *Express Newspapers plc*[139] (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: (Ch pp. 502-03 & 507, paras 36 & 45)

"[T]he question 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.

* * *

137 2006 QB 125 : (2005) 3 WLR 881 (CA)
135 *Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)
138 2008 Ch 57 : (2007) 3 WLR 222 : 2006 EWCA Civ 1776 (CA)
139 2009 Ch 481 : (2008) 3 WLR 1360 (CA)

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[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."

167. *R. (GC)* v. *Commr. of Police of the Metropolis*[140] (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: (WLR pp. 1244 & 1245, paras 46 & 52)

"*46*. … 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.

* * *

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

168. In *JR38, In re*[141] (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: (WLR p. 185, para 98)

"*98*. … 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 MR said in *Murray case*[139]) 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

140 2011 UKSC 21 : (2011) 1 WLR 1230 (SC)
141 2015 UKSC 42 : (2015) 3 WLR 155 (SC)
139 *Murray* v. *Express Newspapers plc*, 2009 Ch 481 : (2008) 3 WLR 1360 (CA)

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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."

Lord Clarke wrote a separate judgment concurring with Lord Toulson and held that: (WLR pp. 188-89, para 112)

"*112*. … 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."

169. The decision in *PJS* v. *News Group Newspapers Ltd.*[142] (2016) dealt with an anonymised privacy injunction.[143] 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: (WLR p. 1274, para 43)

"*43*. … 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."

170. The HRA has rendered clarity on the existence of a right to privacy in the UK jurisprudence and substantially resolved conflicting approaches regarding privacy in decided cases. The HRA, by incorporating the provisions of the European Convention on Human Rights (ECHR), has adopted the guarantee of the right to privacy into the 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.

142 2016 UKSC 26 : (2016) 2 WLR 1253 (SC)

143 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>.

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(ii) The US Supreme Court decisions

171. The US Constitution does not contain an express right to privacy. But the American privacy jurisprudence reflects that it has been protected under several amendments[144] of the US Constitution.

172. As early as 1886, in *Boyd* v. *United States*[13], 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. Bradley, J. delivered the opinion of the Court and held as follows: (SCC OnLine US SC paras 15 & 17)

> "*15*. 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*....
>
> * * *
>
> *17*. ... 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)

173. 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*[145] (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 McReynolds, J. 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, McReynolds, J. held: (SCC OnLine US SC para 6)

> "*6*. ... 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

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144 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.

13 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)

145 1923 SCC OnLine US SC 150 : 67 L Ed 1042 : 262 US 390 (1923)

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dictates of his own conscience, and generally to enjoy those privileges long recognised 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."

Two years later, in *Pierce* v. *Society of Sisters*[146] (1925), the Court, relying upon *Mayer* v. *Nebraska*[145], struck down the Oregon Compulsory Education Act, which mandated all children (between eight and sixteen years) to attend public schools. It was held that 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" (*Pierce case*[146], SCC OnLine US SC para 11).

174. In *Olmstead* v. *United States*[54] (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. Taft, C.J. wrote the majority judgment, holding that: (SCC OnLine US SC paras 25 & 27)

"*25*. The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects.

* * *

27. … 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, Louis Brandeis, J. wrote a dissenting opinion and observed that: (SCC OnLine US SC paras 53-54)

"*53*. … "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.

54. 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

146 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 45 S Ct 571 : 39 ALR 468 : 268 US 510 (1925)
145 1923 SCC OnLine US SC 150 : 67 L Ed 1042 : 262 US 390 (1923)
54 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)

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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. Brandeis, J. answers this question in a celebrated passage: (SCC OnLine US SC para 62)

"*62. ... 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 civilised 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)

175. The Court, in *Griswold* v. *Connecticut*[52] (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. Douglas, J. 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: (SCC OnLine US SC para 16)

"*16.* 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 tell-tale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."

Goldberg, J. wrote in the concurring opinion that: (SCC OnLine US SC para 35)

"*35.* ... 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."

176. The 1967 decision in *Katz* v. *United States*[66] ("*Katz*") overruled *Olmstead* v. *United States*[54] and revolutionised 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.

52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
66 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)
54 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)

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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 Fourth Amendment protection from "unreasonable searches and seizures" was restricted to the search and seizure of 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.

177. Prior to 1967 when determining the "reasonable expectation of privacy" for purposes of discussing the 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*[54] was held to be no longer relevant. Stewart, J. wrote the majority (7:1) opinion and held that: (*Katz case*[66], SCC OnLine US SC para 6)

> "*6.* … 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)

178. Harlan, J. wrote the concurring judgment holding that: (SCC OnLine US SC para 25)

> "*25.* … (*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: (SCC OnLine US SC para 26)

> "*26.* … "*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

54 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)

66 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)

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there is a twofold requirement, *first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognise 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)

179. In *Stanley* v. *Georgia*[147] (1969), the Court analysed 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: (SCC OnLine US SC paras 7, 9 & 10)

"*7.* … For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

* * *

9. [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. …

10. … 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."

180. Seven years after *Griswold*[52], the Court expanded the right to privacy beyond the "marital bedroom" to include unmarried persons. In *Eisenstadt* v. *Baird*[148] (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: (*Baird case*[148], SCC OnLine US SC para 21)

"*21.* … It is true that in *Griswold*[52] the right to 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 to 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."

147 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)
52 *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
148 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 92 S Ct 1029 : 405 US 438 (1972)

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181. The decision in *Paris Adult Theatre I* v. *Slaton*[149] (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*[147], on the ground that the privacy of the home in *Stanley*[147] was not the same as the commercial exhibition of obscene movies in a theatre. Burger, C.J. 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 liberty" such as "the personal intimacies of the home, the family, marriage, motherhood, procreation and child-bearing" and held that: (*Slaton case*[149], SCC OnLine US SC paras 23 & 24)

> "*23*. … 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.
>
> *24*. … The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive."

182. In the landmark decision on the right to abortion, *Roe* v. *Wade*[53] (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 recognised in *Griswold*[52]. 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. Blackmun, J. delivered the majority judgment and held that: (*Roe case*[53], SCC OnLine US SC paras 42 & 43)

> "*42. The Constitution does not explicitly mention any right to 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 Amendment … or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.…
>
> *43. This right to 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*

149 1973 SCC OnLine US SC 165 : 37 L Ed 2d 446 : 413 US 49 (1973)
147 *Stanley* v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)
53 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
52 *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)

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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)

183. The right to privacy in bank records was analysed by the US Supreme Court in *United States* v. *Miller*[66] (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, Lewis F. Powell, J. asserted that the "documents subpoenaed … are not [Miller's] 'private papers'," but instead, part of the bank's business records. It was held: (SCC OnLine US SC paras 14, 15 & 16)

"*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. 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." (emphasis supplied)

However, Brennan, J. dissented and held that: (SCC OnLine US SC paras 30, 34 & 35)

"*30*. … A bank customer's reasonable expectation is that, absent a compulsion by legal process, the matters he reveals to the bank will be utilised by the bank only for internal banking purposes.

* * *

34. [A] depositor reveals many aspects of his personal affairs, opinions, habits, associations. Indeed, the totality of bank records provides a virtual current biography.…

35. '… 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.' "

66 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)

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184. 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*[150] (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. Brennan, J. 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": (SCC OnLine US SC para 7)

> "*7.* ... 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 child-bearing and education...."

It was further held that: (SCC OnLine US SC para 8)

> "*8.* 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".

185. In *Smith* v. *Maryland*[151] (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. Blackmun, J. 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: (SCC OnLine US SC para 11)

> "*11.* ... First, *we doubt that people in general entertain any actual expectation of privacy in the numbers they dial.* All telephone users realise that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realise, 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

150 1977 SCC OnLine US SC 103 : 52 L Ed 2d 675 : 431 US 678 (1977)
151 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 (1979)

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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 Harlan, J. in *Katz*[66] and held as follows: (*Maryland case*[151], SCC OnLine US SC paras 7 & 8)

> "*7.* [The] inquiry, as Mr Justice Harlan aptly noted in his *Katz*[66] 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. ...
>
> *8.* ... 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*[66] test: (*Maryland case*[151], SCC OnLine US SC para 7 footnote 5)

> "*Situations can be imagined, of course, in which Katz*[66] *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-recognised Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was." (emphasis supplied)

Stewart, J. wrote the dissent, joined by Brennan, J. and held that there was a legitimate expectation of privacy in this case: (*Maryland case*[151], SCC OnLine US SC para 27)

> "*27.* ... the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognised in *Katz*[66]. 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

66 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)

151 *Smith* v. *Maryland*, 1979 SCC OnLine US SC 128 : 61 L Ed 2d 220 : 442 US 735 (1979)

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are entitled to Fourth and Fourteenth Amendment protection. Further, that information is an integral part of the telephonic communication that under *Katz*[66] is entitled to constitutional protection...."

Marshal, J. dissented and opined on the dangers of permitting such surveillance, holding: (SCC OnLine US SC para 37)

"*37*. 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 organisations 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)

186. In *Planned Parenthood* v. *Casey*[152] (1992), several Pennsylvania State statutory provisions regarding abortion such as spousal consent were challenged. The Court reaffirmed—what it called—the "essential holding"[153] of *Roe* v. *Wade*[53], and observed: (*Casey case*[152], SCC OnLine US SC)

"... Our precedents "have respected the private realm of family life which the State cannot enter". ... These matters, involving the most

66 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)

152 1992 SCC OnLine US SC 102 : 120 L Ed 2d 674 : 505 US 833 (1992)

153 The essential holding of *Roe*, 1973 SCC OnLine US SC 20, as summarised in *Planned Parenthood*, 1992 SCC OnLine US SC 102, 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 foetus that may become a child.

53 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)

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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*[53]. It is a rule of law and a component of liberty we cannot renounce."

187. In *Minnesota* v. *Carter*[154] (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. Rehnquist, C.J. delivered the majority opinion of the 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*[155] (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: (*Carter case*[154], SCC OnLine US SC)

"*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 the 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 the respondents and the householder, all lead us to conclude … any search which may have occurred did not violate their Fourth Amendment rights." (emphasis supplied)

Ginsburg, J. wrote the dissenting opinion joined by Stevens and Souter, JJ. and held that: (SCC OnLine US SC)

"… Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they have the prerogative to exclude others.

* * *

53 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
154 1998 SCC OnLine US SC 95 : 142 L Ed 2d 373 : 119 S Ct 469 : 525 US 83 (1998)
155 1990 SCC OnLine US SC 61 : 109 L Ed 2d 85 : 495 US 91 (1990)

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Through the host's invitation, the guest gains a reasonable expectation of privacy in the home. *Minnesota* v. *Olson*[155], so held with respect to an overnight guest. The logic of that decision extends to shorter term guests as well."

188. In *Kyllo* v. *United States*[156] (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. Scalia, J. 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: (SCC OnLine US SC)

> "*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.

189. In *Lawrence* v. *Texas*[157], 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*[158] (1986), where it upheld a challenged Georgia statute and did not find a constitutional protection of sexual privacy. Anthony Kennedy, J. wrote the majority opinion (6:3 decision) and held that: (*Lawrence case*[157], SCC OnLine US SC)

> "... 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."

155 1990 SCC OnLine US SC 61 : 109 L Ed 2d 85 : 495 US 91 (1990)
156 2001 SCC OnLine US SC 61 : 150 L Ed 2d 94 : 533 US 27 (2001)
* **Ed.**: Emphasis in original.
157 2003 SCC OnLine US SC 73 : 156 L Ed 2d 508 : 539 US 558 (2003)
158 1986 SCC OnLine US SC 165 : 92 L Ed 2d 140 : 478 US 186 (1986)

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190. Informational privacy was the core issue in *National Aeronautics and Space Admn. ("NASA")* v. *Nelson*[159] (2011). The Court held unanimously that *NASA*[159] 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 the US Supreme Court judgments, namely, *Whalen* v. *Roe*[160] (1977) and *Nixon* v. *Administrator of General Services*[161] (1977), was violated by background checks. The majority judgment delivered by Alito, J. decided the case assuming that there existed a constitutional right to privacy. The Court held that: (*NASA case*[159], SCC OnLine US SC)

> "... 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: (SCC OnLine US SC)

> "... the mere possibility that security measures will fail provides no "proper ground" for a broad-based attack on government information-collection practices. Respondents also cite a portion of SF-85 that warns

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159 2011 SCC OnLine US SC 155 : 178 L Ed 2d 667 : 562 US 134 (2011)

160 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977). In this case, for the first time, the Court explicitly recognised an individual's interest in non-disclosure 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: (SCC OnLine US SC para 12)

> "*12.* ... 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."

161 1977 SCC OnLine US SC 152 : 53 L Ed 2d 867 : 433 US 425 (1977). In this case, the former President of the US, Nixon, was challenging the Presidential Recordings and Material Preservation Act, 1974 on the ground that it violated his right to privacy, as there would be intrusion through the screening of his documents. Nixon's plea was rejected by the Court, which held that "any intrusion [against privacy] must be weighed against the public interest".

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of possible disclosure "[t]o the news media or the general public". 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". *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)

Scalia, J. in a concurring opinion joined by Thomas, J. 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. criticised the Court's decision to evade the constitutional question, stating that: (SCC OnLine US SC)

"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 analysing 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)

191. In *United States* v. *Jones*[162] (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. Scalia, J. 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". Scalia, J. however, left unanswered the question surrounding the privacy implications of a warrantless use of GPS data without physical intrusion. Sonia Sotomayor, J. concurred with Scalia, J. but addressed the privacy aspects of the judgment. Sotomayor, J. agreed with Alito, J.'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: (SCC OnLine US SC)

162 2012 SCC OnLine US SC 13 : 565 US 400 (2012)

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"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)

Sotomayor, J. concluded, by stating: (SCC OnLine US SC)

"[I] doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every website 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."

192. In *Florida* v. *Jardines*[163] (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. Scalia, J. who delivered the opinion of the Court held as follows: (SCC OnLine US SC)

"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)

Kagan, J. in a concurring opinion, wrote: (SCC OnLine US SC)

"… Like the binoculars, a drug-detection dog is a specialised 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*

163 2013 SCC OnLine US SC 18 : 569 US 1 (2013)

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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)

193. Three years ago, in *Riley* v. *California*[164] (2014), the Court unanimously held that the warrantless search and seizure of digital contents of a cellphone during an arrest is unconstitutional. Roberts, C.J. delivered the opinion of the Court and commented on the impact on privacy in an era of cellphones: (SCC OnLine US SC)

"*... 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)

194. In *Obergefell* v. *Hodges*[165], 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. Kennedy, J. authored the majority opinion (joined by Ginsburg, Breyer, Sotomayor and Kagan, JJ.): (SCC OnLine US SC)

* **Ed.**: The words between two asterisks have been emphasised in original as well.

164 2014 SCC OnLine US SC 71 : 180 L Ed 2d 285 : 573 US __ (2014)

165 2015 SCC OnLine US SC 6 : 192 L Ed 2d 609 : 576 US __ (2015)

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"... Indeed, the Court has noted *it would be contradictory 'to recognize a right to 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)

195. 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 to 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 decriminalising 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

196. 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;

(*b*) their property searched;

(*c*) their possessions seized; or

(*d*) the privacy of their communications infringed."

197. In *National Media Ltd.* v. *Jooste*[166] (1996), Harms, J. 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

166 (1996) 3 SA 262 (A)

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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 … 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."

198. In *Bernstein* v. *Bester*[167] (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. Ackermann, J. 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."

199. The constitutional validity of laws making sodomy an offence was challenged in *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*[168] (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:

167 1996 SCC OnLine ZACC 2 : (1996) 2 SA 751 (CC)
168 1998 SCC OnLine ZACC 15 : (1999) 1 SA 6 (CC)

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

Sachs, J. 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.

200. In *Investigating Directorate: Serious Economic Offences* v. *Hyundai Motor Distributors (Pty) Ltd.*[169] (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."

169 2000 SCC OnLine ZACC 14 : (2001) 1 SA 545 (CC)

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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 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)

201. In *Minister of Home Affairs* v. *Fourie*[170] (2006), the Constitutional Court of South Africa ruled unanimously that same-sex couples have a constitutional right to marry. The judgment delivered by Sachs, J. held that:

> "Section 9(1) of the Constitution provides:
>
> '**9. *Equality***.—(1) 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)

202. In *NM* v. *Smith*[171] (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 violating their privacy and dignity rights. Madala, J. 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

170 2005 SCC OnLine ZACC 20 : (2006) 1 SA 524 (CC)
171 2007 SCC OnLine ZACC 6 : (2007) 5 SA 250 (CC)

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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.

203. In the dissenting opinion, O'Regan, J. held in *Smith case*[171] 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 to 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."

204. According to the decision in *Smith case*[171], there are two interrelated 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)

171 *NM* v. *Smith*, 2007 SCC OnLine ZACC 6 : (2007) 5 SA 250 (CC)

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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 interrelationship 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 interrelationship 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 interdependent 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)

205. The interim as well as the Final Constitution of South Africa contain explicit provisions guaranteeing the right to privacy. The Judges of the South African Supreme Court have given an expansive meaning to the right, making significant interlinkages 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) Constitutional right to privacy in Canada

206. 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 recognise a right to privacy. Most notably, Section 8[172] (the Canadian version of the Fourth Amendment of the US Constitution) has been employed in this respect. Privacy issues have also been recognised in respect of Section 7[173] of the Charter. In 1983, the Privacy Act was enacted to regulate how Federal Government

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172 Section 8 of the Charter provides as follows:

"**8. *Search or seizure*.**—Everyone has the right to be secure against unreasonable search or seizure."

173 Section 7 of the Canadian Charter deals with life, liberty and security of person and states that:

"**7. *Life, liberty and security of person*.**—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."

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collects, uses and discloses personal information.[174] 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.

207. One of the landmark cases on the right to privacy was *Hunter* v. *Southam Inc.*[175] (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 authorised 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 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: (SCC OnLine Can SC)

> "... The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by Section 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." (emphasis in original)

208. In *R.* v. *Dyment*[176] (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

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174 In *Commr. of Official Languages* v. *Lavigne*, 2002 SCC OnLine Can SC 53 : (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: (SCC OnLine Can SC para 25)

> "25. 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."

175 1984 SCC OnLine Can SC 36 : (1984) 2 SCR 145

176 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417

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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: (SCC OnLine Can SC para 20)

> "*20*. [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*'." (emphasis supplied)
>
> "*17. … 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*." (SCC OnLine Can SC para 17) (emphasis supplied)

On the importance of informational privacy, it was held: (SCC OnLine Can SC para 22)

> "*22*. … '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."

209. La Forest, J. wrote on the importance of consent and held that (*Dyment case*[176], SCC OnLine Can SC para 27) "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 in *Dyment*[176] 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: (SCC OnLine Can SC para 31)

> "*31*. … 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

176 *R.* v. *Dyment*, 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417

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the Charter protection. For the State to take it in violation of a patient's right to privacy constitutes a seizure for the purposes of Section 8."

210. *Plant* v. *R.*[177] (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.

211. The judgment delivered by Sopinka, J. relied on a part of the *United States* v. *Miller*[67] decision, that in order to be constitutionally protected the information must be of a "personal and confidential" nature and held that: (*Plant case*[177], SCC OnLine Can SC)

> "... In fostering the underlying values of dignity, integrity and autonomy, it is fitting that Section 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".

212. In *R.* v. *Walter Tessling*[178] (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 Section 8 of the Canadian Charter) need to be

177 1993 SCC OnLine Can SC 92 : (1993) 3 SCR 281
67 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)
178 2004 SCC OnLine Can SC 68 : (2004) 3 SCR 432 : 2004 SCC 67

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distinguished between personal privacy, territorial privacy and informational privacy. The Court relied on Sopinka, J.'s understanding of the scope of the protection of informational privacy in *Plant* v. *R.*[177] 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.

213. The decision in *Spencer* v. *R.*[179] (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: (SCC OnLine Can SC para 18)

> "*18.* ... 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-matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances*." (emphasis supplied)

214. The issue in *Spencer case*[174] 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: (SCC OnLine Can SC para 35)

> "*35.* 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...."

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177 1993 SCC OnLine Can SC 92 : (1993) 3 SCR 281

179 2014 SCC OnLine Can SC 34 : (2014) 2 SCR 212 : 2014 SCC 43

174 In *Commr. of Official Languages* v. *Lavigne*, 2002 SCC OnLine Can SC 53 : (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: (SCC OnLine Can SC para 25)

> "*25.* 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."

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The Court found that the nature of the appellant's privacy interest in subscriber information relating to a computer used privately was primarily an informational one and held: (SCC OnLine Can SC para 47)

> "*47.* … the identity of a person linked to their use of the internet must be recognised 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: (SCC OnLine Can SC para 48)

> "*48.* … 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 recognising an absolute right to anonymity, it held that "anonymous internet activity engages a high level of informational privacy". The Court further held that: (SCC OnLine Can SC para 66)

> "*66.* … 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."

215. 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

216. In Europe, there are two distinct but related frameworks to ensure the protection of the right to 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

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(CJEU), also called the "Luxembourg Court", is the chief judicial authority of the European Union and oversees the uniform application and interpretation of the European Union law, in cooperation with the national judiciary of the member States.

217. Article 8 of the ECHR provides that:

"**8.** ***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."

218. Under the Charter, the relevant provisions are:

"**7.** ***Respect for private and family life***.—Everyone has the right to respect for his or her private and family life, home and communications.

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.

* * *

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) Insofar 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

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part of the right to privacy in line with how the ECtHR in Strasbourg interprets Article 8 of ECHR till date[180].

219. 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 analysed. The term "private life" is an essential ingredient of both these provisions and has been interpreted to encompass a wide range of interests.

220. In *Niemietz* v. *Germany*[181] (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*[182] (1993), the ECtHR stated that "the notion of "private life" is a broad one" and "is not susceptible to exhaustive definition".

221. This broad approach is also present in the recent cases of the European jurisprudence. In *S and Marper* v. *United Kingdom*[183] (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 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

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180 In *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, *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."

181 (1992) 16 EHRR 97

182 (1993) 19 EHRR 112

183 2008 ECHR 1581

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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 …"

222. In *Uzun* v. *Germany*[184] (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[185], which can be summarised 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,

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.

184 Application No. 35623/05, decided on 2-9-2010 (ECHR) : (2010) 53 EHRR 852

185 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 p. 9.

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223. The Grand Chamber of 18 Judges at the ECHR, in *S and Marper* v. *United Kingdom*[183], 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

183 2008 ECHR 1581

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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 ..."

224. In *Uzun* v. *Germany*[184], the ECtHR examined an application claiming violation of Article 8 of the European Convention of Human Rights where the applicant's data was obtained via the Global Positioning System (GPS) by the investigating 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."

225. The decision of the CJEU in *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)* v. *Spain*[186] 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 subject's rights enshrined in Articles 7 and 8 of the Charter must be properly taken into account."

184 Application No. 35623/05, decided on 2-9-2010 (ECHR) : (2010) 53 EHRR 852
186 C-468/10, decided on 24-11-2011, 2011 ECR I-12181 : ECLI : EU : C : 2011 : 777

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226. In *Digital Rights Ireland Ltd.* v. *Minister*[187] (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: (WLR p. 1653, para 33)

> "*33*. 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: (WLR pp. 1655-56, para 51)

> "*51*. 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 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" (WLR p. 1658, para 69).

227. In *RE* v. *United Kingdom*[188] (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[189] 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,

187 (2014) 3 WLR 1607 : C-293/12, decided on 8-4-2014 (CJEU)

188 Application No. 62498/11, decided on 27-10-2015 : 2015 ECHR 947

189 As per the facts of the case, an "appropriate adult" could be a relative or guardian, or a person experienced in dealing with mentally disordered or mentally vulnerable people.

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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."

228. In *Roman Zakharov* v. *Russia*[190] (2015), the 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."

229. Both the ECtHR and the CJEU, while dealing with the application and interpretation of Article 8 of the ECHR and Article 7 of the Charter, have kept a balanced approach 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 the ECtHR.

(vi) ***Decisions of the Inter-American Court of Human Rights***

230. Article 11 of the American Convention on Human Rights deals with the Right to Privacy. The provision is extracted below:

"**11.** ***Right to privacy***.—(1) Everyone has the right to have his honor respected and his dignity recognized.

(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."

231. The decision in *Artavia Murillo ("In Vitro Fertilization")* v. *Costa Rica*[191] (2012), addressed the question of whether the State's prohibition on

190 Application No. 47143/06, decided on 4-12-2015 (ECHR) : (2016) 63 EHRR 17
191 2012 SCC OnLine IACTHR 30 : Ser. C No. 257, decided on 28-11-2012 (Int-Am Ct HR)

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the practice of in vitro fertilisation constituted an arbitrary interference with the right to private life. The Court held that: (SCC OnLine IACTHR para 143)

> "*143. 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)

232. In *Escher* v. *Brazil*[192] (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: (SCC OnLine IACTHR paras 114, 117 & 118)

> "*114.* … 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.
>
> * * *
>
> *117.* … 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.

192 2009 SCC OnLine IACTHR 54 : Ser. C No. 200, decided on 6-7-2009 (Inter-Am Ct HR)

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118. [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."

233. 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.

234. The development of the law on privacy in these jurisdictions has drawn sustenance from the importance and sanctity attributed to individual freedom and liberty. The 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***

235. The Attorney General for India, leading the arguments before this Court on behalf of the Union of India, has been critical of the recognition being given to a general right to privacy. The submission has several facets, among them being:

235.1. There is no general or fundamental right to privacy under the Constitution.

235.2. 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.

235.3. 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 recognised in several decisions of this Court.

235.4. Privacy is a concept which does not have any specific meaning or definition and the expression is inchoate.

235.5 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.

236. 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

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domestically and internationally. These, as we notice, are based on academic, philosophical and practical considerations.

237. 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)."[193]

238. 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"[194]. 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"[194]. 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's 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."[195]

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.

239. Another criticism, which is by *Robert Bork*, questions the choice of fundamental values of the Constitution by the Judges of the US Supreme Court

193 "Privacy", *Stanford Encyclopaedia of Philosophy* (2002), available at <https://plato.stanford.edu/entries/privacy/>.
194 Julie E. Cohen, "What Privacy is For", *Harvard Law Review* (2013), Vol. 126, at p. 1904.
195 *Id*, at pp. 1904-1905.

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and the theory (propounded by Douglas, J. in *Griswold*[52]) of the existence of "penumbras" or zones of privacy created by the Bill of Rights as a leap of judicial interpretation.[195a]

240. The *Stanford Encyclopaedia of Philosophy* seeks to offer an understanding of the literature on privacy in terms of two concepts: Reductionism and Coherentism.[193] 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) *Thomson's Reductionism*[196]

241. *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.

(b) *Posner's Economic critique*[197]

242. *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*

243. *Robert Bork*, in *The Tempting of America: The Political Seduction of the Law*[198], has been severe in his criticism of the protection of privacy by the US Supreme Court. In his view, Douglas, J. 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.

244. 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

52 *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)

195a For this criticism, see: Robert H. Bork, "Neutral Principles and Some First Amendment Problems", *Indiana Law Journal* (Fall 1971), Vol. 47(1), at pp. 8-9.

193 "Privacy", *Stanford Encyclopaedia of Philosophy* (2002), available at <https://plato.stanford.edu/entries/privacy/>.

196 Judith Jarvis Thomson, "The Right to Privacy", *Philosophy and Public Affairs* (1975), Vol. 4, at pp. 295-314, as cited in "Privacy", *Stanford Encyclopaedia of Philosophy* (2002).

197 Richard Posner, *The Economics of Justice* (Harvard University Press, 1981), as cited in "Privacy", *Stanford Encyclopaedia of Philosophy* (2002).

198 Robert Bork, *The Tempting of America: The Political Seduction of the Law* (Simon and Schuster, 1990), as cited in "Privacy", *Stanford Encyclopaedia of Philosophy* (2002).

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concerns that emerge in privacy issues. In this view, liberty is a concept which is broader than privacy and issues or claims relating to privacy are a subset of claims to liberty.[193] 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"[193]. This rationale understands the relationship between liberty and privacy by stipulating that while liberty is a broader notion, privacy is essential for protecting liberty. Recognising 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***

245. 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 caused an affront to "honour". Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets.

246. *Catherine MacKinnon* in a 1989 publication titled *Towards a Feminist Theory of the State*[199] 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 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 sterilisation 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.

247. 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 are:

247.1. *Alan Westin*[200] 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

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193 "Privacy", *Stanford Encyclopaedia of Philosophy* (2002), available at <https://plato.stanford.edu/entries/privacy/>.

199 Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), as cited in "Privacy", *Stanford Encyclopaedia of Philosophy* (2002).

200 Westin's categorisation of privacy is based on the specific values which it subserves. 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), pp. 383-423.

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the individual in an "inner dialogue with the mind and conscience".[201] 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 hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express"[202].

247.2. *Roger Clarke* has developed a classification of privacy on *Maslow's pyramid* of values[203]. The values described in Maslow's pyramid are: self-actualisation, 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 sterilisation; (*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.

247.3. *Anita Allen* has, in a 2011 publication, developed the concept of "unpopular privacy"[204]. 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*) 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.[205]

248. Privacy has distinct connotations including (*i*) spatial control; (*ii*) decisional autonomy; and (*iii*) informational control.[206] 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

201 Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38, Issue 2, at p. 496.
202 *Id*, at p. 497
203 *Id*, at p. 498
204 *Id*, at p. 500
205 *Id*, at pp. 500-501
206 Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, at p. 32.

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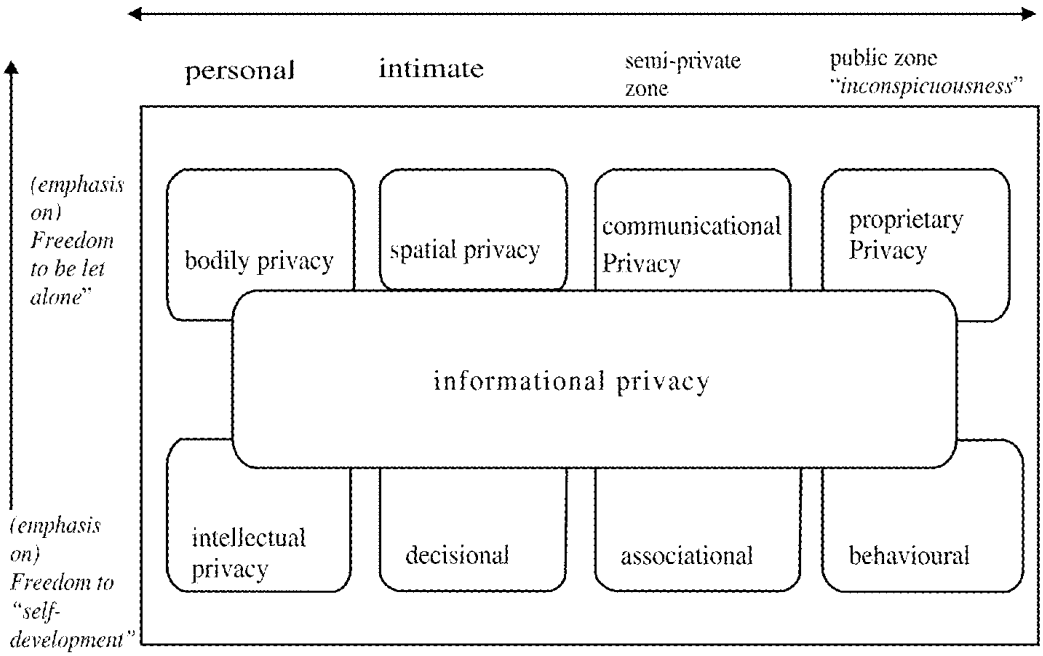
over information pertaining to the person. With regard to informational privacy, it has been stated that:

> "... 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)".[207]

249. Integrated together, the fundamental notions of privacy have been depicted in a seminal article published in 2017 titled "*A Typology of Privacy*"[208] in the University of Pennsylvania Journal of International Law. The article contains an excellent visual depiction of privacy, which is presented in the following format:



250. 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;

207 Bhairav Acharya, "The Four Parts of Privacy in India", *Economic & Political Weekly* (2015), Vol. 50 Issue 22, at p. 34

208 Bert-Jaap Koops et al., "A Typology of Privacy", *University of Pennsylvania Journal of International Law* (2017), Vol. 38 Issue 2, at p. 566.

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(*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***

251. 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.

252. On 17-3-1947, 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[209]:

"… (*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…".

209 B. Shiva Rao, *The Framing of India's Constitution* (Indian Institute of Public Administration, 1967) Vol. 2, at p. 75.

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253. On 24-3-1947, 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[210]:

> "... 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...".

254. The draft report of the Sub-Committee submitted on 3-4-1947 contained a division between the fundamental rights into justiciable and non-justiciable rights. Clause 9(*d*) and Clause 10 provided as follows[211]:

> "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....
>
> 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."

255. Dr B.N. Rau in his notes on the draft report had reservations about Clause 10 which were expressed thus[212]:

> "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 e.g. The 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."

256. A note was submitted by Sir Alladi Krishnaswamy Iyer on 10-4-1947 objecting to the "secrecy of correspondence" mentioned in Clause 9(*d*) and the protection against unreasonable searches in Clause 10[213]:

> "Clause 9(*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

210 B. Shiva Rao, *The Framing of India's Constitution* (Indian Institute of Public Administration, 1967) Vol. 2, at p. 87
211 *Id*, at p. 139
212 *Id*, at p. 152
213 *Id*, at pp. 158-159

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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, Sections 120-127. The result of this clause will be that every private correspondence will assume the rank of a State paper, or, in the language of Sections 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."

257. 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[214]:

"…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 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.

214 B. Shiva Rao, *The Framing of India's Constitution: A Study* (Indian Institute of Public Administration, 1968) at pp. 219-20.

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258. 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.

259. 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 interrelationship 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

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the path for succeeding generations to meet the challenges to privacy that may be unknown today.

260. The impact of the decision in *Cooper*[4] 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 interrelated, 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 watertight compartments, the post-*Maneka*[5] 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:

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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(*i*) The right to go abroad — *Satwant Singh Sawhney* v. *D. Ramarathnam*[16].

(*ii*) The right against solitary confinement — *Sunil Batra* v. *UT of Delhi*[215]

(*iii*) The right of prisoners against bar fetters — *Charles Sobraj* v. *Supt., Central Jail*[216].

(*iv*) The right to legal aid — *M.H. Hoskot* v. *State of Maharashtra*[217].

(*v*) The right to speedy trial — *Hussainara Khatoon (1)* v. *State of Bihar*[218].

(*vi*) The right against handcuffing — *Prem Shankar Shukla* v. *UT of Delhi*[99]

(*vii*) The right against custodial violence — *Sheela Barse* v. *State of Maharashtra*[219].

(*viii*) The right against public hanging — *Attorney General of India* v. *Lachma Devi*[220].

(*ix*) Right to doctor's assistance at government hospitals — *Paramanand Katara* v. *Union of India*[221].

(*x*) Right to shelter — *Shantistar Builders* v. *Narayan Khimalal Totame*[222].

(*xi*) Right to a healthy environment — *Virender Gaur* v. *State of Haryana*[223].

(*xii*) Right to compensation for unlawful arrest — *Rudal Sah* v. *State of Bihar*[224].

(*xiii*) Right to freedom from torture — *Sunil Batra* v. *UT of Delhi*[215]

(*xiv*) Right to reputation — *Umesh Kumar* v. *State of A.P.*[225]

(*xv*) Right to earn a livelihood — *Olga Tellis* v. *BMC*[115]

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

16 (1967) 3 SCR 525 : AIR 1967 SC 1836
215 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
216 (1978) 4 SCC 104 : 1978 SCC (Cri) 542
217 (1978) 3 SCC 544 : 1978 SCC (Cri) 468
218 (1980) 1 SCC 81 : 1980 SCC (Cri) 23
99 (1980) 3 SCC 526 : 1980 SCC (Cri) 815
219 (1983) 2 SCC 96 : 1983 SCC (Cri) 353
220 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413
221 (1989) 4 SCC 286 : 1989 SCC (Cri) 721
222 (1990) 1 SCC 520
223 (1995) 2 SCC 577
224 (1983) 4 SCC 141 : 1983 SCC (Cri) 798
225 (2013) 10 SCC 591 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237
115 (1985) 3 SCC 545

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the Constitution and while understanding the core of those rights, to define the ambit of what the right comprehends.

261. 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 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.

262. 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?*

263. The Union Government and some of the States which have supported it have urged before 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.

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264. 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.

265. 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*

266. 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 through 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 scrutinise and the right to dissent which enables an informed citizenry to scrutinise the actions of the Government. Those who

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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 scrutinise 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.

267. 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 monopolise 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 subserves the purpose of ensuring that socio-economic benefits actually permeate to the underprivileged 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.

268. 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.[226] 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 per cent and Zimbabwe one of 38 per cent between 1979-1981 and 1983-1984, in the same period in which the food production decline amounted to a relatively modest 11 or 12 per cent 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

226 Amartya Sen, *Development as Freedom* (Oxford University Press, 2000) at pp. 178-79.

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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."[227]

269. 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"[228]. Political liberties and democratic rights are hence regarded as "constituent components" of development.[229] 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 organised public projects while there were 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."[230]

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 industrialisation or technological advance or social modernisation. 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

227 Amartya Sen, *Development as Freedom* (Oxford University Press, 2000) at p. 179
228 Amartya Sen, *The Idea of Justice* (Penguin Books, 2009) at p. 339.
229 *Id*, at p. 347
230 Amartya Sen, *Development as Freedom* (Oxford University Press, 2000) at p. 180.

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they have the freedom to do what they have reason to value. In this sense, development consists of expansion of people's freedom."[231]

270. In an article recently published in July 2017 in *Public Law*, titled "The Untapped Potential of the Mandela Constitution"[232], 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*[233] 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"[234]. Examples can be multiplied on how a State sanctioned curtain of misinformation or State mandated blackouts of information can cause a serious denial of socio-economic rights. The strength of Indian democracy lies in the foundation provided by 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.

271. 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 sterilisation. 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.

231 Amartya Sen, *The Country of First Boys* (Oxford University Press) pp. 80-81.

232 Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", *Public Law* (2017), at p. 394.

233 *Minister of Health* v. *Treatment Action Campaign*, 2002 SCC OnLine ZACC 17 : (2002) 5 SA 721 (CC)

234 Edwin Cameron and Max Taylor, "The Untapped Potential of the Mandela Constitution", *Public Law* (2017), at p. 395.

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P. ***Not just a Common law right***

272. 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[235]:

> "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 i.e. the inner core of a person's private life....
>
> The positive right to privacy entails an obligation of States to remove obstacles for an autonomous shaping of individual identities."

Q. ***Substantive due process***

273. 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.

274. 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 to the US Constitution. The draft Constitution which was

235 Anna Jonsson Cornell, "Right to Privacy", *Max Planck Encyclopaedia of Comparative Constitutional Law* (2015).

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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[236] 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 the 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.[237] 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.[238] These decisions were eventually distinguished or overruled in 1937 and thereafter.[239]

275. 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, 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*[240]).

276. 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

236 *Lochner* v. *New York*, 1905 SCC OnLine US SC 100 : 49 L Ed 937 : 198 US 45 (1905)

237 William B. Lockhart, et al, *Constitutional Law: Cases — Comments Questions* (West Publishing Co., 1986) 6th Ed, at p. 394.

238 *Adair* v. *United States*, 1908 SCC OnLine US SC 24 : 52 L Ed 436 : 28 S Ct 277 : 208 US 161 (1908) (Fifth Amendment); *Adkins* v. *Children's Hospital*, 1923 SCC OnLine US SC 105 : 67 L Ed 785 : 43 S Ct 22 : 261 US 525 (1923) (Fifth Amendment); *Tyson & Bro.* v. *Banton*, 1927 SCC OnLine US SC 63 : 71 L Ed 718 : 47 S Ct 426 : 273 US 418 (1927) and *New State Ice Co.* v. *Liebmann*, 1932 SCC OnLine US SC 63 : 76 L Ed 747 : 52 S Ct 371 : 285 US 262 (1932)

239 *National Labor Relations Board* v. *Jones & Laughlin Steel Corpn.*, 1937 SCC OnLine US SC 79 : 81 L Ed 893 : 301 US 1 (1937); *West Coast Hotel Co.* v. *Parrish*, 1937 SCC OnLine US SC 58 : 81 L Ed 703 : 57 S Ct 578 : 300 US 379 (1937)

240 B. Shiva Rao, *The Framing of India's Constitution : A Study* (Indian Institute of Public Administration, 1968) at p. 235. *See also* B. Shiva Rao, *The Framing of India's Constitution*, Vol. 2, at pp. 20-36, 147-153.

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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[241]:

> "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'."

277. 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"[242]. In his words[242]: (CAD Vol. 7, pp. 853-54)

> "… 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,

241 Granville Austin, *The Indian Constitution : Cornerstone of a Nation* (Oxford University Press, 1966) at p. 103.

242 *Constituent Assembly Debates*, Vol. 7 (6-12-1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p20b.htm>.

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the need for coordinating 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 Das Bhargava, Hukam Singh and four members of the Muslim League.[243] K.M. Munshi stated that[244]:

"... 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."

278. Dr B.R. Ambedkar in an insightful observation, presented the merits and demerits of the rival viewpoints dispassionately. In his words[245]: (CAD Vol. 7, pp. 1000-01)

"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 the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite

243 Granville Austin, *The Indian Constitution : Cornerstone of a Nation* at p. 105.
244 *Id*, at pp. 105-106
245 *Constituent Assembly Debates*, Vol. 7 (13-12-1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p25a.htm>.

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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 therefore 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 13-12-1948 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.

279. In *Gopalan*[3], 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. Kania, C.J. 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. Patanjali Sastri, J. 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, Das, J. 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.

280. In his celebrated dissent, Fazl Ali, J. pointed out that the phrase "procedure established by law" was borrowed from the Japanese Constitution (which was drafted under the American influence at the end of the Second World War) and hence the expression means "procedural due process". In Fazl Ali, J.'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, Fazl Ali, J. held thus: (*Gopalan case*[3], AIR pp. 60-61, para 77)

> "*77.* … Article 21 purports to protect life and personal liberty, and it would be a precarious protection and a protection not worth having,

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

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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."

281. In *Maneka*[5], where the passport of the petitioner was impounded without furnishing reasons, a majority of the 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 Chandrachud, Bhagwati and Krishna Iyer, JJ. emerge from the following brief extracts: (SCC p. 323, para 48)

Chandrachud, J.:

"*48.* … 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."

Bhagwati, J.:

"*7.* … 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." (SCC p. 284, para 7)

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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Krishna Iyer, J.:

"*82.* … 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.

* * *

85. … To sum up, "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece." (SCC p. 338, paras 82 & 85)

282. Soon after the decision in *Maneka*[5], 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. *UT of Delhi*[215], 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. D.A. Desai, J. speaking for the majority, held that: (*Sunil Batra case*[215], SCC pp. 574-75, para 228)

"*228.* … The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in *Maneka Gandhi case*[5] that the law must be right, just and fair and not arbitrary, fanciful or oppressive."

Krishna Iyer, J. took note of the fact that our Constitution does not contain a due process clause and opined that after the decision in *Maneka*[5], the absence of such a clause would make no difference: (SCC p. 518, para 52)

"*52.* True, our Constitution has no "due process" clause or the VIIIth Amendment; but, in this branch of law, after *Cooper*[4] and *Maneka Gandhi*[5] the consequence is the same."

283. A substantive challenge to the constitutional validity of the death penalty on a conviction on a charge of murder was raised in *Bachan Singh*[125]. The judgment noted: (SCC p. 730, para 136)

"*136.* Article 21 reads as under:

'***Protection of life and personal liberty***.—No person shall be deprived of his life or personal liberty except according to procedure established by law.'

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
215 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
125 *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580

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If this Article is expanded in accordance with the interpretative principle indicated in *Maneka Gandhi*[5], 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.' "

284. *Bachan Singh*[125] 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. In his dissent[246], Bhagwati, J. 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: (SCC p. 55, para 17)

> "*17.* ... 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."

285. In *Mithu* v. *State of Punjab*[247] ("*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 Sections 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 on the touchstone of having imposed a penalty which is savage or, as the Court held, an anathema of civilised jurisprudence: (SCC pp. 284-85, para 6)

> "*6.* 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;

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
125 *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580
246 *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24 : 1982 SCC (Cri) 535
247 (1983) 2 SCC 277 : 1983 SCC (Cri) 405

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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." (emphasis supplied)

286. In *A.K. Roy* v. *Union of India*[248], dealing with the question of preventive detention, a Constitution Bench of this Court adverted to the conscious decision in the Constituent Assembly to delete the expression "due process of law" from Article 21. The Court held that: (SCC p. 301, para 35)

"*35.* 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".*" (emphasis supplied)

248 (1982) 1 SCC 271 : 1982 SCC (Cri) 152

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287. In *Saroj Rani* v. *Sudarshan Kumar Chadha*[249], 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.

288. In *Mohd. Arif* v. *Supreme Court of India*[250], 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, Rohinton Fali Nariman, J. speaking for the majority in the Constitution Bench, observed as follows: (SCC p. 756, para 28)

> "*28.* … The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."

289. More recently, Chelameswar, J. speaking for a Bench of two Judges in *Rajbala* v. *State of Haryana*[251], 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: (SCC p. 481, para 64)

> "*64.* From the above extract from *McDowell & Co. case*[252] 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. Krishna* v. *State of Madras*[253] declared that the doctrine of due process has no application under the Indian Constitution. As pointed out by Frankfurter, J. arbitrariness became a mantra." (emphasis supplied)

290. 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

249 (1984) 4 SCC 90
250 (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408
251 (2016) 2 SCC 445
252 *State of A.P.* v. *McDowell & Co.*, (1996) 3 SCC 709, para 43
253 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409

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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 viewpoints for decision by the House. Evidently "due process" was substituted with the expression "procedure established by law". "Liberty" was qualified by "personal".

291. Having noticed this, the evolution of Article 21, since the decision in *Cooper*[4] indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or watertight 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.

292. 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[254] which is based on the foundational principle that the

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

254 *Charanjit Lal Chowdhury* v. *Union of India*, AIR 1951 SC 41; *Ram Krishna Dalmia* v. *S.R. Tendolkar*, AIR 1958 SC 538; *Burrakur Coal Co. Ltd.* v. *Union of India*, AIR 1961 SC 954; *Pathumma* v. *State of Kerala*, (1978) 2 SCC 1; *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675 : 1982 SCC (Tax) 30 : 1982 SCC (Tax) 30; *State of Bihar* v. *Bihar Distillery Ltd.*, (1997) 2 SCC 453 : AIR 1997 SC 1511; *State of A.P.* v. *K. Purushotham 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*, (2005) 8 SCC 534; *Bhanumati* v. *State of U.P.*, (2010) 12 SCC 1; *K.T. Plantation (P) Ltd.* v. *State of Karnataka*, (2011) 9 SCC 1 : (2011) 4 SCC (Civ) 414; *State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481 and *Namit Sharma* v. *Union of India*, (2013) 1 SCC 745 : (2013) 1 SCC (Civ) 786 : (2013) 1 SCC (Cri) 737 : (2013) 1 SCC (L&S) 244

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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.[255]

293. 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 Patanjali Sastri, C.J. in *State of Madras* v. *V.G. Row*[256], where the learned Chief Justice held thus: (AIR p. 200, para 15 : SCR p. 607)

> "*15.* 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 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 authorising the imposition of the restrictions, considered them to be reasonable." (emphasis supplied)

294. 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

255 *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675 : 1982 SCC (Tax) 30; *Maharashtra State Board of Secondary and Higher Secondary Education* v. *Paritosh Bhupeshkumar Sheth*, (1984) 4 SCC 27 : AIR 1984 SC 1543; *State of A.P.* v. *McDowell & Co.*, (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 (P) Ltd.* v. *State of Karnataka*, (2011) 9 SCC 1 : (2011) 4 SCC (Civ) 414 and *BDA* v. *Aircraft Employees' Coop. Society Ltd.*, (2012) 3 SCC 442

256 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966

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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*[125]) and mandatory death sentence (*Mithu*[247]), 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 interrelationship 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". 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.

295. Above all, it must be recognised 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.

296. 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*

297. 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

125 *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580
247 *Mithu* v. *State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405

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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. Recognising 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.

298. 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 intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation 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

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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 to 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.

299. Privacy represents the core of the human personality and recognises 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 desires to be left alone. On an

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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***

300. 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[257]. 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 aggregation, information provides a picture of the being: of things which matter and those that do not, of things to be disclosed and those best hidden.

257 *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>.

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301. 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 online 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 online to shopping malls provide a profile of customer preferences. A woman who purchases pregnancy related medicines online 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.

302. A Press Note released by the Telecom Regulatory Authority of India on 3-7-2017[258] is indicative of the prevalence of telecom services in India as on 31-12-2016. The total number of subscribers stood at 1151.78 million, reflecting a 11.13 per cent 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.

303. 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 non-rivalrous, invisible and recombinant[259]. Information is non-rivalrous 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"[259]. Thirdly, information is recombinant in the sense that data output can be used as an input to generate more data output.

304. 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

258 Press Release 45/2017, available at <http://trai.gov.in/sites/default/files/PR_No.45of2017.pdf>.
259 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 p. 153.

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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."[260]

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"[261]. 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.[262] The challenges which big data poses to privacy interests emanate from 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."[263]

305. 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.[264] Yet,

260 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 p. 154.

261 Yvonne McDermott, "Conceptualizing the Right to Data Protection in an Era of Big Data", *Big Data and Society* (2017), at p. 1.

262 *Id*, at pp. 1 and 4.

263 *Id*, at p. 4.

264 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 p. 159. The article attributes Daniel Solove's work on privacy as — Daniel J. Solove, *Understanding Privacy* (2008) 70.

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it is now a universally accepted fact that information and data flow are "increasingly central to social and economic ordering"[265]. 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 practices finds its way to State surveillance mechanisms, through the corporations that hold that data"[266].

306. 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.

307. 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.

308. 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 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.

309. 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 subserves 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

265 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 p. 156.

266 Yvonne McDermott, "Conceptualizing the Right to Data Protection in an Era of Big Data", *Big Data and Society* (2017), at p. 4.

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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...."[267]

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 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.[267] 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"[267]. 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.

310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold 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 manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate 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 threefold requirement for a valid law arises out of the mutual interdependence 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.

267 Richard A. Posner, "Privacy, Surveillance, and Law", *The University of Chicago Law Review* (2008), Vol. 75, at p. 251.

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311. 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 unauthorisedly 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.

312. A distinction has been made in contemporary literature between anonymity on one hand and privacy on the other.[268] 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.

313. 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.

314. The Union Government constituted a Group of Experts on privacy under the auspices of the erstwhile Planning Commission. The Expert

268 *See* in this connection, Jeffrey M. Skopek, "Reasonable Expectations of Anonymity", *Virginia Law Review* (2015), Vol. 101, at pp. 691-762.

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Group in its Report[269] (dated 16-10-2012) 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:

314.1. ***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.

314.2. ***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;

314.3. ***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;

314.4. ***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;

314.5. ***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;

314.6. ***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.

269 "Report of the Group of Experts on Privacy" (16-10-2012), Government of India, available at <http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf>.

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Data controllers shall not publish or in any other way make public personal information, including personal sensitive information;

314.7. ***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, deanonymisation, unauthorised disclosure [either accidental or incidental] or other reasonably foreseeable risks;

314.8. ***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

314.9. ***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 organisations or overseeing bodies extend all necessary support to the Privacy Commissioner and comply with the specific and general orders of the Privacy Commissioner.

315. During the course of the hearing of these proceedings, the Union Government has placed on the record an Office Memorandum dated 31-7-2017 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*

316. The judgment in *M.P. Sharma*[1] 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

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

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not a right guaranteed by the Indian Constitution is not reflective of the correct position. *M.P. Sharma*[1] is overruled to the extent to which it indicates to the contrary.

317. *Kharak Singh*[2] 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*[2] 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*[2] 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*[2] reliance upon the decision of the majority in *Gopalan*[3] is not reflective of the correct position in view of the decisions in *Cooper*[4] and in *Maneka*[5]. *Kharak Singh*[2] to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled.

318. 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.

319. 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.

320. 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.

321. Judicial recognition of the existence of a constitutional right to 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.

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves 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.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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323. 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.

324. 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.

325. 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 threefold 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.

326. 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.

327. Decisions rendered by this Court subsequent to *Kharak Singh*[2], upholding the right to privacy would be read subject to the above principles.

328. 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

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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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.

329. The reference is answered in the above terms.

JASTI CHELAMESWAR, J. (*concurring*)— I have had the advantage of reading the opinion of my learned Brothers Nariman, J. and Chandrachud, J. 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.

331. The following three questions, in my opinion, constitute the crux of the enquiry:

331.1. (*i*) Is there any fundamental right to privacy under the Constitution of India?

331.2. (*ii*) If it exists, where is it located?

331.3. (*iii*) What are the contours of such right?

331.4. These questions arose because the Union of India and some of the respondents took a stand that in view of two larger Bench judgments of this Court[270], no fundamental right to privacy is guaranteed under the Constitution.

332. Therefore, at the outset, it is necessary to examine whether it is the ratio decidendi of *M.P. Sharma*[1] and *Kharak Singh*[2] that under our Constitution there is no fundamental right to 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 this Court in *M.P. Sharma*[1] was—whether seizure of

270 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 and *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 (both decisions of Constitution Bench of eight and six Judges, respectively).

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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documents from the custody of a person accused of an offence would amount to "testimonial compulsion" prohibited under Article 20(3) of our Constitution?

333. The rule against the "testimonial compulsion" is contained in Article 20(3)[271] 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[272] and the same was incorporated in the Fifth Amendment of the American Constitution.[273]

334. Does the rule against "testimonial compulsion", entrenched as a fundamental right under our Constitution, create a right to privacy?—is a question not examined in *M.P. Sharma*[1]. It was argued in *M.P. Sharma*[1] "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*[13] extended

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271 Article 20(3) of the Constitution of India:

"**20. (3)** No person accused of any offence shall be compelled to be a witness against himself."

272 "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 *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 Edn., pp. 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, pp. 301 to 303.) This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof."

273 "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...."

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

13 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)

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the rule even to documents procured during the course of a constitutionally impermissible search.[274] This Court refused to read the principle enunciated in *Boyd*[13] into Article 20(3) on the ground: "we have nothing in our Constitution corresponding to the Fourth Amendment."

335. 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 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 to privacy: (*M.P. Sharma case*[1], AIR pp. 306-07, para 18)

> "*18*. 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." (emphasis supplied)

336. I see no warrant for a conclusion (which is absolute) that their Lordships held that there is no right to privacy under our Constitution. All that, in my opinion, their Lordships meant to say was that contents of the US Fourth Amendment cannot be imported into our Constitution, while interpreting Article 20(3). That is the boundary of *M.P. Sharma*[1] 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.[275] Therefore, values other than those informing the

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274 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."

13 *Boyd* v. *United States*, 1886 SCC OnLine US SC 58 : 29 L Ed 746 : 116 US 616 (1886)

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

275 In *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965), Douglas, J. who delivered the opinion of the Court opined that the Ist, IInd, IVth, Vth and IXth Amendments creates zones of privacy. Goldberg, J. opined that even the XIVth Amendment creates a zone of privacy. *This undoubtedly grounds a right to privacy beyond the IVth Amendment.* Even after Griswold, other cases like *Roe* v. *Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973) have made this point amply clear by sourcing a constitutional right to privacy from sources other than the IVth Amendment.

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Fourth Amendment can ground a right to privacy if such values are a part of the Indian constitutional framework, and *M.P. Sharma*[1] 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*[3] era compartmentalisation ruled the roost during the time of the *M.P. Sharma*[1] ruling and there was no *Maneka Gandhi*[5] interpretation of Part III as a cohesive and fused code as is presently.

337. Whether the right to privacy is implied in any other fundamental right guaranteed under Articles 21, 14, 19 or 25, etc. was not examined in *M.P. Sharma*[1]. The question whether a fundamental right to privacy is implied from these Articles, is therefore, res integra and *M.P. Sharma*[1] is no authority on that aspect. I am, therefore, of the opinion that *M.P. Sharma*[1] is not an authority for an absolute proposition that there is no right to privacy under our Constitution; and such is not the ratio of that judgment.

338. The issue in *Kharak Singh*[2] was the constitutionality of Police Regulations of U.P. 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 that 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*[2] 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: (AIR p. 1302, para 17)

> "*17.* ... 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." (emphasis supplied)

339. The *Kharak Singh*[2] 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*[14], 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[276] and against the "very essence of a scheme of

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
276 Frankfurter, J.

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ordered liberty".[277] The majority judgment in *Kharak Singh*[2] noticed that the conclusion in *Wolf* v. *Colorado*[14] is based on the prohibition contained in the Fourth Amendment of the US 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"[15]. In substance domiciliary visits violate *liberty* guaranteed under Article 21.

340. 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 the law declared by this Court in *Gopalan*[3]—much before *R.C. Cooper*[4] and *Maneka Gandhi*[5] 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 US Fourth Amendment would negate the claim to the right to privacy. Both statements are logically inconsistent. In the earlier part of the judgment their Lordships noticed[272] that it is the English Common Law which formed the basis of the US Fourth Amendment and is required to be read into Article 21; but

277 Murphy, J.
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
15 *Semayne case*, (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
272 "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 *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 Edn., pp. 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, pp. 301 to 303.) This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof."

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nevertheless declined to read the right to privacy into Article 21. This is the incongruence.

341. Interestingly as observed by Justice Nariman, when it came to the constitutionality of the other provisions impugned in *Kharak Singh*[2], their Lordships held that such provisions are not violative of Article 21 since there is no right to privacy under our Constitution[278]. I completely endorse the view of my learned Brother Nariman in this regard.

342. I now proceed to examine the salient features of the minority view:

342.1. Disagreement with the majority on the conclusion that Article 21 contains those aspects of personal liberty excluding those enumerated under Article 19(1):

342.2. After noticing that *Gopalan*[3] 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:

342.3. "*31.* ... 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." (*Kharak Singh case*[2], AIR p. 1306, para 31)

342.4. 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".

343. In substance *Kharak Singh*[2] 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 to 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 to privacy is not a guaranteed right under our Constitution", and therefore the same cannot be read into Article 21.[279]

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2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

278 "*20.* ... Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by the learned counsel for the petitioner. As already pointed out, the right to 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." (*Kharak Singh case*, AIR 1963 SC 1295, p. 1303, para 20)

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

279 *Kharak Singh* v. *State of U.P.*, (1962) 1 SCR 332 at p. 351 : AIR 1963 SC 1295,

"*20.* ... 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 to 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." (AIR p. 1303, para 20)

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344. I am of the opinion that the approach adopted by the majority in *Kharak Singh case*[2] 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 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.[280] 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[281] 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, the intensity of analysis to ascertain the purpose is required to be more profound.[282]

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2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

280 *Melbourne Corpn.* v. *Commonwealth*, (1947) 74 CLR 31 (Aust)

"... 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, *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, p. 448, para 569.

281 Citizens and non-citizens who are amenable to the constitutional authority of the State.

282 Two categories of constitutional interpretation—textualist and living constitutionalist approach—are well known. The former, as is illustrated by *Gopalan case*, AIR 1950 SC 27 : (1950) 51 Cri LJ 1383, 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 this approach of interpretation (for instance, in his book titled *Constitutional Interpretation* (which builds on his earlier work titled *Constitutional Fate*), Philip Bobbitt categorises 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

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345. 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 *Kesavananda*[98], 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 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.

346. 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*[3] and *ADM, Jabalpur*[6]. Else, this Court could not have found the freedom of press under Article 19(1)(*a*) and the other rights[283] which were held to be flowing from

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(footnote 282 *contd.*)

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.

98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207

283 *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305

"*29.* 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

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the guarantee under Article 21. *Romesh Thappar*[91] and *Sakal Papers*[284] are the earliest acknowledgment by this Court of the existence of the 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.

347. The US 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[285] 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 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 Parliament or State Legislatures would be constitutionally competent to prescribe cruel punishments like amputation or blinding or flaying alive of convicts merely on account of a prescription akin to the VIIIth Amendment being absent in our Constitution.[286]

(footnote 283 *contd.*)

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 recognised is *Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124 : (1950) 51 Cri LJ 1514. There, this Court held that 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." (AIR p. 311, para 29)

91 *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : (1950) 51 Cri LJ 1514

284 *Sakal Papers (P) Ltd.* v. *Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842

285 VIIIth Amendment to the American Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

286 *Mithu* v. *State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405 : AIR 1983 SC 473

"*6. … 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 civilised jurisprudence of Article 21.*" (SCC p. 284, para 6) (emphasis supplied)

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348. This Court by an interpretive process read the right to earn a livelihood[115], the right to education[116, 287], the right to speedy trial[288], the right to protect one's reputation[289] and the right to have an environment free of pollution[222, 290] in the expression "life" under Article 21 of the Indian Constitution. Similarly, the right to go abroad[16] and the right to speedy trial of criminal cases[218] were read into the expression "liberty" occurring under Article 21. This Court found delayed execution of capital punishment violated both the rights of life and "liberty" guaranteed under Article 21[291] and also perceived reproductive rights and the individual's autonomy regarding sterilisation to being inherent in the rights of life and liberty under Article 21.[292]

349. None of the abovementioned rights are to be found anywhere in the text of the Constitution.

350. 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 to 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. 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 to privacy in the limited context of "searches" and "secrecy of correspondence". Dimensions of the right to 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 to privacy was also not debated. The submissions before us revolve around these questions. The petitioners assert that the right to privacy is a part of the rights guaranteed under Articles 19 and 21 and other Articles.

351. The Constitution of any country reflects the aspirations and goals of the people of that country voiced through the language of the few chosen

115 *Olga Tellis* v. *BMC*, (1985) 3 SCC 545
116 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645
287 *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666
288 *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat*, (1997) 7 SCC 622 : 1997 SCC (Cri) 1120 : 1997 SCC (L&S) 1784
289 *State of Bihar* v. *Lal Krishna Advani*, (2003) 8 SCC 361
222 *Shantistar Builders* v. *Narayan Khimalal Totame*, (1990) 1 SCC 520
290 *M.C. Mehta* v. *Kamal Nath*, (2000) 6 SCC 213
16 *Satwant Singh Sawhney* v. *D. Ramarathnam*, (1967) 3 SCR 525 : AIR 1967 SC 1836
218 *Hussainara Khatoon (1)* v. *State of Bihar*, (1980) 1 SCC 81 : 1980 SCC (Cri) 23
291 *T.V. Vatheeswaran* v. *State of T.N.*, (1983) 2 SCC 68 : 1983 SCC (Cri) 342
292 *Devika Biswas* v. *Union of India*, (2016) 10 SCC 726

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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.[293] 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 Preamble[294]. Part III of the Constitution is incorporated to ensure achievement of the objects contained in the Preamble.[295] "We the People" of this country are the intended beneficiaries[296] of the Constitution. It must be seen as a document written in the blood of innumerable martyrs of 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.

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293 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.

294 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

"*91.* … Our Preamble outlines the objectives of the whole Constitution. It expresses "what we had thought or dreamt for so long"." (SCC p. 323, para 91)

295 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956

"*5.* … To implement and fortify these supreme purposes set forth in the Preamble, Part III of our Constitution has provided for us certain fundamental rights." (AIR p. 965, para 5)

296 *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479

"*23.* After all, for whose benefit was the Constitution enacted? What was the point of making all this bother about fundamental rights? I am clear that the Constitution is not for the exclusive benefit of 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." (AIR p. 487, para 23)

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352. 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 to 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.

353. 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[297] to 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 society. Several Constitutions contain provisions stipulating various attendant conditions which any legislation intending to abridge such (fundamental) rights is required to comply with.

354. 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

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297 *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479

"*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." (AIR p. 487, para 24)

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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.

355. 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 Constitutions of other nations which in turn are products of historical events.

356. 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.

357. Provisions akin to the fundamental rights guaranteed under our Constitution exist in the American Constitution also[298]. They are anterior to our Constitution.

358. The interrelationship 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*[3]. The march of the law in this regard is recorded by Nariman and Chandrachud, JJ. in detail.

359. *R.C. Cooper*[4] and *Maneka Gandhi*[5] gave a different orientation to the topic. Bhagwati, J. in *Maneka Gandhi*[5] speaking for the majority opined[299] that

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298 The first 8 amendments to the Constitution are some of them.

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

299 "5. … It was in *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (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

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in view of the later decision of this Court in *R.C. Cooper*[4], the minority view (in *Kharak Singh*[2]) 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.[300]

(footnote 299 *contd.*)

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 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248, the minority view must be regarded as correct and the majority view must be held to have been overruled." (*Maneka Gandhi case*, (1978) 1 SCC 248, SCC pp. 278-79, para 5)

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

300 "*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, insofar 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 case*, (1970) 1 SCC 248; *Sambhu Nath Sarkar case* [*Sambhu Nath Sarkar* v. *State of W.B.*, (1973) 1 SCC 856 : 1973 SCC (Cri) 618] and *Haradhan Saha case* [*Haradhan Saha* v. *State of W.B.*, (1975) 3 SCC 198 : 1974 SCC (Cri) 816]. 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 Mukherjea, J., in *A.K. Gopalan's case*, AIR 1950 SC 27 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." (*Maneka Gandhi case*, (1978) 1 SCC 248, pp. 282-83, para 6)

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360. In *Kharak Singh*[2], 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" 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.[301]

361. An analysis of *Kharak Singh*[2] 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 Articles 19(1) and 21 are independent fundamental rights, though there is "overlapping".

362. The expression "liberty" is capable of taking within its sweep not only the right to move freely, guaranteed under Article 19(1)(*d*); 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[302] 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;

> "*37*. 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."
>
> — *Whitney* v. *California*[303], SCC OnLine US SC para 37 : US p. 375

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2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

301 "*30*. … 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." (*Kharak Singh case*, AIR 1963 SC 1295, p. 1305, para 30)

302 Gettysburg Speech

303 1927 SCC OnLine US SC 126 : 71 L Ed 1075 : 274 US 357 (1927)

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363. 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 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 twofold. Firstly, to place the expression "liberty" beyond the argumentative process[304] 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.[305] It must be remembered that the authority of the State to deprive any person of the fundamental right

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304 That was exactly the State's submission in *A.K. Gopalan case*, AIR 1950 SC 27 which unfortunately found favour with this Court.

305 "**19. (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, insofar 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 insofar 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 insofar 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 insofar 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 insofar 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 insofar 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."

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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 clause[306]; 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[307]. 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 (*sic* not) incorporated in India, etc.

364*. The interrelationship of Articles 19 and 21, if understood, as stated in para 363, 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.

(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 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.

365. 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

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306 That was exactly the State's submission in *A.K. Gopalan case*, AIR 1950 SC 27 : (1950) 51 Cri LJ 1383 which unfortunately found favour with this Court.

307 See *Hans Muller of Nurenburg* v. *Supt., Presidency Jail*, AIR 1955 SC 367, paras 34 and 38 : 1955 Cri LJ 876

State Trading Corpn. of India Ltd. v. *CTO*, AIR 1963 SC 1811, para 20

Indo-China Steam Navigation Co. Ltd. v. *Collector of Customs*, AIR 1964 SC 1140, para 35 : (1964) 2 Cri LJ 234

Charles Sobraj v. *Supt., Central Jail*, (1978) 4 SCC 104 : 1978 SCC (Cri) 542 : AIR 1978 SC 1514, para 16

Louis De Raedt v. *Union of India*, (1991) 3 SCC 554, para 13 : 1991 SCC (Cri) 886

* **Ed.**: Para 364 corrected vide Official Corrigendum No. F.3/Ed.B.J./50/2017 dated 31-8-2017.

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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.

366. Whether it is possible to arrive at a coherent, integrated and structured statement explaining the right to privacy is a question that has been troubling scholars and Judges in various jurisdictions for decades.[308] Considerable amount of literature, both academic and judicial, came into existence. In this regard various taxonomies[309] have been proposed suggesting that there are a number of interests and values into which the right to privacy could be dissected.

367. 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 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 to privacy.

368. 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 to privacy against the State[310]. 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.

369. To answer the above question, it is necessary to understand conceptually and identify the nature of the right to privacy.

370. 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 to privacy. International treaties and conventions have been referred to, to establish the existence and 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 Nariman, J. opined:

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308 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

"*23*. … The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right." (SCC p. 156, para 23)

309 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).

310 It is a settled principle of law that some of the fundamental rights like Articles 14 and 29 are guaranteed even to non-citizens.

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"*536*. 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*[1] and the majority in *Kharak Singh*[2], to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognising 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 Hon'ble Judges of this Court in light of the judgment just delivered by us."

Chandrachud, J. held:

"320. 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."

371. One of the earliest cases where the constitutionality of State's action allegedly infringing the right to privacy fell for the consideration of the US Supreme Court is *Griswold* v. *Connecticut*[52]. 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".[311] Building on this framework, Bostwick[312] 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 to 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 recognise the existence of the right to 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.

372. 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

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
311 *Griswold* v. *Connecticut*, 381 US 479 (1965) at p. 487
312 Gary Bostwick, "A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision" (1976) 64 California Law Review 1447.

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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.[313] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which Governments do not approve.[314] 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[315] the freedom of conscience and right to freely profess, practise and propagate religion. While the right to freely "profess, practise 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.

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313 *Stanley* v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)

"*3.* ... that the mere private possession of obscene matter cannot constitutionally be made a crime.

* * *

9. ... 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." (SCC OnLine US SC paras 3 & 9)

314 *Bijoe Emmanuel* v. *State of Kerala*, (1986) 3 SCC 615

315 "**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.

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."

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373. Concerns of privacy arise when the State seeks to intrude into the body of subjects.[316] 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 falls within the zone of the right to privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there is a huge debate on those issues though it is still a grey area.[317] 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 to 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.[5] A person's freedom to choose the place of his residence once again is a part of his right to privacy[318] recognised by the Constitution of India under Article 19(1)(*e*) though the predominant purpose of enumerating the abovementioned 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 of appearance and apparel are also aspects of the right to 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 to 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 to privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State,

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316 *Skinner* v. *Oklahoma*, 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942)

"*20.* 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." (SCC OnLine US SC para 20)—Jackson, J.

317 For the legal debate in this area in US, See Chapter 15.11 of *American Constitutional Law* by Laurence H. Tribe, 2nd Edn.

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

318 *Williams* v. *Fears*, 1900 SCC OnLine US SC 211 : 45 L Ed 186 : 179 US 270 (1900)—

"*8.* Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty...." (SCC OnLine US SC para 8)

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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 biometric data regarding all the residents of this country. The abovementioned 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 to privacy.

374. 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.[319] 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 to privacy. It is one of the most intimate decisions.

375. 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 defended. It is part of liberty within the meaning of that expression in Article 21.

376. I am in complete agreement with the conclusions recorded by my learned Brothers in this regard.

377. 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 to 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.

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319 The High Court of A.P. held that Article 19(1)(*c*) would take within its sweep the matrimonial association in *T. Sareetha* v. *T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 : AIR 1983 AP 356. However, this case was later overruled by this Court in *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90 : AIR 1984 SC 1562.

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378. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry[320]; 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[321] that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen.

379. 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 Article 21 is bleak. Without discounting that possibility, it needs to be noted that Article 21 is the bedrock of 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.

380. 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.[65, 73] *Gobind*[8] 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 the strictest scrutiny is the standard of compelling State interest to be used. As for others,

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320 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 T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : AIR 1974 SC 555, is very simply the lack of any reasoning.

321 A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in constitutional law, that is, fn 4 in *United States* v. *Carolene Products Co.*, 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.

65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186

73 *State of Maharashtra* v. *Bharat Shanti Lal Shah*, (2008) 13 SCC 5

8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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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 to privacy is to be found.

S.A. BOBDE, J. (*concurring*)—

The origin of the reference

381. 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 to 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 U.P.*[2]

382. The question, which was framed by a Bench of three of us and travels to us from a Bench of five, was the following: (*K.S. Puttaswamy case*[11], SCC p. 741, paras 12-13)

> "*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*[1] and *Kharak Singh*[2] 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 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 *M.P. Sharma*[1] and *Kharak Singh*[2] is scrutinised and the jurisprudential correctness of the subsequent decisions of this Court

1 AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
11 *K.S. Puttaswamy* v. *Union of India*, (2015) 8 SCC 735

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where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength."

383. 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 Chhattisgarh 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.

***The effect of M.P. Sharma*[1] *and Kharak Singh*[2]**

384. The question of whether Article 21 encompasses a fundamental right to privacy did not fall for consideration before the 8 Judges in *M.P. Sharma*[1] 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.

385. *M.P. Sharma*[1] 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.

386. Neither does the 4:2 majority in *Kharak Singh* v. *State of U.P.*[2] 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"[322]. 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,

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
322 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332 at p. 350

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"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 civilisation"[323]. (AIR p. 1302, para 18)

It proceeded to affirm that the statement in *Semayne case*[15] that: (*Kharak Singh case*[2], AIR p. 1302, para 18)

"*18.* ... '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.' (*Semayane case*[15])"

articulated an

"abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" ". (*Kharak Singh case*[2], AIR pp. 1302-03, para 18)

Thus far, the *Kharak Singh*[2] 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 to privacy was covered by that guarantee.

387. The *M.P. Sharma*[1] 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 *Rustom Cavasjee Cooper* v. *Union of India*[4] and its progeny—including *Maneka Gandhi* v. *Union of India*[5]—which require us to read Part III's guarantees of rights together. Unlike *A.K. Gopalan* v. *State of Madras*[3] which held the field in *M.P. Sharma*[1] time, rights and 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 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 *A.K. Gopalan*[3] era.

388. *M.P. Sharma*[1] 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*

323 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332 at p. 349
15 (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
4 (1970) 1 SCC 248
5 (1978) 1 SCC 248
3 AIR 1950 SC 27 : 1950 SCR 88

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Gandhi v. *Union of India*[5]), the right to livelihood (*Olga Tellis* v. *BMC*[115]) and the right to medical care (*Paramanand Katara* v. *Union of India*[221]).

389. Therefore, nothing in *M.P. Sharma*[1] and *Kharak Singh*[2] supports the conclusion that there is no fundamental right to privacy in our 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*[4] and *Maneka Gandhi*[5] has removed the foundations of *M.P. Sharma*[1] and *Kharak Singh*[2].

390. The petitioners submitted that decisions numbering at least 30, beginning with Mathews, J. 's full-throated acknowledgment of the existence and value of a legal concept of privacy in *Gobind* v. *State of M.P.*[8], 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

391. It was argued for the Union by Mr K.K. Venugopal, learned Attorney General that the right to privacy may at best be a common law 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.

392. According to Salmond, rights are interests protected by "rules of right" i.e. by moral or legal rules.[324] 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.[325] 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 interests as

5 (1978) 1 SCC 248
115 (1985) 3 SCC 545
221 (1989) 4 SCC 286 : 1989 SCC (Cri) 721
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
324 P.J. Fitzgerald, *Salmond on Jurisprudence* (12th Edn., 1966) at p. 217.
325 Roscoe Pound, *The Spirit of the Common Law* (1921) at p. 88.

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it is expedient to recognise, are the work of the law and in that sense the work of the State."[326]

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.

393. 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 case*[15], 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 to 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 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*[15], Chapter 17 of the Penal Code, 1860, treats trespass against property as a criminal offence.[327]

394. 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, and themselves becoming agents of political power qua the State. Constitutions like our own are means by which individuals

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326 Roscoe Pound, *The Spirit of the Common Law* (1921) at p. 92

15 *Semayne case*, (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194

327 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. Section 126-9, Indian Evidence Act, 1872 (protecting certain classes of communication as privileged).

2. Section 4, Indian Easements Act, 1882 (defining "easements" as the right to choose how to use and enjoy a given piece of land).

3. Section 5(2), Indian Telegraph Act, 1885 (specifying the permissible grounds for the Government to order the interception of messages).

4. Sections 5 and 6, Bankers Books (Evidence) Act, 1891 (mandating a court order for the production and inspection of bank records).

5. Sections 25 and 26, Indian Post Office Act, 1898 (specifying the permissible grounds for the interception of postal articles).

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—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.

395. 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 civilised 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.[328]

396. This Court has already recognised the capacity of Constitutions to be the means by which to declare recognised natural rights as applicable qua the State, and of constitutional courts to enforce these declarations. In *Kesavananda Bharati* v. *State of Kerala*[98], Mathew, J. borrows from Roscoe Pound to explain this idea in the following terms: (SCC p. 783, para 1461)

> "*1461.* 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)

This Court also recognises 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 *PUCL* v. *Union of India*[329], it has recently been affirmed that the objective of Part III is to place citizens at centre stage and make the State accountable to

328 Martin Loughlin, *The Foundations of Public Law* (2010) at pp. 344-46.
98 (1973) 4 SCC 225
329 (2005) 2 SCC 436

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them. In *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[330], it was held that: (SCC p. 32, para 27)

> "[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."

397. 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 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 recognised as a common law right and a fundamental right. Where the interference with a recognised interest is by the State or any other like entity recognised 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.

398. 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 to privacy

399. 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 recognising a right and treating it as fundamental where there are strong constitutional grounds on which to do so.

400. The existence of zones of privacy is felt instinctively by all civilised 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

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describes the natural and instinctive recognition of the need for privacy in the following terms[331]:

> "The right to privacy has its foundation in the instincts of nature. It is recognised 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."

401. 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*[65], this Court observed what the jarring reality of a lack of privacy may entail: (SCC p. 520, para 48)

> "*48.* … 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"* '." (emphasis in original)

402. "Privacy" is "[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions"[332]. The right to be in this condition has been described as "the right to be let alone"[333]. 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.

403. 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 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

331 *Pavesich* v. *New England Life Insurance Co.*, 50 SE 68 : 122 Ga 190 (1905) (Supreme Court of Georgia)
65 (2005) 1 SCC 496 : AIR 2005 SC 186
332 *Black's Law Dictionary* (Bryan Garner Edition) 3783 (2004)
333 Samuel D. Warren and Louis D. Brandeis, "The Right To Privacy", 4 HARV L REV 193 (1890)

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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 authorisation for search of a person even where there is suspicion.[334] 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.

404. 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.[335] 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[336]. 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*[337]. Confession of one's sins is a private act.[338] Religious and social customs affirming privacy also find acknowledgment in our laws, for example, in the Civil Procedure Code's exemption of a pardanashin lady's appearance in court.[339]

405. Privacy, that is to say, the condition arrived at after excluding other persons, is a basic prerequisite 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.

406. 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

334 Narcotic Drugs and Psychotropic Substances Act, 1985, Section 42
335 *Kautilya's Arthashastra* 180-90 (R. Shamasastri, trans. 1915).
336 A.A. Maududi, *Human Rights in Islam* (1982) at p. 27.
337 Thessalonians 4:11 The *Bible*.
338 James 5:16 The *Bible*.
339 Code of Civil Procedure, 1908, S. 132.

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of "personal liberty" and freedoms guaranteed by the Constitution. It is the inarticulate major premise in Part III of the Constitution.

Privacy's connection to dignity and liberty

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilised 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.

408. 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 characterised 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

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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."[340] (emphasis supplied)

409. The first and natural home for a right to 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 civilised people. Privacy is thus one of those rights "instrumentally required if one is to enjoy"[341] rights specified and enumerated in the constitutional text.

410. This Court has endorsed the view that "life" must mean "something more than mere animal existence"[342] on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (1)* v. *UT of Delhi*[215] *Sunil Batra*[215] connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin* v. *UT of Delhi*[93], 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*[93], Bhagwati, J. opined as follows: (SCC p. 618, para 7)

> "*7.* 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 U.P.*[2], Subba Rao, J. quoted with approval the following passage from the judgment of Field, J. in *Munn* v. *Illinois*[61] to emphasise the quality of life covered by Article 21: (*Kharak Singh case*[2], AIR p. 1301, para 15)
>
> > '*15.* ... "By the term "life" as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The

340 John Stuart Mill, *On Liberty and Other Essays* (Stefan Collini Edition, 1989) (1859)
341 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.
342 *Munn* v. *Illinois*, 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877) (Per Field, J.) as cited in *Kharak Singh*, (1964) 1 SCR 332 at pp. 347-48
215 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
93 (1981) 1 SCC 608 : 1981 SCC (Cri) 212
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
61 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)

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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*[215]. *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.

411. 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 to 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

412. I have already shown that the right to 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 practise a profession or

215 *Sunil Batra* v. *UT of Delhi*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155

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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.

413. Ex facie, privacy is essential to the exercise of freedom of conscience and the right to profess, practise 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 recognises the right of a student attending an educational institution recognised 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.

414. The right to 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.

415. 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

416. 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"[343] 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.*[116], a Constitution Bench of this Court held that "several unenumerated rights fall within Article 21 since personal liberty is of widest amplitude"[344] 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: (SCC pp. 669-70, para 30)

343 P.J. Fitzgerald, *Salmond on Jurisprudence* at p. 228.
116 (1993) 1 SCC 645
344 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645 at p. 669, para 29

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"*30*. The following rights are held to be covered under Article 21:

1. The right to go abroad. *Satwant Singh* v. *D. Ramarathnam*[16].

2. The right to privacy. *Gobind* v. *State of M.P.*[8] In this case reliance was placed on the American decision in *Griswold* v. *Connecticut*[52], US at p. 510.

3. The right against solitary confinement. *Sunil Batra (1)* v. *UT of Delhi*[215], SCC at p. 545.

4. The right against bar fetters. *Charles Sobhraj* v. *Supt., Central Jail*[216].

5. The right to legal aid. *M.H. Hoskot* v. *State of Maharashtra*[217].

6. The right to speedy trial. *Hussainara Khatoon (1)* v. *State of Bihar*[218].

7. The right against handcuffing. *Prem Shankar* v. *UT of Delhi*[99]

8. The right against delayed execution. *T.V. Vatheeswaran* v. *State of T.N.*[291]

9. The right against custodial violence. *Sheela Barse* v. *State of Maharashtra*[219].

10. The right against public hanging. *Attorney General of India* v. *Lachma Devi*[220].

11. Doctor's assistance. *Paramananda Katara* v. *Union of India*[221].

12. Shelter. *Santistar Builders* v. *Narayan Khimalal Totame*[222]."

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 a right or condition, "logically presupposed"[345] by rights expressly recorded in the constitutional text, if they are to make sense. 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.

417. Not recognising character of privacy as a fundamental right is likely to erode the very substratum of the personal liberty guaranteed

16 (1967) 3 SCR 525 : AIR 1967 SC 1836
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
215 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
216 (1978) 4 SCC 104 : 1978 SCC (Cri) 542
217 (1978) 3 SCC 544 : 1978 SCC (Cri) 468
218 (1980) 1 SCC 81 : 1980 SCC (Cri) 23
99 (1980) 3 SCC 526 : 1980 SCC (Cri) 815
291 (1983) 2 SCC 68 : 1983 SCC (Cri) 342
219 (1983) 2 SCC 96 : 1983 SCC (Cri) 353
220 1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413
221 (1989) 4 SCC 286 : 1989 SCC (Cri) 721
222 (1990) 1 SCC 520
345 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.

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by the Constitution. The decided cases clearly demonstrate that particular fundamental rights could not have been exercised without the recognition of the right to privacy as a fundamental right. Any derecognition or diminution in the importance of the right to privacy will weaken the fundamental rights which have been expressly conferred.

418. 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.

419. 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 to 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.

420. The learned Additional Solicitor General, Shri Tushar Mehta listed innumerable statutes which protect the right to privacy wherever necessary and urged that it is neither necessary nor appropriate to recognise 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.

421. 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 recognised 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 recognised as implicating a fundamental right. Indeed, it would be premature to do so. 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

422. 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

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privacy. In *Deoki Nandan* v. *Murlidhar*[346], four Judges of this Court articulated the distinction in the following terms: (AIR p. 136, para 5)

> "5. … 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.

423. 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.

424. 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 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 signalling 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.

425. 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.

346 AIR 1957 SC 133 : 1956 SCR 756

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Standards of review of privacy violations

426. There is no doubt that privacy is integral to the several fundamental rights recognised by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right to 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 case*[5]. 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"[347].

427. 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 *Rustom Cavasjee Cooper* v. *Union of India*[4].

Conclusion

428. In view of the foregoing, I answer the reference before us in the following terms:

428.1. The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. *M.P. Sharma*[1] and the majority opinion in *Kharak Singh*[2] must stand overruled to the extent that they indicate to the contrary.

428.2. 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.

428.3. 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.

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
347 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 at p. 323, para 48
4 (1970) 1 SCC 248
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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ROHINTON FALI NARIMAN, J. (*concurring*)—

Prologue

429. 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 nine Judges has been constituted to look into questions relating to basic human rights. A three-Judge Bench of this Court was dealing with a scheme propounded by the Government of India popularly known as the Aadhaar 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 three-Judge Bench opined as follows: (*K.S. Puttaswamy case*[11], SCC p. 741, paras 12-13)

> "*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*[1] and *Kharak Singh*[2] 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*[1] and *Kharak Singh*[2] is scrutinised 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."

430. The matter was heard by a Bench of five learned Judges on 18-7-2017, and was thereafter referred[12] to nine learned Judges in view of the fact that the

11 *K.S. Puttaswamy* v. *Union of India*, (2015) 8 SCC 735
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
12 *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 641

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judgment in *M.P. Sharma* v. *Satish Chandra*[1] was by a Bench of eight learned Judges of this Court.

431. The 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*[1] and *Kharak Singh* v. *State of U.P.*[2] which was by a Bench of six learned Judges, should be overruled as they do not reflect the correct position in law. In any case, both judgments have been overtaken by *Rustom Cavasjee Cooper* v. *Union of India*[4] and *Maneka Gandhi* v. *Union of India*[5] and therefore require a revisit at our end. According to them, the right to privacy is very much a fundamental right which is coterminous 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 recognised as such.

432. 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 eight-Judge Bench and the six-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:

> "(*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."

433. 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.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
4 (1970) 1 SCC 248
5 (1978) 1 SCC 248

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434. 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 eight-Judge Bench and the six-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.

435. 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.

436. 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*[2] 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 M.P.*[8] did not state that there was

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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any fundamental right to privacy and the later judgments which referred only to *Gobind*[8] as laying down such a right are incorrect for this reason.

437. 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 US 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 specialised 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 the following:

8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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(*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."

438. 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 US 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 marshalled 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.

439. Shri Jugal Kishore, appearing on behalf of the State of Chhattisgarh, has also broadly supported the stand of the learned Attorney General.

440. Shri Gopal Sankaranarayanan, appearing on behalf of the Centre for Civil Society, argued that *M.P. Sharma*[1] and *Kharak Singh*[2] are correctly decided and must be followed as there has been no change in the constitutional context of privacy from *Gopalan*[3] through *R.C. Cooper*[4] and *Maneka Gandhi*[5]. 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 recognising 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.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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Early Views on Privacy

441. Any discussion with regard to a right to privacy of the individual must necessarily begin with *Semayne case*[15]. 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.[348] James I was an absolute monarch who ruled believing that he did so by Divine Right. *Semayne case*[15] was decided in this historical setting.

442. The importance of *Semayne case*[15] 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." (emphasis supplied)

A century and a half later, pretty much the same thing was said in *Huckle* v. *Money*[349] 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 that: (ER p. 769)

> "... 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...."

443. This statement of the law was echoed in *Entick* v. *Carrington*[127] 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*[350], 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

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15 *Semayne case*, (1604) 5 Co Rep 91a : 1 Sm LC (13th Edn.) 104 at p. 105 : 77 ER 194

348 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.

349 (1763) 2 Wils KB 205 : 95 ER 768

127 (1765) 19 St Tr 1029 : 95 ER 807

350 (1778) 2 Cowp 729 : 98 ER 1331

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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.

444. When we cross the Atlantic Ocean and go to the United States, we find a very interesting article[351] printed in the *Harvard Law Review* in 1890 by Samuel D. Warren and Louis D. Brandeis. 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."

445. 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 to privacy were suggested, being an action of tort for damages in all cases and perhaps an injunction in some. The right to 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

446. 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.

351 Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy", (1890) 4 Harv L Rev 193.

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447. 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.[352] 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...."

448. 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.*[353] SCC OnLine US SC para 24 : US at p. 406 (1932)]. John P. Frank wrote, in 1958, of the Brandeis view as follows:

> "Brandeis was a great institutional man. He realised 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: his shots were all the harder because he chose his ground."[354]

449. Whichever way one looks at it, the foresight of Fazl Ali, J. in *A.K. Gopalan* v. *State of Madras*[3] 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: (AIR pp. 52-53, para 58 : SCR p. 148)

> "*58.* 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

352 *See*, E. Gaffney Jr., "The Importance of Dissent and the Imperative of Judicial Civility" (1994) 28 Val UL Rev 583.

353 1932 SCC OnLine US SC 70 : 76 L Ed 815 : 285 US 393 (1932)

354 John P. Frank, Book Review, 10 Journal of Legal Education 401 at p. 404 (1958).

3 AIR 1950 SC 27 : 1950 SCR 88

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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."

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: (AIR pp. 57-58, paras 69-71 : SCR pp. 159-61)

"*69*. 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 11-10-1945, General MacArthur 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).

70. 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* (p. 107):

'The American history of its interpretation falls into three periods. During the first period, covering roughly the first century of the 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

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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.

71. 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."

He also went on to state that "law" in Article 21 means "valid law".

450. 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 realise how correct he was, and in *R.C. Cooper*[4], an eleven-Judge Bench of this Court, agreeing with Fazl Ali, J., finally held: (SCC p. 289, paras 52-53)

"*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 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

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

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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."[355]

451. 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. *Supreme Court of India*[250] by a Constitution Bench of this Court, has held: (SCC pp. 755-56, paras 27-28)

"*27*. The stage was now set for the judgment in *Maneka Gandhi*[5]. Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read

355 Shri Gopal Sankaranarayanan has argued that the statement contained in *R.C. Cooper*, (1970) 1 SCC 248 that 5 out of 6 learned Judges had held in *Gopalan*, AIR 1950 SC 27 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*, AIR 1950 SC 27 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*, (1970) 1 SCC 248 cleared the air to state that none of the fundamental rights can be construed as being mutually exclusive.

250 (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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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 SCC pp. 393-95, paras 198-204 : SCR pp. 646-48 per Beg, C.J., at SCC pp. 279-84 & 296-97, paras 5-7 & 18 : SCR pp. 669, 671-74 and 687 per Bhagwati, J. and at SCC pp. 335-39, paras 74-85 : SCR pp. 720-23 per Krishna Iyer, J.) Krishna Iyer, J. set out the new doctrine with remarkable clarity thus: (SCC pp. 338-39, para 85 : SCR p. 723)

> '*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*[5] came *Mithu* v. *State of Punjab*[247], in which case the Court noted as follows: (*Mithu case*[247], SCC pp. 283-84, para 6)

> '*6*. ... In *Sunil Batra* v. *UT of Delhi*[215], 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 *Bank Nationalisation case*[4] and *Maneka Gandhi case*[5].... In *Bachan Singh*[125] 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*[5], 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.' " '

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
247 (1983) 2 SCC 277 : 1983 SCC (Cri) 405
215 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
125 *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580

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The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."[356]

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356 Shri Rakesh Dwivedi has argued before us that in *Maneka Gandhi*, (1978) 1 SCC 248, Chandrachud, J. had, in para 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*, (1978) 4 SCC 494 that a due process clause as contained in the US 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*, (1983) 2 SCC 277, Chandrachud, C.J., did not refer to his concurring judgment in *Maneka Gandhi*, (1978) 1 SCC 248, but instead referred, with approval, to Krishna Iyer, J.'s statement of the law in para 6. It is this statement that is reproduced in para 28 of *Mohd. Arif*, (2014) 9 SCC 737. Also, "substantive due process" in our context only means that a law can be 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* v. *Nathella Sampathu Chetty*, (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364, a Constitution Bench of this Court, when asked to apply certain American decisions, stated the following: (AIR p. 328, para 23 : SCR p. 816)

> "*23*. … 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) 4 SCC 225 : 1973 Supp SCR 1 commented on this particular passage thus: (SCC pp. 873-74, para 1695 : SCR pp. 824-26)

> "*1695*. 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

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452. The second great dissent, which is of Subba Rao, J., in *Kharak Singh*[2], has a direct bearing on the question to be decided by us.[357] In this judgment, Regulation 236 of the U.P. Police Regulations was challenged as violating fundamental rights under Article 19(1)(*d*) and Article 21. The Regulation reads as follows: (AIR p. 1304, para 26)

> "236. 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 houses 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."

453. All six 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: (*Kharak Singh case*[2], AIR p. 1306, para 31 : SCR p. 359)

> "*31*. ... 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

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(footnote 356 *contd.*)

> 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"."

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

357 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."

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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*[14] 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."

***The eight-Judge Bench decision in M.P. Sharma*[1] *and the six-Judge Bench decision in Kharak Singh*[2]**

454. This takes us to the correctness of the aforesaid view, firstly in light of the decision of the eight-Judge Bench in *M.P. Sharma*[1]. 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 US, the UK and in this country.

455. While dealing with the argument, this Court noticed that there is nothing in our Constitution corresponding to the Fourth Amendment of the US Constitution, which interdicts unreasonable searches and seizures. In so holding, this Court then observed: (*M.P. Sharma case*[1], AIR pp. 306-07, para 18 : SCR pp. 1096-97)

"*18.* ... 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

14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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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. … 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."

456. The first thing that strikes one on reading the aforesaid passage is that the Court resisted the invitation to read the US Fourth Amendment into the US 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).

457. 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 US and the UK 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*[3] era, which did not have the benefit of *R.C. Cooper*[4] or *Maneka Gandhi*[5]. 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:

> "*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."

458. 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:

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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"**51.** ***Promotion of international peace and security***.—The State shall endeavour to—

(*a*)-(*b*) * * *

(*c*) foster respect for international law and treaty obligations in the dealings of organised peoples with one another;"

459. In order that legislation be effected to implement an international treaty, Article 253 removes legislative competence from all the States and entrusts only 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."

460. We were shown judgments of the highest Courts in the UK and the US 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 US Constitution declares:

"... 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."

461. It is thus clear that no succour can be drawn from the experience of either the UK or the US. We must proceed in accordance with the law laid down in the judgments of the Supreme Court of India.

462. 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*[125], SCC at para 139, *Francis Coralie Mullin* v. *UT of Delhi*[93], SCC at para 8, *Vishaka* v. *State of Rajasthan*[126], SCC at para 7 and *National Legal Services Authority* v. *Union of India*[92], SCC at paras 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 para 60 is as follows: (*National Legal Services Authority case*[92], SCC p. 487)

"*60*. The principles discussed hereinbefore on TGs and the international conventions, including *Yogyakarta Principles*, which we have found not inconsistent with the various fundamental rights

125 (1980) 2 SCC 684 : 1980 SCC (Cri) 580
93 (1981) 1 SCC 608 : 1981 SCC (Cri) 212
126 (1997) 6 SCC 241 : 1997 SCC (Cri) 932
92 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438

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guaranteed under the Indian Constitution, must be recognised and followed, which has sufficient legal and historical justification in our country." (emphasis in original)

463. In fact, the Protection of Human Rights Act, 1993, makes interesting reading in this context. Sections 2(1)(*d*) and (*f*) are important, and read as follows:

> "**2.** ***Definitions***.—(1) In this Act, unless the context otherwise requires—
>
> (*a*)-(*c*) * * *
>
> (*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*) * * *
>
> (*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 16-12-1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;"

464. 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-Judicial Execution Victim Families Assn.* v. *Union of India*[358] decided on 14-7-2017, this Court highlighted the Protection of Human Rights Act, 1993 as follows: (SCC pp. 429-30, paras 29-30)

> "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 16-12-1966. 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

358 (2017) 8 SCC 417 : (2017) 3 SCC (Cri) 622

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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 organised 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 NHRC.

31. In *Ram Deo Chauhan* v. *Bani Kanta Das*[359], this Court recognised 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 paras 47-49 of the Report: (SCC pp. 223-24)

'*47*. 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.

48. 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.

49. 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

359 (2010) 14 SCC 209 : (2011) 3 SCC (Cri) 727

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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.' "

465. 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 UN 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 recognised under international human rights law. …"

466. Ignoring Article 12 of the 1948 Declaration would by itself sound the death knell to the observations on the fundamental right to privacy contained in *M.P. Sharma*[1].

467. It is interesting to note that, in at least three later judgments, this judgment was referred to only in passing in:

467.1. *Sharda* v. *Dharmpal*[64]: (SCC pp. 513-14, paras 54-56)

> "*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*[1], AIR at pp. 306-07, para 18, in the context of search and seizure observed that:
>
> > '*18*. … 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.*[2], the majority judgment observed thus: (AIR p. 1303, para 20)
>
> > '[T]he right to 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.*

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
64 (2003) 4 SCC 493
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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Rajagopal v. *State of T.N.*[9] and *PUCL* v. *Union of India*[10].) In some cases the right has been held to be amalgam of various rights."

467.2. *District Registrar and Collector* v. *Canara Bank*[65], where this Court held: (SCC p. 516, para 35)

"*35*. The earliest case in India to deal with "privacy" and "search and seizure" was *M.P. Sharma* v. *Satish Chandra*[1] 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."

467.3. *Selvi* v. *State of Karnataka*[79], this Court held as follows: (SCC p. 363, para 205)

"*205*. In *M.P. Sharma*[1] 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."

468. It will be seen that different smaller Benches of this Court were not unduly perturbed by the observations contained in *M.P. Sharma*[1] as it was an early judgment of this Court delivered in the *Gopalan*[3] era which had been eroded by later judgments dealing with the interrelation between fundamental rights and the development of the fundamental right to privacy as being part of the liberty and dignity of the individual.

469. 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

9 (1994) 6 SCC 632
10 (1997) 1 SCC 301
65 (2005) 1 SCC 496 : AIR 2005 SC 186
1 AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
79 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1
3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

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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*[5] 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.

470. We now come to the majority judgment of 4 learned Judges in *Kharak Singh*[2]. When examining 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*[61]. The majority judgment, after quoting from *Gopalan*[3], 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.[360]

471. This part of the judgment has been expressly overruled by *R.C. Cooper*[4] as recognised by Bhagwati, J. in *Maneka Gandhi*[5]: (*Maneka Gandhi case*[5], SCC pp. 278-79, para 5)

> "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*[3] 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

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5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

61 1876 SCC OnLine US SC 4 : 24 L Ed 77 : 94 US 113 (1877)

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

360 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, at least, to be read together with Articles 19(1)(*a*) and 25.

4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

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pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the interrelation between Articles 19 and 21. It was in *Kharak Singh* v. *State of U.P.*[2] 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.' (*Kharak Singh case*[2], AIR p. 1302, para 17)

The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: (*Kharak Singh case*[2], AIR p. 1305, para 30)

> '*30.* ... 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 *Rustom Cavasjee Cooper* v. *Union of India*[4] the minority view must be regarded as correct and the majority view must be held to have been overruled."

472. The majority judgment in *Kharak Singh*[2] 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*[14] 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 US Fourth Amendment which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures.

2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
4 (1970) 1 SCC 248
14 1949 SCC OnLine US SC 102 : 93 L Ed 1782 : 338 US 25 (1949)

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Though the Indian Constitution did not expressly confer a like guarantee, the majority held that nonetheless an unauthorised 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.

473. However, while upholding sub-clauses (*c*), (*d*) and (*e*) of Regulation 236, the Court stated: (*Kharak Singh case*[2], AIR p. 1303, para 20 : SCR p. 351)

> "*20.* … As already pointed out, the right to 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 US Fourth Amendment was not reflected in the Indian Constitution, yet any unauthorised intrusion into a person's home, which is nothing but a facet of the right to privacy, was given a go-by.

474. 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 recognising a fundamental right to privacy in Article 21. (See *PUCL* v. *Union of India*[10], at para 14; *'X'* v. *Hospital 'Z'*[60], at paras 21 and 22; *District Registrar and Collector* v. *Canara Bank*[65] at para 36; and *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[88], at para 57.)

475. 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 unauthorised 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 to privacy is not a guaranteed right under our Constitution. It can be seen, therefore, that the majority judgment is

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
10 (1997) 1 SCC 301
60 (1998) 8 SCC 296
65 (2005) 1 SCC 496 : AIR 2005 SC 186
88 (2013) 16 SCC 82

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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 nine-Judge Bench in that we hereby declare that neither the eight-Judge nor the six-Judge Bench can be read to come in the way of reading the fundamental right to privacy into Part III of the Constitution.

476. However, the learned Attorney General has argued in support of the eight-Judge Bench and the six-Judge Bench, stating that the Framers of the Constitution expressly rejected the right to privacy being made part of the fundamental 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 recognise 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.

477. 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*[5] 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*[250], this Court, at para 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.

478. 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 cellphones, and would come forward to press the fundamental right to privacy, both against the Government and against other

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
250 *Mohd. Arif* v. *Supreme Court of India*, (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408

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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 Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, by which the Aadhaar card is the means to see that various beneficial schemes of the Government filter down to persons for whom such schemes are intended. This nine-Judge Bench has not been constituted to look into the constitutional validity of the Aadhaar Act, but it has been constituted to consider a much larger question, namely, that the right to 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.

479. 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 recognising 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 US 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 foetus; rights of same sex couples—including the right to marry; rights as to procreation, contraception, general family relationships, child-bearing, education, data protection, etc. This argument again need not detain us any further and is rejected.

480. 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*[67]. This Court in *Canara Bank*[65] referred to the criticism of this judgment as follows: (SCC pp. 520-21, para 48)

> "*48. … (A) Criticism of Miller*[67]
>
> (*i*) The majority in *Miller*[67] 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

67 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)
65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186

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Miller[67] 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*.' " (emphasis in original)

481. It may also be noticed that *Miller*[67] was done away with by a Congressional Act of 1978. This Court then went on to state: (*Canara Bank case*[65], SCC p. 522, para 48)

> "*48. … (B) Response to Miller*[67] *by Congress*
>
> We shall next refer to the response by Congress to *Miller*[67]. (As stated earlier, we should not be understood as necessarily recommending this law as a model for India.) Soon after *Miller*[67], 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

67 *United States* v. *Miller*, 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)
65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186

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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 requirements 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."

482. 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*[361], at para 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 *Sunil Batra* v. *UT of Delhi*[215], at paras 192, 197-B, 234 and 241 and *Prem Shankar Shukla* v. *UT of Delhi*[99], at paras 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.

483. The judgment in *Stanley* v. *Georgia*[147], (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 US 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 US Constitution. Yet, the Court held: (SCC OnLine US SC paras 7 & 9 : L Ed pp. 549 & 550)

361 (1980) 2 SCC 360
215 (1978) 4 SCC 494 : 1979 SCC (Cri) 155
99 (1980) 3 SCC 526 : 1980 SCC (Cri) 815
147 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)

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"*7*. 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*[362], SCC OnLine US SC Para 5 : US p. 143 : L Ed p. 1316; see *Griswold* v. *Connecticut*[52], US p. 482 : L Ed p. 513; *Lamont* v. *Postmaster General*[363], US pp. 307-08 : L Ed pp. 402 & 403 (Brennan, J., concurring); cf. *Pierce* v. *Society of Sisters*[146]. This right to receive information and ideas, regardless of their social worth, see *Winters* v. *New York*[364], US p. 510 : L Ed p. 847, 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.

* * *

9. These are the rights that the 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 the 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: (SCC OnLine US SC para 14 : L Ed p. 551)

"*14*. We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth*[365] 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."

362 1943 SCC OnLine US SC 85 : 87 L Ed 1313 : 63 S Ct 862 : 319 US 141 (1943)
52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
363 1965 SCC OnLine US SC 106 : 14 L Ed 2d 398 : 85 S Ct 1493 : 381 US 301 (1965)
146 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 45 S Ct 571 : 39 ALR 468 : 268 US 510 (1925)
364 1948 SCC OnLine US SC 42 : 92 L Ed 840 : 68 S Ct 665 : 333 US 507 (1948)
365 *Roth* v. *United States*, 1957 SCC OnLine US SC 106 : 1 L Ed 2d 1498 : 354 US 476 (1957)

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484. 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.

485. 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 fundamental right to privacy — that right being intimately connected with the liberty of the person would certainly fall within the expression "personal liberty".

486. According to Shri Sundaram, every facet of privacy is not protected. Instances of actions which, according to him, are not protected are:

(*i*) Taxation laws requiring the furnishing of information;

(*ii*) In relation to a census;

(*iii*) Details and documents required to be furnished for the purpose of obtaining a passport;

(*iv*) Prohibitions pertaining to viewing pornography.

487. 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 US Supreme Court's decision in *Stanley*[147] held that such prohibitions would be invalid if the State were to intrude into the privacy of one's home.

488. 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*[366]. 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 be stating exactly that — See the difference in approach between the earlier Constitution Bench judgment in *Krishan Kumar Narula* v. *State of J&K*[367], and the later Constitution Bench judgment in *Har*

147 *Stanley* v. *Georgia*, 1969 SCC OnLine US SC 78 : 22 L Ed 2d 542 : 394 US 557 (1969)
366 (1995) 1 SCC 574
367 (1967) 3 SCR 50 : AIR 1967 SC 1368

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Shankar v. *Excise and Taxation Commr.*[368] 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 recognised, 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.

489. 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 the 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 to privacy into Part III of the Constitution.

490. 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 *despite the governments that they may elect*. 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

368 (1975) 1 SCC 737

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as offending the fundamental right to privacy. This argument, therefore, also merits rejection.

491. Shri Rakesh Dwivedi referred copiously to the "reasonable expectation of privacy" test laid down by the decisions of the US Supreme Court. The origin of this test is to be found in the concurring judgment of Harlan, J. in *Katz* v. *United States*[66]. Though this test has been applied by several subsequent decisions, even in the United States, the application of this test has been criticised.

492. In *Minnesota* v. *Carter*[154], S Ct 469 at p. 477 (1998), the concurring judgment of Scalia, J. criticised the application of the aforesaid test in the following terms: (SCC OnLine US SC)

> "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*[66]. In my view, the only thing the past three decades have established about *Katz*[66] test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*[66], see *id.*, at p. 360 is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognise as "reasonable" ", *id.*, at p. 361, 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 generalised "right to privacy" and leave it to this Court to determine which particular manifestations of the value of privacy 'society is prepared to recognise as "reasonable"'. *Ibid.*" (emphasis in original)

493. In *Kyllo* v. *United States*[156], S Ct at p. 2043 (2001), the US 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 US Supreme Court stated: (SCC OnLine US SC)

> "The *Katz*[66] test—whether the individual has an expectation of privacy that society is prepared to recognise as reasonable—has often been criticised as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure § 2.1(*d*), pp. 393-94 (3rd Edn. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, S Ct Rev p. 188;

66 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)
154 1998 SCC OnLine US SC 95 : 142 L Ed 2d 373 : 119 S Ct 469 : 525 US 83 (1998)
156 2001 SCC OnLine US SC 61 : 150 L Ed 2d 94 : 533 US 27 (2001)

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Carter[154], at US p. 97 (Scalia, J., concurring). But see *Rakas*[369], at US pp. 143-44, n. 12. While it may be difficult to refine *Katz*[66] 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*[370], US at p. 512 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." (emphasis in original)

494. 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*[67], which is that if information is voluntarily parted with, no right to privacy exists. As has been held by us, in *Canara Bank*[65], this Court referred to *Miller*[67] 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*[67], 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.

154 *Minnesota* v. *Carter*, 1998 SCC OnLine US SC 95 : 142 L Ed 2d 373 : 119 S Ct 469 : 525 US 83 (1998)
369 *Rakas* v. *Illinois*, 1978 SCC OnLine US SC 205 : 58 L Ed 2d 387 : 99 S Ct 421 : 439 US 128 (1978)
66 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)
370 *Silverman* v. *United States*, 1961 SCC OnLine US SC 38 : 5 L Ed 2d 734 : 81 S Ct 679 : 365 US 505 (1961)
67 *United States* v. *Miller*, 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)
65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186

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495. Shri Gopal Sankaranarayanan, relying upon the statement of law in *Behram Khurshid Pesikaka* v. *State of Bombay*[114], *Basheshar Nath* v. *CIT*[371] and *Olga Tellis* v. *BMC*[115] 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:

(*i*) All the statutory provisions that deal with aspects of privacy would be vulnerable.

(*ii*) 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.

(*iii*) 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 statutory purpose concerned, 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

496. 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.

497. 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*[372], L Ed p. 601 : US at p. 407 (1819).] Indeed a Constitution is meant to govern

114 (1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215
371 1959 Supp (1) SCR 528 : AIR 1959 SC 149
115 (1985) 3 SCC 545
372 4 L Ed 579 : 17 US (4 Wheat) 316 (1819)

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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.

498. In *Ashok Tanwar* v. *State of H.P.*[373], a Constitution Bench stated as follows: (SCC pp. 114-16, para 16)

> "*16.* ... 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 a 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*[374], in para 124, observed thus: (SCC p. 385)
>
> > '*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*[372] (Wheaton at p. 407, L Ed at p. 602) made the pregnant remark —"we must never forget that it is a 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*[372] declared (L Ed at pp. 603-04) that the Constitution was 'intended to endure for ages to come, and

373 (2005) 2 SCC 104
374 1994 Supp (1) SCC 324
372 4 L Ed 579 : 17 US (4 Wheat) 316 (1819)

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consequently, to be adapted to the various crises of human affairs'. In this regard it is worthwhile to see the observations made in paras 324 to 326 in *Supreme Court Advocates-on-Record Assn.*[375]: (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.*[175] [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*[376] dealing with Bermudian Constitution, Lord Wilberforce reiterated that

375 *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441
175 1984 SCC OnLine Can SC 36 : (1984) 2 SCR 145
376 1980 AC 319 : (1979) 2 WLR 889 : (1979) 3 All ER 21 (PC)

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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*[377] 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 the 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." (emphasis in original)

499. To similar effect is the judgment of a nine-Judge Bench in *I.R. Coelho* v. *State of T.N.*[121], which states: (SCC p. 79, para 42)

"*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."

500. It is in this background that the fundamental rights chapter has been interpreted. We may also refer to para 19 in *M. Nagaraj* v. *Union of India*[102], 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.

501. It is as a result of constitutional interpretation that after *Maneka Gandhi*[5], Article 21 has been the repository of a vast multitude of human rights[378].

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377 (2002) 7 SCC 368 : 5 SCEC 310

121 (2007) 2 SCC 1

102 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

5 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

378 (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. *Sunil Batra* v. *UT of Delhi*, (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 U.P.*, (1978) 1 SCC 579 at para 8 : 1978 SCC (Cri) 133; (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. *UT of Delhi*, (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.

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502. 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 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 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

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(footnote 378 *contd.*)

Olga Tellis v. *BMC*, (1985) 3 SCC 545 at para 37; (10) The right to know. *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592 at para 34; (11) The right against public hanging. *Attorney General 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. *Narayan Khimalal Totame*, (1990) 1 SCC 520 at paras 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 : 1992 SCC (Cri) 93; (17) The right against illegal detention. *Joginder Kumar* v. *State of U.P.*, (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 : 1995 SCC (L&S) 604; (20) The right to a clean environment. *Vellore Citizen's Welfare Forum* v. *Union of India*, (1996) 5 SCC 647 at paras 13, 16 and 17; (21) The right against sexual harassment. *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 at paras 3 and 7; (22) The right against noise pollution. *Noise Pollution (5), In re*, (2005) 5 SCC 733 at para 117; (23) The right to fair trial. *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 at paras 36 and 38 : (2006) 2 SCC (Cri) 8; (24) The right to sleep. *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1 at paras 311 and 318; (25) The right to reputation. *Umesh Kumar* v. *State of A.P.*, (2013) 10 SCC 591 at para 18; (26) The right against solitary confinement. *Shatrughan Chauhan* v. *Union of India*, (2014) 3 SCC 1 at para 241 : (2014) 2 SCC (Cri) 1.

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of the Constitution shall be, and for this purpose the Constitution entrusts this task to a minimum of five Judges of this Court.

503. Does a fundamental right to privacy reside primarily in Article 21 read with certain other fundamental rights?

504. At this point, it is important to advert to the US Supreme Court's development of the right to privacy.

505. The earlier cases tended to see the right to 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[379]. Thus in an early case, *Olmstead* v. *United States*[54], US at pp. 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 was too narrow a construction of the Fourth Amendment and said in words that were futuristic that: (SCC OnLine US SC para 54)

> "*54*. 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?"

506. 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 to privacy is a constitutionally protected right: (*Olmstead case*[54], SCC OnLine US SC para 62)

> "*62*. 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 recognised the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that

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379 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.

54 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)

† Otis' argument against Writs of Assistance. See Tudor, James Otis, p. 66; *John Adams' Works*, Vol. II, p. 524; Minot, *Continuation of the History of Massachusetts Bay*, Vol. II, p. 95.

‡ *Entick* v. *Carrington*, 19 Howell's State Trials, 1030, p. 1066.

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> only a part of the pain, pleasure and satisfactions 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 civilised 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*[66].

507. A large number of judgments of the US Supreme Court since *Katz*[66] have recognised the right to privacy as falling in one or other of the clauses of the Bill of Rights in the US Constitution. Thus, in *Griswold* v. *Connecticut*[52], 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 US Constitution. Goldberg, J. found this right to be embedded in the Ninth Amendment which states that certain rights which are not enumerated are nonetheless recognised 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 recognised and applied in *Roe* v. *Wade*[53], in which a woman's right to choose for herself whether or not to abort a foetus was established, until the foetus was found "viable". Other judgments also recognised this right of independence of choice in personal decisions relating to marriage, *Loving* v. *Virginia*[380], US p. 12 : S Ct p. 1823; procreation, *Skinner* v. *Oklahoma*[381], US pp. 541-42 : S Ct pp. 1113-14; contraception, *Eisenstadt* v. *Baird*[148], US pp. 453-54 : S Ct pp. 1038-39, family relationships, *Prince* v. *Massachusetts*[382], US p. 166 : S Ct p. 442; and child-bearing and education, *Pierce* v. *Society of Sisters*[146], US p. 535 : S Ct p. 573.

508. In a recent decision of the US Supreme Court in *United States* v. *Jones*[162], the US Supreme Court's majority judgment traces the right to privacy through the labyrinth of case law in Part II of Scalia, J. 's opinion, and regards it as a constitutionally protected right.

509. Based upon the prevalent thinking of the US Supreme Court, a seminal judgment was delivered by Mathew, J. in *Gobind*[8]. This judgment dealt with the M.P. Police Regulations, similar to the Police Regulations contained in

66 *Katz* v. *United States*, 1967 SCC OnLine US SC 248 : 19 L Ed 2d 576 : 88 S Ct 507 : 389 US 347 (1967)
52 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
53 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
380 1967 SCC OnLine US SC 152 : 18 L Ed 2d 1010 : 87 S Ct 1817 : 388 US 1 (1967)
381 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 62 S Ct 1110 : 316 US 535 (1942)
148 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 92 S Ct 1029 : 405 US 438 (1972)
382 1944 SCC OnLine US SC 27 : 88 L Ed 645 : 64 S Ct 438 : 321 US 158 (1944)
146 1925 SCC OnLine US SC 168 : 69 L Ed 1070 : 45 S Ct 571 : 39 ALR 468 : 268 US 510 (1925)
162 2012 SCC OnLine US SC 13 : 565 US 400 (2012)
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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Kharak Singh[2]. After setting out the majority and minority opinions in the said judgment, Mathew, J. went on to discuss the US Supreme Court judgments in *Griswold*[52] and *Roe*[53]. In a very instructive passage the learned Judge held: (*Gobind case*[8], SCC pp. 155-57, paras 22-24 & 27-28)

> "*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 characterisation 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-bearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of distinctive characteristics of the right to 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.

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
52 *Griswold* v. *Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)
53 *Roe* v. *Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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* * *

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 to privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute."

The Police Regulations were, however, not struck down, but were termed as being perilously close to being unconstitutional.

510. 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*[8] 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*[8] these cases can be supported on the ground that there exists a fundamental right to privacy.

511. In *R. Rajagopal* v. *State of T.N.*[9], this Court had to decide on the rights of privacy vis-à-vis the freedom of the press, and in so doing, referred to a large number of judgments and arrived at the following conclusion: (SCC pp. 649-51, para 26)

"*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

8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
9 (1994) 6 SCC 632

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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 the Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

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(*6*) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media."[383] (emphasis in original)

512. Similarly, in *PUCL* v. *Union of India*[10], this Court dealt with telephone tapping as follows: (SCC p. 311, paras 17-18)

"*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 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."

The Court then went on to apply Article 17 of the International Covenant on Civil and Political Rights, 1966 which recognises 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.

513. In *Sharda* v. *Dharmpal*[64], 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 UK courts, this Court held: (SCC p. 524, para 81)

"*81*. To sum up, our conclusions are:

1. A matrimonial court has the power to order a person to undergo medical test.

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383 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.

10 (1997) 1 SCC 301

64 (2003) 4 SCC 493

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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."

514. In *Canara Bank*[65], 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 to privacy contained in Article 21. The Court exhaustively went into the issue and cited many UK and US judgments. After so doing, it analysed some of this Court's judgments and held: (SCC pp. 523 & 524, paras 53 & 56)

"*53*. Once we have accepted in *Gobind*[8] 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*[67] 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 *Maneka Gandhi* v. *Union of India*[5], 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. 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

65 *District Registrar and Collector* v. *Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468
67 *United States* v. *Miller*, 1976 SCC OnLine US SC 70 : 48 L Ed 2d 71 : 425 US 435 (1976)
5 (1978) 1 SCC 248

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Article 21 as well, the law and procedure authorising interference with personal liberty and right to 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." (emphasis in original)

515. In *Selvi* v. *State of Karnataka*[79], 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, recognising 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: (SCC pp. 369-70, paras 224-225)

"*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."

79 (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1

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516. All this leads to a discussion on what exactly is the fundamental right to privacy—where does it fit in Chapter III of the Constitution, and what are the parameters of its constitutional protection.

517. In an instructive article reported in Vol. 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 pp. 1482-83):

> "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 recognised that the right to 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."

518. Shortly thereafter, in 1977, an instructive judgment is to be found in *Whalen* v. *Roe*[384], US at pp. 598 and 599 by the US Supreme Court. This case dealt with a legislation by the State of New York in which the State, in a centralised 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 US 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 US Supreme Court found that the right to privacy was grounded after *Roe*[53] in the Fourteenth Amendment's concept of personal liberty. Having thus grounded the right, the US Supreme Court in a very significant passage stated: (SCC OnLine US SC paras 11 & 12)

384 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977)
53 *Roe* v. *Wade*, 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973)

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"*11*. … 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. …

12. 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."

519. 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."

520. The Constitutional Court of South Africa in *NM* v. *Smith*[171], had this to say about the fundamental right to privacy recognised by the South African Constitution:

171 2007 SCC OnLine ZACC 6 : (2007) 5 SA 250 (CC)

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"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 interdependent 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)

521. 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 recognises 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.

522. 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.

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523. 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." (emphasis supplied)

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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)

524. "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:

> "**4.** 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.

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525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.[385] 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 unauthorised 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 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 to 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.

526. 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.

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385 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 recognise human dignity as being an essential part of the fundamental rights chapter. For example, see *Prem Shankar Shukla* v. *UT of Delhi*, (1980) 3 SCC 526 at para 21, *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 at paras 6, 7 and 8, *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 at para 10, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, (2010) 3 SCC 786 at para 37, *Shabnam* v. *Union of India*, (2015) 6 SCC 702 at paras 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761 at para 37.

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527. 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 recognised. We were referred to the Indian Telegraph Act of 1885, vintage and in particular Section 5 thereof which reads as under:

> "**5.** ***Power for Government to take possession of licensed telegraphs and to order interception of messages***.—(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 authorised 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."

528. 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 tranquillity, the Central Government, or a State Government, or any officer specially authorised 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 tranquillity, a certificate of the Central Government or, as the case may be, of the State Government shall be conclusive proof on the point."

529. 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*)-(*i*) * * *
>
> (*j*) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which

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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."

It will be noticed that in this statutory provision, the expression "privacy of the individual" is specifically mentioned.

530. In an illuminating judgment, reported as *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[88], 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: (SCC pp. 112-14, paras 57-60 & 62-64)

"*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 penalisation for violation of such rights and matters connected therewith, is pending. In several judgments including *Kharak Singh* v. *State of U.P.*[2], *R. Rajagopal* v. *State of T.N.*[9], *PUCL* v. *Union of India*[10] and *State of Maharashtra* v. *Bharat Shanti Lal Shah*[73], this Court has recognised the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.

58. The right to privacy is also recognised 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, nor 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 or correspondence nor to unlawful attacks on his honour and reputation.'

88 (2013) 16 SCC 82
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
9 (1994) 6 SCC 632
10 (1997) 1 SCC 301
73 (2008) 13 SCC 5

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60. This Court in *R. Rajagopal*[9] 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*)-(*i*) * * *
>
> (*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 that information which he is legally obliged to pass on to a public authority by law, and also only that 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(1)(*j*) of the RTI Act. Right to be left alone, as propounded in *Olmstead* v. *United States*[54] is the most comprehensive of the rights and most valued by civilised man.

9 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
54 1928 SCC OnLine US SC 131 : 72 L Ed 944 : 277 US 438 (1928)

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64. 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 safeguards to protect the rights under Section 8(1)(*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. *CIC*[386], 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."

531. There can be no doubt that the counsel for the petitioners are right in their submission that the legislature has also recognised the fundamental right to 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*[1] and *Kharak Singh*[2].

The inalienable nature of the right to privacy

532. The learned counsel for the petitioners also referred to another important aspect of the right to privacy. According to the learned counsel for the petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in para 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 recognised and given the status of being fundamental. There is no doubt that the petitioners are correct in this submission. However, one important roadblock in the way needs to be got over.

533. In *ADM, Jabalpur* v. *Shivakant Shukla*[6], 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

386 (2013) 1 SCC 212 : (2013) 1 SCC (L&S) 150
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332
6 (1976) 2 SCC 521 : AIR 1976 SC 1207

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away those rights altogether. A remarkable dissent was that of Khanna, J.[387] The learned Judge held: (SCC pp. 747 & 751, paras 525 & 531)

> "*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

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387 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 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. However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given." (at Appendix p. 2229).

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Fifth Amendment prohibits inter alia deprivation of life 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 p. 21 of the *Constitutional and Administrative Law* by O. Hood Phillips, 3rd Edn.).

* * *

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 case*[3], 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." (emphasis in original)

3 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88

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534. According to us this is a correct enunciation of the law for the following reasons:

534.1. 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;

534.2. 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*[121], this Court noticed in para 29 that: (SCC p. 76)

> "*76.* … The decision in *ADM, Jabalpur*[6], 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: (SCC pp. 85-86, para 61)

> "*61.* The approach in the interpretation of fundamental rights has been evidenced in a recent case *M. Nagaraj* v. *Union of India*[102], in which the Court noted: (SCC pp. 241-42, para 20)
>
> > '*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*

121 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1
6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207
102 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013

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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*[284] 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*[3]. 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 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*[3] *and held in its landmark judgment in Maneka Gandhi* v. *Union of India*[5] *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.' " (emphasis in original)

534.3. 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 recognises 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

284 AIR 1962 SC 305 : (1962) 3 SCR 842
3 AIR 1950 SC 27 : 1950 SCR 88
5 (1978) 1 SCC 248

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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 recognised and protected not merely by Article 21 but by the civil and criminal laws of India, and it is unfortunate that in *Habeas Corpus case*[6] 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 Edn., Vol. II) Appendix p. 2219.) (emphasis in original)

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*[6].

535. 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 to 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

536. 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*[1] and the majority in *Kharak Singh*[2], to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognising privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on

6 *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521 : AIR 1976 SC 1207
1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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merits to the original Bench of three Hon'ble Judges of this Court in light of the judgment just delivered by us.

ABHAY MANOHAR SAPRE, J. (*concurring*)— I have had the benefit of reading the scholarly opinions of my esteemed learned brothers, J. Chelameswar, S.A. Bobde, Rohinton Fali Nariman and Dr D.Y. Chandrachud, JJ. 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. 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.

538. In substance, two questions were referred to this nine-Judge Bench, first, whether the law laid down in *M.P. Sharma* v. *Satish Chandra*[1] and *Kharak Singh* v. *State of U.P.*[2] 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?

539. 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.

540. 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;"

541. 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. 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.

542. 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-fulfilment.

543. 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

1 AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077
2 AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332

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assures the dignity to every individual. Both expressions are interdependent and intertwined.

544. 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.

545. 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.

546. 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.

547. 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 the rule of law (see *S.S. Bola* v. *B.D. Sardana*[388]).

548. Our Constitution has recognised 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 the process of judicial interpretation depending upon the nature of right asserted by the citizens on case-to-case basis.

549. 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 recognised 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.

550. 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:

388 (1997) 8 SCC 522

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"**21.** ***Protection of life and personal liberty***.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

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* v. *State of Madras*[3] up to *Mohd. Arif* v. *Supreme Court of India*[250]. In between this period, several landmark judgments were rendered by this Court.

551. 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.

552. The learned Judges endeavoured 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.

553. It is a settled rule of interpretation as held in *Rustom Cavasjee Cooper* v. *Union of India*[4] 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 *Kesavananda Bharati* v. *State of Kerala*[98] 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.

554. 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.

555. 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

3 AIR 1950 SC 27 : 1950 SCR 88
250 (2014) 9 SCC 737 : (2014) 5 SCC (Cri) 408
4 (1970) 1 SCC 248
98 (1973) 4 SCC 225

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years has taken the help of English cases for interpreting the provisions of our Constitution and other laws. 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.

556. Indeed, it may not be out of place to state that this Court while interpreting the provisions of the Indian Companies Act, which is modelled 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.* v. *Raghunath Prasad Jhunjhunwalla*[389].] The questions referred need examination in the light of these principles.

557. 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 their last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguishes with human being.

558. One cannot conceive an individual enjoying meaningful life with dignity without such right. Indeed, it is one of those cherished rights, which every civilised society governed by rule of law always recognises in every human being and is under obligation to recognise 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.

559. "Right to privacy" is not defined in law except in the dictionaries. The courts, however, by process of judicial interpretation, have assigned meaning to this right in the context of specific issues involved on case-to-case basis.

560. The most popular meaning of "*right to privacy*" is—"*the right to be let alone*". In *Gobind* v. *State of M.P.*[8], K.K. Mathew, J. noticed multiple facets of this right (paras 21-25) and then gave a rule of caution while examining the contours of such right on case-to-case basis.

561. 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*[4] followed by *Maneka Gandhi* v. *Union of India*[5], *PUCL (PUCL)* v. *Union of India*[10], *Gobind case*[8],

389 (1976) 3 SCC 259
8 (1975) 2 SCC 148 : 1975 SCC (Cri) 468
4 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248
5 (1978) 1 SCC 248
10 (1997) 1 SCC 301

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'X' v. *Hospital 'Z'*[60], *District Registrar & Collector* v. *Canara Bank*[65] and lastly in *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*[88].

562. It is in these cases and especially the two, namely, *Gobind*[8] and *District Registrar*[65], 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.

563. In *Gobind case*[8], the learned Judge, K.K. Mathew, J. speaking for the Bench held and indeed rightly in para 28 as under: (SCC p. 157)

> "*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 to privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute."

564. Similarly in *District Registrar*[65], the learned R.C. Lahoti, C.J. (as his Lordship then was) speaking for the Bench with his distinctive style of writing concluded in para 39 as under: (SCC p. 518)

> "*39.* We have referred in detail to the reasons given by Mathew, J. in *Gobind*[8] 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*." (emphasis in original)

565. 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 Articles 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.

566. 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

60 (1998) 8 SCC 296
65 (2005) 1 SCC 496 : AIR 2005 SC 186
88 (2013) 16 SCC 82
8 *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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"personal liberty" under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition.

567. In view of the foregoing discussion, my answer to Question 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.

568. 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.

569. My esteemed learned Brothers, J. Chelameswar, J., S.A. Bobde, J., Rohinton Fali Nariman, J., and Dr D.Y. Chandrachud, J. have extensively dealt with Question 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. I entirely agree with their reasoning and the conclusion on Question 1 and hence do not wish to add anything to what they have said in their respective scholarly opinions.

570. 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 the Aadhaar Scheme in their submissions.

571. 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* v. *State of Maharashtra*[390] SCR at p. 753.)

572. 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.

573. 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.

390 (1966) 3 SCR 744 : AIR 1967 SC 1

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SANJAY KISHAN KAUL, J. (*concurring*)— I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman and Dr D.Y. Chandrachud, JJ. 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.

575. 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.

576. "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.

577. 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.

578. It is not India alone, but the world that recognises the right to 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. 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-Judge Constitution Bench.

579. This reference has arisen from the challenge to what is called the "Aadhaar 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-Judge Bench.

580. 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 *grund norm* — the Indian Constitution. We have been ably assisted by various Senior Counsel both for and against the proposition as to whether privacy is a constitutional right or not.

Privacy

581. In the words of Lord Acton:

> "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[391]."

391 John Emerich Edward Delberg and Lord Acton, *The History of Freedom and Other Essays* (MacMillan and Co. Ltd., London 1907), p. 587.

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582. 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.

583. 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[392]. 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 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.[393] 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 and technology

584. 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.

A. Privacy concerns against the State

585. 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 utilising 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 the States is "profiling". The European Union Regulation of 2016[394] 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

392 *The Right to Privacy,* (1890) 4 Harv L Rev 193.

393 Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.

394 Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation).

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preferences, interests, reliability, behaviour, location or movements[394]. 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.

586. 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. Privacy concerns against non-State actors

587. 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.

588. 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 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".[395]

589. 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."[396] "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 network 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 and increase our reliance on internet-based services, we are creating deeper and deeper digital footprints — passively and actively.

590. These digital footprints and extensive data can be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour 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

394 Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation).

395 Michael L. Rustad, SannaKulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 Harv JL & Tech 349.

396 Tom Goodwin "The Battle is for Customer Interface", <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>.

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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.

591. 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.

592. 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.[397]

593. 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.[393]

594. 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

595. 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. 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.

397 Kadhim Shubber, "Blackberry gives Indian Government ability to intercept messages" published by Wired on 11-7-2013 <http://www.wired.co.uk/article/blackberry-india>.

393 Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.

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596. In our country, she inspired our founding fathers — the Sovereign, Socialist, Secular, Democratic Republic of India was founded on her very spirit. 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.

597. In it they poured her essence, and gave to her a grand throne in Part III of the Indian Constitution. 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 *grund norm*, that it is the Supreme Legal Document in the country.

598. 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 Montesquiean 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."[398]

599. 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*.

600. 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.

601. 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.

398 Dhananjay Keer, Dr Ambedkar: Life and Mission (Bombay: Popular Prakashan, 1971) [1954], CAD Vol. 7, p. 44.

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602. Therefore, the *theory of original intent* itself supports the stand that the original intention of the makers of the Constitution 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.

603. The then Chief Justice of India, Patanjali Sastri, in *State of W.B.* v. *Anwar Ali Sarkar*[399] observed as follows: (AIR p. 103, para 85)

> "*85*. I find it impossible to read these portions of the Constitution without regard to the background out of which 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."

604. How the Constitution should be read and interpreted is best found in the words of Khanna, J., in *Kesavananda Bharati* v. *State of Kerala*[98] as follows: (SCC pp. 770-71, para 1437)

> "*1437*. … A Constitution is essentially different from pleadings filed in Court of litigating parties. Pleadings contain claim and counterclaim 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 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 US Constitution have equal relevance for our Constitution. Said the great Judge:

399 AIR 1952 SC 75 : 1952 Cri LJ 510 : 1952 SCR 284
98 (1973) 4 SCC 225

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> '8. … 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*[400], SCC OnLine US SC para 8 : US p. 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 world. 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)

605. In the same judgment, K.K. Mathew, J., observed: (*Kesavananda case*[98], SCC p. 830, para 1563)

> "*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 forth with 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*[401].]"

606. In the context of the necessity of the doctrine of flexibility while dealing with the Constitution it was observed in *Union of India* v. *Naveen Jindal*[402]: (SCC p. 539, paras 39-40)

400 1914 SCC OnLine US SC 153 : 58 L Ed 1115 : 233 US 604 (1914)
98 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
401 1919 SCC OnLine US SC 213 : 63 L Ed 1173 : 250 US 616 (1919)
402 (2004) 2 SCC 510

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"*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.

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."

607. 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.

608. 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.

609. 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.

610. 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.

611. 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

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the passage of time, just as certain rights may get weeded out due to natural evolution.

612. 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.*

613. 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* v. *P.R. Ramakrishnan*[403] would equally apply to the requirements of interpretation of the Constitution in the present context: (SCC p. 255, para 9)

> "*9.* … 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."

614. 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 ॥"

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, Articles 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

403 (1983) 1 SCC 228 : 1983 SCC (L&S) 72

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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.

615. 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.

616. 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.

617. The Constitution and its all-encompassing spirit forever grows, but never ages.

Privacy is essential to liberty and dignity

618. Rohinton F. Nariman, and Dr D.Y. Chandrachud, JJ., have emphasised 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:

618.1. In *Robertson and Nicol on Media Law*[404] 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."

618.2. Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell case*[135] recognised the importance of the protection of privacy. Lord Hoffman opined as under: (AC p. 472 H & 473 A-D, paras 50-51)

> "*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

404 Geoffrey Robertson, QC and Andrew Nicol, QC, *Media Law*, 5th Edn., p. 265.
135 *Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)

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have less protection against a private individual than he would have against the state for the 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."

618.3. Lord Nicholls opined as under: (*Naomi Campbell case*[135], AC p. 464 D-F, para 12)

"*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. *Dyment*[176], SCC OnLine Can SC para 17 : SCR p. 426."

619. 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 criticise someone but not share the criticism with the world.

Privacy — Right to control information

620. 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 candour 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

135 *Campbell* v. *MGN Ltd.*, (2004) 2 AC 457 : (2004) 2 WLR 1232 : (2004) UKHL 22 (HL)
176 1988 SCC OnLine Can SC 86 : (1988) 2 SCR 417

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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.[393]

621. Dr D.Y. Chandrachud, J., notes that recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of their personality. Rohinton F. Nariman, J., recognises informational privacy which recognises that an individual may have control over the dissemination of material which is personal to him. Recognised 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.

622. 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:

> "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.

623. 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[393].

624. There is no justification for making all truthful information available to the public. The public does not have an interest in knowing 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.[405] Thus, truthful information that breaches privacy may also require protection.

393 Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacy-matters/>.

405 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 and injunction could also not be published.

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625. 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.[406]

626. 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-definition, which prevents others from interfering with the meanings and values that the public associates with her.[407]

627. Prosser categorised the invasion of privacy into four separate torts[408]:

(*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 US has adopted a right to publicity.[409]

628. In the poetic words of Felicia Lamport mentioned in the book *The Assault on Privacy*[410]:

"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,
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

406 The Second Circuit's decision in *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.*, 202 F 2d 866 (2d Cir 1953) penned by Jerome Frank, J. defined the right to publicity as "the right to grant the exclusive privilege of publishing his picture".

407 Mark P. McKenna, "The Right of Publicity and Autonomous Self-Definition", 67 U PITT L REV 225 at p. 282 (2005).

408 William L. Prosser, "Privacy", 48 CAL L REV 383 (1960).

409 The scope of the right to publicity varies across States in the US.

410 Arthur R. Miller (The University of Michigan Press, 1971).

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Until the day we die
When we'll be snatched up by the great
Computer in the Sky"

Informational privacy

629. 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.

630. A high school teacher was fired after posting on her Facebook page that she was "so not looking forward to another [school] year" since the school district's residents were "arrogant and snobby". A flight attendant was fired for posting suggestive photos of herself in the company's uniform.[411] 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.

631. 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 footprints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle[412].

632. 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 privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

633. 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.[395] 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.

634. 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

411 Patricia Sánchez Abril, "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee", 49 Am Bus LJ 63 at p. 69 (2012).

412 Ravi Antani, "THE RESISTANCE OF MEMORY : COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?", 30 Berkeley Tech LJ 1173 (2015).

395 Michael L. Rustad, SannaKulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 Harv JL & Tech 349.

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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.

635. 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 to privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

636. Thus, the European Union Regulation of 2016[394] has recognised 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 recognise 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 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

637. 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[394] of the European Parliament and of the Council of 27-4-2016 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 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.

394 Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation).

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Test: Principle of proportionality and legitimacy

638. 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

639. 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.

640. It would be useful to turn to the European Union Regulation of 2016[394]. 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.
>
> (*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 identified or identifiable natural person but remains anonymous. The European Union Regulation of 2016[394] 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

394 Regulation No. (EU) 2016/679 of the European Parliament and of the Council of 27-4-2016 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 No. 95/46/EC (General Data Protection Regulation).

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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

641. 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 under the Chairmanship of Justice A.P. Shah, which submitted a report on 16-10-2012. 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 cooperation 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

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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."

642. 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!

643. 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 to privacy cannot be left to be formulated by the legislature. It is a primal natural right which is only being recognised as a fundamental right falling in Part III of the Constitution of India.

Conclusion

644. The right to 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.

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645. 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.

646. 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 recognised 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 recognise this important, natural, primordial right as a fundamental right.

647. 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 to privacy he has referred to the judgment in *Suresh Kumar Koushal* v. *Naz Foundation*[7]. In the challenge laid to Section 377 of the 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[122] that the right to live with dignity and the right to privacy both are recognised as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find 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 vires 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 paras 144 to 146 of his judgment, states that the right to 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 categorised as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy. The observations made in *Mosley* v. *News Group Papers Ltd.*[413], in a broader concept may be usefully referred to:

7 (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1
122 *Naz Foundation* v. *State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94
413 2008 EWHC 1777 (QB)

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"*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-recognised 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*[414] at pp. 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."

648. 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.

649. The second aspect is the discussion in respect of the majority judgment in *ADM, Jabalpur* v. *Shivakant Shukla*[6] in both the opinions. In *I.R. Coelho* v. *State of T.N.*[121] it was observed that *ADM, Jabalpur case*[6] has been impliedly overruled and that the supervening event was the Forty-fourth Amendment to the Constitution, amending Article 359 of the Constitution. I fully agree with the view expressly overruling *ADM, Jabalpur case*[6] 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.

650. Let the right to 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.

414 *Von Hannover* v. *Germany*, (2004) 40 EHRR 1
6 (1976) 2 SCC 521 : AIR 1976 SC 1207
121 (2007) 2 SCC 1

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ORDER OF THE COURT*

651. The judgment on behalf of Jagdish Singh Khehar, C.J., R.K. Agrawal, S. Abdul Nazeer and Dr D.Y. Chandrachud, JJ. was delivered by Dr D.Y. Chandrachud, J., J. Chelameswar, J., S.A. Bobde, J., Abhay Manohar Sapre, J., Rohinton Fali Nariman, J., and Sanjay Kishan Kaul, J. delivered separate judgments.

652. The reference is disposed of in the following terms:

652.1. The decision in *M.P. Sharma*[1] which holds that the right to privacy is not protected by the Constitution stands overruled;

652.2. The decision in *Kharak Singh*[2] to the extent that it holds that the right to privacy is not protected by the Constitution stands overruled;

652.3. 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.

652.4. Decisions subsequent to *Kharak Singh*[2] which have enunciated the position in para 652.3, above lay down the correct position in law.

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* **Ed.**: Signed by all nine Hon'ble Judges.

1 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

2 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329 : (1964) 1 SCR 332