REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO.494 OF 2012

JUSTICE K.S. PUTTASWAMY
(RETD.) AND ANR. …PETITIONERS

VERSUS

UNION OF INDIA AND ORS. …RESPONDENTS

WITH

TRANSFERRED CASE (CIVIL) NO.151 OF 2013

TRANSFERRED CASE (CIVIL) NO.152 OF 2013

WRIT PETITION (CIVIL) NO.833 OF 2013

WRIT PETITION (CIVIL) NO.829 OF 2013

WRIT PETITION (CIVIL) NO.932 OF 2013

CONTEMPT PETITION (CIVIL) NO.144 OF 2014
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

TRANSFER PETITION (CIVIL) NO. 313 OF 2014

TRANSFER PETITION (CIVIL) NO. 312 OF 2014

SPECIAL LEAVE PETITION (CRIMINAL) NO.2524 OF 2014

WRIT PETITION (CIVIL) NO.37 OF 2015

WRIT PETITION (CIVIL) NO.220 OF 2015

CONTEMPT PETITION (CIVIL) NO.674 OF 2015
IN
WRIT PETITION (CIVIL) NO.829 OF 2013

TRANSFER PETITION (CIVIL) NO. 921 OF 2015

CONTEMPT PETITION (CIVIL) NO.470 OF 2015
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

CONTEMPT PETITION (CIVIL) NO.444 OF 2016
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

CONTEMPT PETITION (CIVIL) NO.608 OF 2016
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

WRIT PETITION (CIVIL) NO.797 OF 2016

CONTEMPT PETITION (CIVIL) NO.844 OF 2017
IN
WRIT PETITION (CIVIL) NO.494 OF 2012

WRIT PETITION (CIVIL) NO.342 OF 2017

WRIT PETITION (CIVIL) NO.372 OF 2017

J U D G M E N T

R.F. Nariman, J.

Prologue

1. The importance of the present matter is such that whichever way it is decided, it will have huge repercussions for the democratic republic that we call "*Bharat*" i.e. India. A Bench of 9-Judges has been constituted to look into questions relating to basic human rights. A 3-Judge Bench of this Court was dealing with a scheme propounded by the Government of India popularly known as the Aadhar card scheme. Under the said scheme, the Government of India collects and compiles both demographic and biometric data of the residents of this country to be used for various purposes. One of the grounds of attack on the said scheme is that the very collection of such data is violative of the "Right to Privacy". After hearing the learned Attorney General, Shri Gopal Subramanium and Shri Shyam Divan, a 3-Judge Bench opined as follows:

> "12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including

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

2. The matter was heard by a Bench of 5 learned Judges on July 18, 2017, and was thereafter referred to 9 learned Judges in view of the fact that the judgment in **M.P. Sharma and others** v. **Satish Chandra, District Magistrate, Delhi, and**

others, 1954 SCR 1077, was by a Bench of 8 learned Judges of this Court.

3. Learned senior counsel for the petitioners, Shri Gopal Subramanium, Shri Shyam Divan, Shri Arvind Datar, Shri Sajan Poovayya, Shri Anand Grover and Miss Meenakshi Arora, have argued that the judgments contained in **M.P. Sharma** (supra) and **Kharak Singh** v. **State of U.P.**, (1964) 1 SCR 332, which was by a Bench of 6 learned Judges, should be overruled as they do not reflect the correct position in law. In any case, both judgments have been overtaken by **R.C. Cooper** v. **Union of India**, (1970) 1 SCC 248, and **Maneka Gandhi** v. **Union of India**, (1978) 1 SCC 248, and therefore require a revisit at our end. According to them, the right to privacy is very much a fundamental right which is co-terminus with the liberty and dignity of the individual. According to them, this right is found in Articles 14, 19, 20, 21 and 25 when read with the Preamble of the Constitution. Further, it was also argued that several international covenants have stated that the right to privacy is fundamental to the development of the human personality and that these international covenants need to be read into the

fundamental rights chapter of the Constitution. Also, according to them, the right to privacy should be evolved on a case to case basis, and being a fundamental human right should only yield to State action if such State action is compelling, necessary and in public interest. A large number of judgments were cited by all of them. They also invited this Court to pronounce upon the fact that the right to privacy is an inalienable natural right which is not conferred by the Constitution but only recognized as such.

4. Shri Kapil Sibal, learned senior counsel on behalf of the States of Karnataka, West Bengal, Punjab and Puducherry broadly supported the petitioners. According to him, the 8-Judge Bench and the 6-Judge Bench decisions have ceased to be relevant in the context of the vastly changed circumstances of today. Further, according to him, State action that violates the fundamental right to privacy must contain at least four elements, namely:

- "The action must be sanctioned by law;
- The proposed action must be necessary in a democratic society for a legitimate aim;

- The extent of such interference must be proportionate to the need for such interference;

- There must be procedural guarantees against abuse of such interference."

5. Shri P.V. Surendra Nath, appearing on behalf of the State of Kerala, also supported the petitioners and stated that the constitutional right to privacy very much exists in Part III of the Constitution.

6. Appearing on behalf of the Union of India, Shri K.K. Venugopal, learned Attorney General for India, has argued that the conclusions arrived at in the 8-Judge Bench and the 6-Judge Bench decisions should not be disturbed as they are supported by the fact that the founding fathers expressly rejected the right to privacy being made part of the fundamental rights chapter of the Constitution. He referred in copious detail to the Constituent Assembly debates for this purpose. Further, according to him, privacy is a common law right and all aspects of privacy do not elevate themselves into being a fundamental right. If at all, the right to privacy can only be one amongst

several varied rights falling under the umbrella of the right to personal liberty. According to him, the right to life stands above the right to personal liberty, and any claim to privacy which would destroy or erode this basic foundational right can never be elevated to the status of a fundamental right. He also argued that the right to privacy cannot be claimed when most of the aspects which are sought to be protected by such right are already in the public domain and the information in question has already been parted with by citizens.

7. Shri Tushar Mehta, learned Additional Solicitor General of India, appearing for UIDAI and the State of Madhya Pradesh, generally supported and adopted the arguments of the learned Attorney General. According to him, privacy is an inherently vague and subjective concept and cannot, therefore, be accorded the status of a fundamental right. Further, codified statutory law in India already confers protection to the individual's right to privacy. According to him, no further expansion of the rights contained in Part III of our Constitution is at all warranted. Also, the position under English Law is that there is no common law right to privacy. He cited before us

examples of other countries in the world where privacy is protected by legislation and not by or under the Constitution.

8. Shri Aryama Sundaram, appearing for the State of Maharashtra, also supported the arguments made by the learned Attorney General. According to him, there is no separate "privacy" right and violation of a fundamental right should directly be traceable to rights expressly protected by Part III of the Constitution. Further, privacy is a vague and inchoate expression. He also referred to the Constituent Assembly debates to buttress the same proposition that the right to privacy was expressly discountenanced by the framers of the Constitution. He went on to state that "personal liberty" in Article 21 is liberty which is circumscribed – i.e. it relates only to the person of the individual and is smaller conceptually than "civil liberty". According to him, the ratio of **Kharak Singh** (supra) is that there is no fundamental right to privacy, but any fundamental right that is basic to ordered liberty would certainly be included as a fundamental right. According to him, **Gobind** v. **State of Madhya Pradesh**, (1975) 2 SCC 148, did not state that there was any fundamental right to privacy and the later

judgments which referred only to **Gobind** (supra) as laying down such a right are incorrect for this reason.

9. Shri Rakesh Dwivedi, learned senior counsel appearing for the State of Gujarat, has argued that both the petitioners as well as the learned Attorney General have taken extreme positions. According to him, the petitioners state that in the case of every invasion of a privacy right, howsoever trivial, the fundamental right to privacy gets attracted, whereas according to the learned Attorney General, there is no fundamental right to privacy at all. He asked us to adopt an intermediate position – namely, that it is only if the U.S. Supreme Court's standard that a petitioner before a Court satisfies the test of "reasonable expectation of privacy" that such infraction of privacy can be elevated to the level of a fundamental right. According to Shri Dwivedi, individual personal choices made by an individual are already protected under Article 21 under the rubric "personal liberty". It is only when individuals disclose certain personal information in order to avail a benefit that it could be said that they have no reasonable expectation of privacy as they have voluntarily and freely parted with such information. Also,

according to him, it is only specialized data, if parted with, which would require protection. As an example, he stated that a person's name and mobile number, already being in the public domain, would not be reasonably expected by that person to be something private. On the other hand, what is contained in that person's bank account could perhaps be stated to be information over which he expects a reasonable expectation of privacy and would, if divulged by the bank to others, constitute an infraction of his fundamental right to privacy. According to him:

> "…when a claim of privacy seeks inclusion in Article 21 of the Constitution of India, the Court needs to apply the reasonable expectation of privacy test. It should see:–
>
> (i) What is the context in which a privacy law is set up.
>
> (ii) Does the claim relate to private or family life, or a confidential relationship.
>
> (iii) Is the claim serious one or is it trivial.
>
> (iv) Is the disclosure likely to result in any serious or significant injury and the nature and the extent of disclosure.
>
> (v) Is disclosure for identification purpose or relates to personal and sensitive information of an identified person.

(vi) Does disclosure relate to information already disclosed publicly to third parties or several parties willingly and unconditionally. Is the disclosure in the course of e commerce or social media?

Assuming, that in a case that it is found that a claim for privacy is protected by Article 21 of the Constitution, the test should be following:-

(i) the infringement should be by legislation.

(ii) the legislation should be in public interest.

(iii) the legislation should be reasonable and have nexus with the public interest.

(iv) the State would be entitled to adopt that measure which would most efficiently achieve the objective without being excessive.

(v) if apart from Article 21, the legislation infringes any other specified Fundamental Right then it must stand the test in relation to that specified Fundamental Right.

(vi) Presumption of validity would attach to the legislations."

10. Shri A. Sengupta, appearing on behalf of the State of Haryana, has supported the arguments of the learned Attorney General and has gone on to state that even the U.S. Supreme Court no longer uses the right to privacy to test laws that were earlier tested on this ground. Any right to privacy is

conceptually unsound, and only comprehensive data protection legislation can effectively address concerns of data protection and privacy. The Government of India is indeed alive to the need for such a law. He further argued that privacy as a concept is always marshaled to protect liberty and, therefore, argued that the formulation that should be made by this Court is whether a liberty interest is at all affected; is such liberty "personal liberty" or other liberty that deserves constitutional protection and is there a countervailing legitimate State interest.

11. Shri Jugal Kishore, appearing on behalf of the State of Chhattisgarh, has also broadly supported the stand of the learned Attorney General.

12. Shri Gopal Sankaranarayanan, appearing on behalf of the Centre for Civil Society, argued that **M.P. Sharma** (supra) and **Kharak Singh** (supra) are correctly decided and must be followed as there has been no change in the constitutional context of privacy from **Gopalan** (supra) through **R.C. Cooper** (supra) and **Maneka Gandhi** (supra). He further argued that being incapable of precise definition, privacy ought not to be

elevated in all its aspects to the level of a fundamental right. According to him, the words “life” and “personal liberty” in Article 21 have already been widely interpreted to include many facets of what the petitioners refer to as privacy. Those facets which have statutory protection are not protected by Article 21. He also argued that we must never forget that when recognizing aspects of the right to privacy as a fundamental right, such aspects cannot be waived and this being the case, a privacy interest ought not to be raised to the level of a fundamental right. He also cautioned us against importing approaches from overseas out of context.

Early Views on Privacy

13. Any discussion with regard to a right of privacy of the individual must necessarily begin with **Semayne’s case**, 77 ER 194. This case was decided in the year 1603, when there was a change of guard in England. The Tudor dynasty ended with the death of Elizabeth I, and the Stuart dynasty, a dynasty which hailed from Scotland took over under James VI of Scotland,

who became James I of England.[1] James I was an absolute monarch who ruled believing that he did so by Divine Right. **Semayne's case** (supra) was decided in this historical setting.

14. The importance of **Semayne's case** (supra) is that it decided that every man's home is his castle and fortress for his defence against injury and violence, as well as for his repose. William Pitt, the Elder, put it thus: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter, the rain may enter — *but the King of England cannot enter* — all his force dare not cross the threshold of the ruined tenement." A century and a half later, pretty much the same thing was said in **Huckle** v. **Money**, 95 ER 768 (1763), in which it was held that Magistrates cannot exercise arbitrary powers which violated the *Magna Carta* (signed by King John, conceding certain rights to his barons in 1215), and if they did, exemplary damages must be given for the same. It was stated

[1] It is interesting to note that from 1066 onwards, England has never been ruled by a native Anglo-Saxon. The Norman French dynasty which gave way to the Plantagenet dynasty ruled from 1066-1485; the Welsh Tudor dynasty then ruled from 1485-1603 AD; the Stuart dynasty, a Scottish dynasty, then ruled from 1603; and barring a minor hiccup in the form of Oliver Cromwell, ruled up to 1714. From 1714 onwards, members of a German dynasty from Hanover have been monarchs of England and continue to be monarchs in England.

that, “To enter a man’s house by virtue of a nameless warrant, in order to procure evidence is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour.”

15. This statement of the law was echoed in **Entick** v. **Carrington**, 95 ER 807 (1765), in which Lord Camden held that an illegal search warrant was “subversive of all the comforts of society” and the issuance of such a warrant for the seizure of all of a man’s papers, and not only those alleged to be criminal in nature, was “contrary to the genius of the law of England.” A few years later, in **Da Costa** v. **Jones**, 98 ER 1331 (1778), Lord Mansfield upheld the privacy of a third person when such privacy was the subject matter of a wager, which was injurious to the reputation of such third person. The wager in that case was as to whether a certain Chevalier D’eon was a cheat and imposter in that he was actually a woman. Such wager which violated the privacy of a third person was held to be injurious to the reputation of the third person for which damages were awarded to the third person. These early judgments did much to uphold the inviolability of the person of a citizen.

16. When we cross the Atlantic Ocean and go to the United States, we find a very interesting article printed in the Harvard Law Review in 1890 by Samuel D. Warren and Louis D. Brandeis [(4 Harv. L. Rev. 193)]. The opening paragraph of the said article is worth quoting:

> "THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,— the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession— intangible, as well as tangible."

17. This article is of great importance for the reason that it spoke of the right of the individual "to be let alone". It stated in unmistakable terms that this right is not grounded as a property

right, but is grounded in having the right of an “inviolate personality”. Limitations on this right were also discussed in some detail, and remedies for the invasion of this right of privacy were suggested, being an action of tort for damages in all cases and perhaps an injunction in some. The right of privacy as expounded in this article did not explore the ramifications of the said right as against State action, but only explored invasions of this right by private persons.

Three Great Dissents

18. When the Constitution of India was framed, the fundamental rights chapter consisted of rights essentially of citizens and persons against the State. Article 21, with which we are directly concerned, was couched in negative form in order to interdict State action that fell afoul of its contours. This Article, which houses two great human rights, the right to life and the right to personal liberty, was construed rather narrowly by the early Supreme Court of India. But then, there were Judges who had vision and dissented from their colleagues. This judgment will refer to three great dissents by Justices Fazl Ali, Subba Rao and Khanna.

19. Charles Evans Hughes, before he became the Chief Justice of the United States and while he was still a member of the New York Court of Appeals, delivered a set of six lectures at Columbia University.[2] The famous passage oft quoted in many judgments comes from his second lecture. In words that resonate even today, he stated:

> "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed….."

20. Brandeis, J. had a somewhat different view. He cautioned that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." [See **Burnet v. Coronado Oil & Gas Co.**, 285 U.S. 393 at 406 (1932)]. John P. Frank wrote, in 1958, of the Brandeis view as follows:

> "Brandeis was a great institutional man. He realized that …. random dissents …. weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents …. need to be saved for major matters if the Court is not to appear indecisive and quarrelsome….. To have discarded some of his separate opinions is a supreme example of Brandeis's sacrifice to the strength and consistency of the Court. And he had his reward:

[2] See, E. Gaffney Jr., "The Importance of Dissent and the Imperative of Judicial Civility" (1994) 28 Val. U.L. Rev 583.

his shots were all the harder because he chose his ground."[3]

21. Whichever way one looks at it, the foresight of Fazl Ali, J. in **A.K. Gopalan** v. **State of Madras**, 1950 SCR 88, simply takes our breath away. The subject matter of challenge in the said case was the validity of certain provisions of the Preventive Detention Act of 1950. In a judgment which anticipated the changes made in our constitutional law twenty years later, this great Judge said:

> "To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under articles 20 and 21 and also under article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in article 22, also amounts to deprivation of personal liberty which is referred to in article 21, and is a violation of the right of freedom of movement dealt with in article 19(1)(d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to article 19(1)(f) and article 31 both of which deal with the right to property and to some extent overlap each other."
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> (at page 148)

[3] John P. Frank, Book Review, 10 J. Legal Education 401, 404 (1958).

He went on thereafter to hold that the fact that "due process" was not actually used in Article 21 would be of no moment. He said:

> "It will not be out of place to state here in a few words how the Japanese Constitution came into existence. It appears that on the 11th October, 1945, General McArthur directed the Japanese Cabinet to initiate measures for the preparation of the Japanese Constitution, but, as no progress was made, it was decided in February, 1946, that the problem of constitutional reform should be taken over by the Government Section of the Supreme Commander's Headquarters. Subsequently the Chief of this Section and the staff drafted the Constitution with the help of American constitutional lawyers who were called to assist the Government Section in the task. This Constitution, as a learned writer has remarked, bore on almost every page evidences of its essentially Western origin, and this characteristic was especially evident in the preamble "particularly reminiscent of the American Declaration of Independence, a preamble which, it has been observed, no Japanese could possibly have conceived or written and which few could even understand" [See Ogg and Zink's "Modern Foreign Governments"]. One of the characteristics of the Constitution which undoubtedly bespeaks of direct American influence is to be found in a lengthy chapter, consisting of 31 articles, entitled "Rights and Duties of the People," which provided for the first time an effective "Bill of Rights" for the Japanese people. The usual safeguards have been provided there against apprehension without a warrant and against arrest or detention without being informed of the charges or without adequate cause (articles 33 and 34).

Now there are two matters which deserve to be noticed:- (1) that the Japanese Constitution was framed wholly under American influence; and (2) that at the time it was framed the trend of judicial opinion in America was in favour of confining the meaning of the expression “due process of law” to what is expressed by certain American writers by the somewhat quaint but useful expression “procedural due process.” That there was such a trend would be clear from the following passage which I quote from Carl Brent Swisher’s “The Growth of Constitutional Power in the United States” (page 107):-

> “The American history of its interpretation falls into three periods. During the first period, covering roughly the first century of government under the Constitution, due process was interpreted principally as a restriction upon procedure—and largely the judicial procedure—by which the government exercised its powers. During the second period, which, again roughly speaking, extended through 1936, due process was expanded to serve as a restriction not merely upon procedure but upon the substance of the activities in which the government might engage. During the third period, extending from 1936 to date, the use of due process as a substantive restriction has been largely suspended or abandoned, leaving it principally in its original status as a restriction upon procedure.”

In the circumstances mentioned, it seems permissible to surmise that the expression “procedure established by law” as used in the Japanese Constitution represented the current trend

> of American judicial opinion with regard to "due process of law," and, if that is so, the expression as used in our Constitution means all that the American writers have read into the words "procedural due process." But I do not wish to base any conclusions upon mere surmise and will try to examine the whole question on its merits.
>
> The word "law" may be used in an abstract or concrete sense. Sometimes it is preceded by an article such as "a" or "the" or by such words as "any," "all," etc., and sometimes it is used without any such prefix. But, generally, the word "law" has a wider meaning when used in the abstract sense without being preceded by an article. The question to be decided is whether the word "law" means nothing more than statute law.
>
> Now whatever may be the meaning of the expression "due process of law," the word "law" is common to that expression as well as "procedure established by law" and though we are not bound to adopt the construction put on "law" or "due process of law" in America, yet since a number of eminent American Judges have devoted much thought to the subject, I am not prepared to hold that we can derive no help from their opinions and we should completely ignore them."
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> (at pages 159-161)

He also went on to state that "law" in Article 21 means "valid law".

On all counts, his words were a cry in the wilderness. Insofar as his vision that fundamental rights are not in distinct watertight compartments but do overlap, it took twenty years for

this Court to realize how correct he was, and in **R.C. Cooper** (supra), an 11-Judge Bench of this Court, agreeing with Fazl Ali, J., finally held:

> "52. In dealing with the argument that Article 31(2) is a complete code relating to infringement of the right to property by compulsory acquisition, and the validity of the law is not liable to be tested in the light of the reasonableness of the restrictions imposed thereby, it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 & 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action—legislative or executive—Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.
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> 53. We are therefore unable to hold that the challenge to the validity of the provision for

> acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(f) and 31(2) are mutually exclusive."[4]
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> (at page 289)

22. Insofar as the other part of Fazl Ali, J.'s judgment is concerned, that "due process" was an elastic enough expression to comprehend substantive due process, a recent judgment in **Mohd. Arif** v. **Registrar, Supreme Court of India & Ors.**, (2014) 9 SCC 737, by a Constitution Bench of this Court, has held:-

> "27. The stage was now set for the judgment in *Maneka Gandhi* (1978) 1 SCC 248. Several judgments were delivered, and the upshot of all of

[4] Shri Gopal Sankaranarayanan has argued that the statement contained in **R.C. Cooper** (supra) that 5 out of 6 learned Judges had held in **Gopalan** (supra) that Article 22 was a complete code and was to be read as such, is incorrect. He referred to various extracts from the judgments in **Gopalan** (supra) to demonstrate that this was, in fact, incorrect as Article 21 was read together with Article 22. While Shri Gopal Sankaranarayanan may be correct, it is important to note that at least insofar as Article 19 was concerned, none of the judgments except that of Fazl Ali, J. were prepared to read Articles 19 and 21 together. Therefore, on balance, it is important to note that **R.C. Cooper** (supra) cleared the air to state that none of the fundamental rights can be construed as being mutually exclusive.

them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [*See*: at SCR pp. 646-648 per Beg, CJ., at SCR pp. 669, 671-674 and 687 per Bhagwati, J. and at SCR pp. 720-723 per Krishna Iyer, J.]. Krishna Iyer, J. set out the new doctrine with remarkable clarity thus (SCR p.723, para 85):

> "85. To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available. Otherwise, as the procedural safeguards contained in Article 22 will be available only in cases of preventive and punitive detention, the right to life, more fundamental than any other forming part of personal liberty and paramount to the happiness, dignity and worth of the individual, will not be entitled to any procedural safeguard save such as a legislature's mood chooses."

28. Close on the heels of *Maneka Gandhi case* came *Mithu* vs. *State of Punjab*, (1983) 2 SCC 277, in which case the Court noted as follows: (SCC pp. 283-84, para 6)

> "6…In *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 494, while dealing with the question as to whether a person awaiting death sentence can be kept in solitary confinement, Krishna Iyer J. said that though our Constitution did not have a "due process" clause as in the American Constitution; the same consequence ensued after the decisions in the *Bank Nationalisation case* (1970) 1 SCC 248, and *Maneka Gandhi case* (1978) 1 SCC 248.…
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> In *Bachan Singh* (*Bachan Singh* v. *State of Punjab,* (1980) 2 SCC 684) which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in Maneka Gandhi, it will read to say that: (SCC p.730, para 136)
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> > "136. No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."
>
> The wheel has turned full circle. Substantive due process is now to be applied to the fundamental right to life and liberty."[5]

[5] Shri Rakesh Dwivedi has argued before us that in **Maneka Gandhi** (supra), Chandrachud, J. had, in paragraph 55 of the judgment, clearly stated that substantive due process is no part of the Constitution of India. He further argued that Krishna Iyer, J.'s statement in **Sunil Batra** (supra) that a due process clause as contained in the U.S. Constitution is now to be read into Article 21, is a standalone statement of the law and that "substantive due process" is an expression which brings in its wake concepts which do not fit into the Constitution of India. It is not possible to accept this contention for the reason that in the Constitution Bench decision in **Mithu** (supra), Chandrachud, C.J., did not refer to his concurring judgment in **Maneka Gandhi** (supra), but instead referred, with approval, to Krishna Iyer, J.'s statement of the law in paragraph 6. It is this statement that is reproduced in paragraph 28 of **Mohd. Arif** (supra). Also, "substantive due process" in our context only means that a law can be

(at pages 755-756)

23. The second great dissent, which is of Subba Rao, J., in **Kharak Singh** (supra), has a direct bearing on the question to be decided by us.[6] In this judgment, Regulation 237 of the U.P. Police Regulations was challenged as violating fundamental

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struck down under Article 21 if it is not fair, just or reasonable on substantive and not merely procedural grounds. In any event, it is Chandrachud,C.J's earlier view that is a standalone view. In **Collector of Customs, Madras** v. **Nathella Sampathu Chetty**, (1962) 3 SCR 786 at 816, a Constitution Bench of this Court, when asked to apply certain American decisions, stated the following:

> "It would be seen that the decisions proceed on the application of the "due process" clause of the American Constitution. Though the tests of 'reasonableness' laid down by clauses (2) to (6) of Article 19 might in great part coincide with that for judging of 'due process', it must not be assumed that these are identical, for it has to be borne in mind that the Constitution framers deliberately avoided in this context the use of the expression 'due process' with its comprehensiveness, flexibility and attendant vagueness, in favour of a somewhat more definite word "reasonable", and caution has, therefore, to be exercised before the literal application of American decisions."

Mathew, J. in **Kesavananda Bharati** v. **State of Kerala**, (1973) Supp. SCR 1 at 824, 825 and 826 commented on this particular passage thus:

> "When a court adjudges that a legislation is bad on the ground that it is an unreasonable restriction, it is drawing the elusive ingredients for its conclusion from several sources. In fact, you measure the reasonableness of a restriction imposed by law by indulging in an authentic bit of special legislation [See Learned Hand, Bill of Rights, p. 26]. "The words 'reason' and 'reasonable' denote for the common law lawyer ideas which the 'Civilians' and the 'Canonists' put under the head of the 'law of nature'…"
>
> "…The limitations in Article 19 of the Constitution open the doors to judicial review of legislation in India in much the same manner as the doctrine of police power and its companion, the due process clause, have done in the United States. The restrictions that might be imposed by the Legislature to ensure the public interest must be reasonable and, therefore, the Court will have to apply the yardstick of reason in adjudging the reasonableness. If you examine the cases relating to the imposition of reasonable restrictions by a law, it will be found that all of them adopt a standard which the American Supreme Court has adopted in adjudging reasonableness of a legislation under the due process clause.."
>
> "…In the light of what I have said, I am unable to understand how the word 'reasonable' is more definite than the words 'due process'…"

[6] Chief Justice S.R. Das in his farewell speech had this to say about Subba Rao, J., "Then we have brother Subba Rao, who is extremely unhappy because all our fundamental rights are going to the dogs on account of some ill-conceived judgments of his colleagues which require reconsideration."

rights under Article 19(1)(d) and Article 21. The Regulation reads as follows:-

> "Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures:-
>
> (a) Secret picketing of the house or approaches to the house of suspects;
>
> (b) domiciliary visits at night;
>
> (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation;
>
> (d) the reporting by constables and chaukidars of movements and absences from home;
>
> (e) the verification of movements and absences by means of inquiry slips;
>
> (f) the collection and record on a history-sheet of all information bearing on conduct."

24. All 6 Judges struck down sub-para (b), but Subba Rao, J. joined by Shah, J., struck down the entire Regulation as violating the individual's right to privacy in the following words:

> "Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic

> country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf* v. *Colorado* (1949) 338 U.S. 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."
>
> (at page 359)

The 8 Judge Bench Decision in M.P. Sharma and the 6 Judge Bench Decision in Kharak Singh

25. This takes us to the correctness of the aforesaid view, firstly in light of the decision of the 8-Judge Bench in **M.P. Sharma** (supra). The facts of that case disclose that certain searches were made as a result of which a voluminous mass of records was seized from various places. The petitioners prayed

that the search warrants which allowed such searches and seizures to take place be quashed, based on an argument founded on Article 20(3) of the Constitution which says that no person accused of any offence shall be compelled to be a witness against himself. The argument which was turned down by the Court was that since this kind of search would lead to the discovery of several incriminating documents, a person accused of an offence would be compelled to be a witness against himself as such documents would incriminate him. This argument was turned down with reference to the law of testimonial compulsion in the U.S., the U.K. and in this country. While dealing with the argument, this Court noticed that there is nothing in our Constitution corresponding to the Fourth Amendment of the U.S. Constitution, which interdicts unreasonable searches and seizures. In so holding, this Court then observed:

> "It is, therefore, clear that there is no basis in the Indian law for the assumption that a search or seizure of a thing or document is in itself to be treated as compelled production of the same. Indeed a little consideration will show that the two are essentially different matters for the purpose relevant to the present discussion. A notice to produce is addressed to the party concerned and

> his production in compliance therewith constitutes a testimonial act by him within the meaning of article 20(3) as above explained. But search warrant is addressed to an officer of the Government, generally a police officer. Neither the search nor the seizure are acts of the occupier of the searched premises. They are acts of another to which he is obliged to submit and are, therefore, not his testimonial acts in any sense."
>
> "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."
>
> (at pages 1096-1097)

26. The first thing that strikes one on reading the aforesaid passage is that the Court resisted the invitation to read the U.S. Fourth Amendment into the U.S. Fifth Amendment; in short it refused to read or import the Fourth Amendment into the Indian equivalent of that part of the Fifth Amendment which is the same as Article 20(3) of the Constitution of India. Also, the fundamental right to privacy, stated to be analogous to the Fourth Amendment, was held to be something which could not be read into Article 20(3).

27. The second interesting thing to be noted about these observations is that there is no broad ratio in the said judgment that a fundamental right to privacy is not available in Part III of the Constitution. The observation is confined to Article 20(3). Further, it is clear that the actual finding in the aforesaid case had to do with the law which had developed in this Court as well as the U.S. and the U.K. on Article 20(3) which, on the facts of the case, was held not to be violated. Also we must not forget that this was an early judgment of the Court, delivered in the **Gopalan** (supra) era, which did not have the benefit of **R.C. Cooper** (supra) or **Maneka Gandhi** (supra). Quite apart from this, it is clear that by the time this judgment was delivered, India was already a signatory to the Universal Declaration of Human Rights, Article 12 of which states:

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

28. It has always been the law of this Court that international treaties must be respected. Our Constitution contains Directive Principle 51(c), which reads as under:

> "51. The State shall endeavour to—
>
> (a) & (b) xxx xxx xxx
>
> (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another;"

In order that legislation be effected to implement an international treaty, Article 253 removes legislative competence from all the States and entrusts only the Parliament with such legislation. Article 253 reads as follows:

> "**253. Legislation for giving effect to international agreements. -** Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

We were shown judgments of the highest Courts in the U.K. and the U.S in this behalf. At one extreme stands the United Kingdom, which states that international treaties are not a part of the laws administered in England. At the other end of the spectrum, Article VI of the U.S. Constitution declares:

> "xxx xxx xxx
>
> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
>
> xxx xxx xxx"

It is thus clear that no succor can be drawn from the experience of either the U.K. or the U.S. We must proceed in accordance with the law laid down in the judgments of the Supreme Court of India.

29. Observations of several judgments make it clear that in the absence of any specific prohibition in municipal law, international law forms part of Indian law and consequently must be read into or as part of our fundamental rights. (For this proposition, see: **Bachan Singh** v. **State of Punjab**, (1980) 2 SCC 684 at paragraph 139, **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi & Ors.,** (1981) 1 SCC 608 at paragraph 8, **Vishaka & Ors.** v. **State of Rajasthan & Ors.,** (1997) 6 SCC 241 at paragraph 7 and **National Legal Services Authority** v. **Union of India**, (2014) 5 SCC 438 at

paragraphs 51-60). This last judgment is instructive in that it refers to international treaties and covenants, the Constitution, and various earlier judgments. The conclusion in paragraph 60 is as follows:

> "The principles discussed hereinbefore on TGs and the international conventions, including *Yogyakarta Principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country."
>
> (at page 487)

30. In fact, the Protection of Human Rights Act, 1993, makes interesting reading in this context.

Section 2(1)(d) and (f) are important, and read as follows:

> "2. Definitions. – (1) In this Act, unless the context otherwise requires, -
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) xxx xxx xxx
> (d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;
> (e) xxx xxx xxx
> (f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or

> Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;"

31. In terms of Section 12(f), one important function of the National Human Rights Commission is to study treaties and other international instruments on human rights and make recommendations for their effective implementation. In a recent judgment delivered by Lokur, J. in **Extra Judl. Exec. Victim Families Association & Anr.** v. **Union of India & Ors.** in W.P.(Crl.) No.129 of 2012 decided on July 14, 2017, this Court highlighted the Protection of Human Rights Act, 1993 as follows:-

> "29. Keeping this in mind, as well as the Universal Declaration of Human Rights, Parliament enacted the Protection of Human Rights Act, 1993. The Statement of Objects and Reasons for the Protection of Human Rights Act, 1993 is of considerable significance and accepts the importance of issues relating to human rights with a view, *inter alia*, to bring accountability and transparency in human rights jurisprudence. The Statement of Objects and Reasons reads as under:-
>
> > "1. India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, adopted by the General Assembly of the United Nations on the 16th December, 1966. The human rights embodied in the

aforesaid covenants stand substantially protected by the Constitution.

2. However, there has been growing concern in the country and abroad about issues relating to human rights. Having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and systems of administration of justice; with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation.

3. Wide ranging discussions were held at various fora such as the Chief Ministers' Conference on Human Rights, seminars organized in various parts of the country and meetings with leaders of various political parties. Taking into account the views expressed in these discussions, the present Bill is brought before Parliament."

30. Under the provisions of the Protection of Human Rights Act, 1993 the NHRC has been constituted as a high-powered statutory body whose Chairperson is and always has been a retired Chief Justice of India. Amongst others, a retired judge of the Supreme Court and a retired Chief Justice of a High Court is and has always been a member of the NHRC.

31. In *Ram Deo Chauhan* v. *Bani Kanta Das* ((2010) 14 SCC 209), this Court recognized that the words 'human rights' though not defined in the Universal Declaration of Human Rights have been defined in the Protection of Human Rights Act, 1993 in very

broad terms and that these human rights are enforceable by courts in India. This is what this Court had to say in this regard in paragraphs 47-49 of the Report:

> "Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. The Constitution and legislations of a civilised country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection.
>
> Human rights are universal in nature. The Universal Declaration of Human Rights (hereinafter referred to as UDHR) adopted by the General Assembly of the United Nations on 10-12-1948 recognises and requires the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual. Consequently, though the term "human rights" itself has not been defined in UDHR, the nature and content of human rights can be understood from the rights enunciated therein.
>
> Possibly considering the wide sweep of such basic rights, the definition of "human rights" in the 1993 Act has been

> designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, if a person has been guaranteed certain rights either under the Constitution or under an International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human rights and NHRC has the jurisdiction to intervene for protecting it."

32. It may also be noted that the "International Principles on the Application of Human Rights to Communication Surveillance" (hereinafter referred to as the "Necessary and Proportionate Principles"), which were launched at the U.N. Human Rights Council in Geneva in September 2013, were the product of a year-long consultation process among civil society, privacy and technology experts. The Preamble to the Necessary and Proportionate Principles states as follows:

> "Privacy is a fundamental human right, and is central to the maintenance of democratic societies. It is essential to human dignity and it reinforces other rights, such as freedom of expression and information, and freedom of association, and is recognized under international human rights law….."

33. Ignoring Article 12 of the 1948 Declaration would by itself sound the death knell to the observations on the fundamental right of privacy contained in **M.P. Sharma** (supra).

34. It is interesting to note that, in at least three later judgments, this judgment was referred to only in passing in:

(1) **Sharda** v. **Dharmpal**, (2003) 4 SCC 493 at 513-514:

> "54. The right to privacy has been developed by the Supreme Court over a period of time. A bench of eight judges in *M.P. Sharma v. Satish Chandra* (AIR 1954 SC 300), AIR at pp. 306-07, para 18, in the context of search and seizure observed that:
>
> > "When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."
>
> 55. Similarly in *Kharak Singh v. State of U.P.* (AIR 1963 SC 1295), the majority judgment observed thus: (AIR p. 1303, para 20)
>
> > "The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a

fundamental right guaranteed by Part III."

56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632 and *People's Union for Civil Liberties* v. *Union of India*, (1997) 1 SCC 301). In some cases the right has been held to amalgam of various rights."

(2) **District Registrar and Collector, Hyderabad & Anr.** v. **Canara Bank etc.**, (2005) 1 SCC 496 at 516, where this Court held:

"35. The earliest case in India to deal with "privacy" and "search and seizure" was *M.P. Sharma* v. *Satish Chandra* (1954 SCR 1077) in the context of Article 19(1)(f) and Article 20(3) of the Constitution of India. The contention that search and seizure violated Article 19(1)(f) was rejected, the Court holding that a mere search by itself did not affect any right to property, and though seizure affected it, such effect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the accused were unconstitutional was not gone into. The Court, after referring to the American authorities, observed that in the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the accused and did not violate Article 20(3). In the present discussion the case is of limited help. In fact, the law as to privacy

> was developed in later cases by spelling it out from the right to freedom of speech and expression in Article 19(1)(a) and the right to "life" in Article 21."

And (3) **Selvi** v. **State of Karnataka**, (2010) 7 SCC 263 at 363, this Court held as follows:-

> "205. In *M.P. Sharma* (*M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300: 1954 SCC 1077), it had been noted that the Indian Constitution did not explicitly include a "right to privacy" in a manner akin to the Fourth Amendment of the US Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement."

35. It will be seen that different smaller Benches of this court were not unduly perturbed by the observations contained in **M.P. Sharma** (supra) as it was an early judgment of this Court delivered in the **Gopalan** (supra) era which had been eroded by later judgments dealing with the inter-relation between fundamental rights and the development of the fundamental right of privacy as being part of the liberty and dignity of the individual.

36. Therefore, given the fact that this judgment dealt only with Article 20(3) and not with other fundamental rights; given the

fact that the 1948 Universal Declaration of Human Rights containing the right to privacy was not pointed out to the Court; given the fact that it was delivered in an era when fundamental rights had to be read disjunctively in watertight compartments; and given the fact that Article 21 as we know it today only sprung into life in the post **Maneka Gandhi** (supra) era, we are of the view that this judgment is completely out of harm's way insofar as the grounding of the right to privacy in the fundamental rights chapter is concerned.

37. We now come to the majority judgment of 4 learned Judges in **Kharak Singh** (supra). When examining sub-clause (b) of Regulation 236, which endorsed domiciliary visits at night, even the majority had no hesitation in striking down the aforesaid provision. This Court said that "life" used in Article 21 must mean something more than mere animal existence and "liberty" something more than mere freedom from physical restraint. This was after quoting the judgment of Field, J. in **Munn** v. **Illinois**, 94 U.S. 113 (1876). The majority judgment, after quoting from **Gopalan** (supra), then went on to hold that Article 19(1) and Article 21 are to be read separately, and so

read held that Article 19(1) deals with particular species or attributes of personal liberty, whereas Article 21 takes in and comprises the residue.[7]

38. This part of the judgment has been expressly overruled by **R.C. Cooper** (supra) as recognized by Bhagwati, J. in **Maneka Gandhi** (supra):

> **"**5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words 'personal liberty' as used in this article? This question incidentally came up for discussion in some of the judgments in *A.K. Gopalan* v. *State of Madras* (AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383) and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between

[7] This view of the law is obviously incorrect. If the Preamble to the Constitution of India is to be a guide as to the meaning of the expression "liberty" in Article 21, liberty of thought and expression would fall in Article 19(1)(a) and Article 21 and belief, faith and worship in Article 25 and Article 21. Obviously, "liberty" in Article 21 is not confined to these expressions, but certainly subsumes them. It is thus clear that when Article 21 speaks of "liberty", it is, atleast, to be read together with Articles 19(1)(a) and 25.

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

(at pages 278-279)

39. The majority judgment in **Kharak Singh** (supra) then went on to refer to the Preamble to the Constitution, and stated that Article 21 contained the cherished human value of dignity of the individual as the means of ensuring his full development and evolution. A passage was then quoted from **Wolf** v. **Colorado,** 338 U.S. 25 (1949) to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society. The Court then went on to quote the U.S. Fourth Amendment which guarantees the rights of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures. Though the Indian Constitution did not expressly confer a like guarantee, the majority held that nonetheless an unauthorized intrusion into a person's home would violate the English Common Law maxim which asserts that every man's house is his castle. In this view of Article 21, Regulation 236(b) was struck down.

40. However, while upholding sub-clauses (c), (d) and (e) of Regulation 236, the Court stated (at page 351):

> "As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

This passage is a little curious in that clause (b) relating to domiciliary visits was struck down only on the basis of the fundamental right to privacy understood in the sense of a restraint against the person of a citizen. It seems that the earlier passage in the judgment which stated that despite the fact that the U.S. Fourth Amendment was not reflected in the Indian Constitution, yet any unauthorized intrusion into a person's home, which is nothing but a facet of the right to privacy, was given a go by.

41. Peculiarly enough, without referring to the extracted passage in which the majority held that the right to privacy is not a guaranteed right under our Constitution, the majority judgment has been held as recognizing a fundamental right to privacy in Article 21. (See: **PUCL** v. **Union of India**, (1997) 1 SCC 301 at paragraph 14; **Mr. 'X'** v. **Hospital 'Z'**, (1998) 8 SCC 296 at paragraphs 21 and 22; **District Registrar and**

Collector, Hyderabad & Anr. v. **Canara Bank**, **etc**., (2005) 1 SCC 496 at paragraph 36; and **Thalappalam Service Co-operative Bank Limited & Ors.** v. **State of Kerala & Ors.**, (2013) 16 SCC 82 at paragraph 57).

42. If the passage in the judgment dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of Regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgment upholds the right to privacy as being contained in the fundamental rights chapter or otherwise. As the majority judgment contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent. In any case, we are of the view that the majority judgment is good law when it speaks of Article 21 being designed to assure the dignity of the individual as a most cherished human value which ensures the means of full development and evolution of a human being. The majority judgment is also correct in pointing out that Article 21 interdicts unauthorized intrusion into a person's home. Where the majority judgment goes wrong is in holding that

fundamental rights are in watertight compartments and in holding that the right of privacy is not a guaranteed right under our Constitution. It can be seen, therefore, that the majority judgment is like the proverbial curate's egg – good only in parts. Strangely enough when the good parts alone are seen, there is no real difference between Subba Rao, J.'s approach in the dissenting judgment and the majority judgment. This then answers the major part of the reference to this 9-Judge Bench in that we hereby declare that neither the 8-Judge nor the 6-Judge Bench can be read to come in the way of reading the fundamental right to privacy into Part III of the Constitution.

43. However, the learned Attorney General has argued in support of the 8-Judge Bench and the 6-Judge Bench, stating that the framers of the Constitution expressly rejected the right to privacy being made part of the fundament rights chapter of the Constitution. While he may be right, Constituent Assembly debates make interesting reading only to show us what exactly the framers had in mind when they framed the Constitution of India. As will be pointed out later in this judgment, our judgments expressly recognize that the Constitution governs

the lives of 125 crore citizens of this country and must be interpreted to respond to the changing needs of society at different points in time.

44. The phrase “due process” was distinctly avoided by the framers of the Constitution and replaced by the colourless expression “procedure established by law”. Despite this, owing to changed circumstances, **Maneka Gandhi** (supra) in 1978, followed by a number of judgments, have read what was expressly rejected by the framers into Article 21, so that by the time of **Mohd. Arif** (supra), this Court, at paragraph 28, was able to say that the wheel has turned full circle and substantive due process is now part and parcel of Article 21. Given the technological revolution of the later part of the 20th century and the completely altered lives that almost every citizen of this country leads, thanks to this revolution, the right to privacy has to be judged in today’s context and not yesterday’s. This argument, therefore, need not detain us.

45. The learned Attorney General then argued that between the right to life and the right to personal liberty, the former has

primacy and any claim to privacy which would destroy or erode this basic foundational right can never be elevated to the status of a fundamental right. Elaborating further, he stated that in a developing country where millions of people are denied the basic necessities of life and do not even have shelter, food, clothing or jobs, no claim to a right to privacy as a fundamental right would lie. First and foremost, we do not find any conflict between the right to life and the right to personal liberty. Both rights are natural and inalienable rights of every human being and are required in order to develop his/her personality to the fullest. Indeed, the right to life and the right to personal liberty go hand-in-hand, with the right to personal liberty being an extension of the right to life. A large number of poor people that Shri Venugopal talks about are persons who in today's completely different and changed world have cell phones, and would come forward to press the fundamental right of privacy, both against the Government and against other private individuals. We see no antipathy whatsoever between the rich and the poor in this context. It seems to us that this argument is made through the prism of the Aadhar (Targeted Delivery of

Financial and other Subsidies, Benefits and Services) Act, 2016, by which the Aadhar card is the means to see that various beneficial schemes of the Government filter down to persons for whom such schemes are intended. This 9-Judge Bench has not been constituted to look into the constitutional validity of the Aadhar Act, but it has been constituted to consider a much larger question, namely, that the right of privacy would be found, *inter alia*, in Article 21 in both "life" and "personal liberty" by rich and poor alike primarily against State action. This argument again does not impress us and is rejected.

46. Both the learned Attorney General and Shri Sundaram next argued that the right to privacy is so vague and amorphous a concept that it cannot be held to be a fundamental right. This again need not detain us. Mere absence of a definition which would encompass the many contours of the right to privacy need not deter us from recognizing privacy interests when we see them. As this judgment will presently show, these interests are broadly classified into interests pertaining to the physical realm and interests pertaining to the mind. As case law, both in

the U.S. and India show, this concept has travelled far from the mere right to be let alone to recognition of a large number of privacy interests, which apart from privacy of one's home and protection from unreasonable searches and seizures have been extended to protecting an individual's interests in making vital personal choices such as the right to abort a fetus; rights of same sex couples- including the right to marry; rights as to procreation, contraception, general family relationships, child rearing, education, data protection, etc. This argument again need not detain us any further and is rejected.

47. As to the argument that if information is already in the public domain and has been parted with, there is no privacy right, we may only indicate that the question as to "voluntary" parting with information has been dealt with, in the judgment in **Miller** v. **United States,** 425 US 435 (1976). This Court in **Canara Bank** (supra) referred to the criticism of this judgment as follows:

> "***(A) Criticism of Miller***
>
> (*i*) The majority in *Miller*, 425 US 435 (1976), laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof.

Tribe states in his treatise (see p. 1391) that this theory reveals “alarming tendencies” because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then “we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on *our ‘foreheads or our bumper stickers*’.” He observes that the majority in *Miller*, 425 US 435 (1976), confused “privacy” with “secrecy” and that “even their notion of secrecy is a strange one, for a *secret remains a secret even when shared with those whom one selects for one's confidence*”. Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392):

> “Yet one can hardly be said to have *assumed a risk* of surveillance in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — *hermit can live* without a *telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society.”

He concludes (p. 1400):

> "In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self."

(*ii*) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:

> "It is beginning to look as if the only way someone living in our society can avoid '*assuming the risk*' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*."
>
> (at pages 520-521)

It may also be noticed that **Miller** (supra) was done away with by a Congressional Act of 1978. This Court then went on to state:

> "***(B) Response to Miller by Congress***
>
> We shall next refer to the response by Congress to *Miller*, 425 US 435 (1976). (As stated earlier, we should not be understood as necessarily recommending this law as a model for India.) Soon

> after *Miller*, 425 US 435 (1976), Congress enacted the Right to Financial Privacy Act, 1978 (Public Law No. 95-630) 12 USC with Sections 3401 to 3422). The statute accords customers of banks or similar financial institutions, certain rights to be notified of and a right to challenge the actions of Government in court at an anterior stage before disclosure is made. Section 3401 of the Act contains "definitions". Section 3402 is important, and it says that "except as provided by Section 3403(*c*) or (*d*), 3413 or 3414, no government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and that (1) such customer has authorised such disclosure in accordance with Section 3404; (2) such records are disclosed in response to (*a*) administrative subpoenas or summons to meet requirement of Section 3405; (*b*) the requirements of a search warrant which meets the requirements of Section 3406; (*c*) requirements of a judicial subpoena which meets the requirement of Section 3407; or (*d*) the requirements of a formal written requirement under Section 3408. If the customer decides to challenge the Government's access to the records, he may file a motion in the appropriate US District Court, to prevent such access. The Act also provides for certain specific exceptions." (at page 522)

48. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the

Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in **Jolly George Varghese** v. **Bank of Cochin**, (1980) 2 SCC 360 at paragraph 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in **Charles Sobraj** v. **Delhi Administration**, (1978) 4 SCC 494 at paragraphs 192, 197-B, 234 and 241 and **Prem Shankar Shukla** v. **Delhi Administration**, (1980) 3 SCC 526 at paragraphs 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual.

49. The judgment in **Stanley** v. **Georgia**, 22 L.Ed. 2d 542 at 549, 550 and 551 (1969) will serve to illustrate how privacy is

conceptually different from an expressly enumerated fundamental right. In this case, the appellant before the Court was tried and convicted under a Georgia statute for knowingly having possession of obscene material in his home. The U.S. Supreme Court referred to judgments which had held that obscenity is not within the area of constitutionally protected speech under the First Amendment to the U.S. Constitution. Yet, the Court held:

> "It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] … necessarily protects the right to receive……" Martin v. City of Struthers, 319 US 141, 143, 87 L Ed 1313, 1316, 63 S Ct 862 (1943); see Griswold v. Connecticut, 381 US 479, 482, 14 L Ed 2d 510, 513, 85 S Ct 1678 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308, 14 L Ed 2d 398, 402, 403, 85 S Ct 1493 (1965) (Brennan, J., concurring); cf. Pierce v. Society of the Sisters, 268 U.S. 510, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925). This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 US 507, 510, 92 L Ed 840, 847, 68 S Ct 665 (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy…

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."
>
> (Emphasis Supplied)

The Court concluded by stating:

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

50. This case, more than any other, brings out in bold relief, the difference between the right to privacy and the right to

freedom of speech. Obscenity was held to be outside the freedom of speech amended by the First Amendment, but a privacy interest which related to the right to read obscene material was protected under the very same Amendment. Obviously, therefore, neither is privacy as vague and amorphous as has been argued, nor is it correct to state that unless it finds express mention in a provision in Part III of the Constitution, it should not be regarded as a fundamental right.

51. Shri Sundaram's argument that personal liberty is different from civil liberty need not detain us at all for the reason that at least qua the fundament right to privacy — that right being intimately connected with the liberty of the person would certainly fall within the expression "personal liberty".

52. According to Shri Sundaram, every facet of privacy is not protected. Instances of actions which, according to him, are not protected are:

- "Taxation laws requiring the furnishing of information;
- In relation to a census;

- Details and documents required to be furnished for the purpose of obtaining a passport;
- Prohibitions pertaining to viewing pornography."

53. We are afraid that this is really putting the cart before the horse. Taxation laws which require the furnishing of information certainly impinge upon the privacy of every individual which ought to receive protection. Indeed, most taxation laws which require the furnishing of such information also have, as a concomitant provision, provisions which prohibit the dissemination of such information to others except under specified circumstances which have relation to some legitimate or important State or societal interest. The same would be the case in relation to a census and details and documents required to be furnished for obtaining a passport. Prohibitions pertaining to viewing pornography have been dealt with earlier in this judgment. The U.S. Supreme Court's decision in **Stanley** (supra) held that such prohibitions would be invalid if the State were to intrude into the privacy of one's home.

54. The learned Attorney General drew our attention to a number of judgments which have held that there is no fundamental right to trade in liquor and cited **Khoday Distilleries Ltd.** v. **State of Karnataka**, (1995) 1 SCC 574. Quite obviously, nobody has the fundamental right to carry on business in crime. Indeed, in a situation where liquor is expressly permitted to be sold under a licence, it would be difficult to state that such seller of liquor would not have the fundamental right to trade under Article 19(1)(g), even though the purport of some of our decisions seems to stating exactly that – See the difference in approach between the earlier Constitution Bench judgment in **Krishna Kumar Narula** v. **State of Jammu and Kashmir**, (1967) 3 SCR 50, and the later Constitution Bench judgment in **Har Shankar** v. **The Dy. Excise and Taxation Commr**., (1975) 1 SCC 737. In any event, the analogy to be drawn from the cases dealing with liquor does not take us further for the simple reason that the fundamental right to privacy once recognized, must yield in given circumstances to legitimate State interests in combating crime. But this arises only after recognition of the right to

privacy as a fundamental right and not before. What must be a reasonable restriction in the interest of a legitimate State interest or in public interest cannot determine whether the intrusion into a person's affairs is or is not a fundamental right. Every State intrusion into privacy interests which deals with the physical body or the dissemination of information personal to an individual or personal choices relating to the individual would be subjected to the balancing test prescribed under the fundamental right that it infringes depending upon where the privacy interest claimed is founded.

55. The learned Attorney General and Shri Tushar Mehta, learned Additional Solicitor General, in particular, argued that our statutes are replete with a recognition of the right to privacy, and Shri Tushar Mehta cited provisions of the Right to Information Act, 2005, the Indian Easements Act, 1882, the Indian Penal Code, 1860, the Indian Telegraph Act, 1885, the Bankers' Books Evidence Act, 1891, the Credit Information Companies (Regulation) Act, 2005, the Public Financial Institutions (Obligation as to Fidelity and Secrecy) Act, 1983, the Payment and Settlement Systems Act, 2007, the Income

Tax Act, 1961, the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, the Census Act, 1948, the Collection of Statistics Act, 2008, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Protection of Children from Sexual Offences Act, 2012 and the Information Technology Act, 2000. According to them, since these statutes already protect the privacy rights of individuals, it is unnecessary to read a fundamental right of privacy into Part III of the Constitution.

56. Statutory law can be made and also unmade by a simple Parliamentary majority. In short, the ruling party can, at will, do away with any or all of the protections contained in the statutes mentioned hereinabove. Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy <u>despite the governments that they may elect.</u> This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a

recognition that such right exists notwithstanding the shifting sands of majority governments. Statutes may protect fundamental rights; they may also infringe them. In case any existing statute or any statute to be made in the future is an infringement of the inalienable right to privacy, this Court would then be required to test such statute against such fundamental right and if it is found that there is an infringement of such right, without any countervailing societal or public interest, it would be the duty of this Court to declare such legislation to be void as offending the fundamental right to privacy. This argument, therefore, also merits rejection.

57. Shri Rakesh Dwivedi referred copiously to the "reasonable expectation of privacy" test laid down by decisions of the U.S. Supreme Court. The origin of this test is to be found in the concurring judgment of Harlan, J. in **Katz** v. **United States,** 389 U.S. 347 (1967). Though this test has been applied by several subsequent decisions, even in the United States, the application of this test has been criticized.

58. In **Minnesota** v. **Carter**, 525 U.S. 83, 119 S.Ct. 469 at 477 (1998), the concurring judgment of Scalia, J. criticized the application of the aforesaid test in the following terms:

> "The dissent believes that "[o]ur obligation to produce coherent results" requires that we ignore this clear text and 4-century-old tradition, and apply instead the notoriously unhelpful test adopted in a "benchmar[k]" decision that is 31 years old. *Post,* at 110, citing *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In my view, the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz,* see *id.,* at 360, 88 S.Ct. 507) is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,' " *id.,* at 361, 88 S.Ct. 507, bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has *occurred* (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment. That provision did not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable'." *Ibid.*"

In **Kyllo** v. **United States**, 533 U.S. 27, 121 S. Ct. 2038 at 2043 (2001), the U.S. Supreme Court found that the use of a

thermal imaging device, aimed at a private home from a public street, to detect relative amounts of heat within the private home would be an invasion of the privacy of the individual. In so holding, the U.S. Supreme Court stated:

> "The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure §2.1(d), pp. 393-394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; *Carter*, *supra*, at 97, 119 S. Ct. 469 (*SCALIA, J.,* concurring). But see *Rakas*, *supra*, at 143-144, n. 12, 99 S. Ct. 421. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U.S., at 512, 81 S. Ct. 679 constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy

against government that existed when the Fourth Amendment was adopted."

59. It is clear, therefore, that in the country of its origin, this test though followed in certain subsequent judgments, has been the subject matter of criticism. There is no doubt that such a test has no plausible foundation in the text of Articles 14, 19, 20 or 21 of our Constitution. Also, as has rightly been held, the test is circular in the sense that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy. Whether such individual will or will not have such an expectation ought to depend on what the position in law is. Also, this test is intrinsically linked with the test of voluntarily parting with information, inasmuch as if information is voluntarily parted with, the person concerned can reasonably be said to have no expectation of any privacy interest. This is nothing other than reading of the "reasonable expectation of privacy" with the test in **Miller** (supra), which is that if information is voluntarily parted with, no right to privacy exists. As has been held by us, in **Canara Bank** (supra), this Court referred to **Miller** (supra) and the criticism that it has

received in the country of its origin, and refused to apply it in the Indian context. Also, as has been discussed above, soon after **Miller** (supra), the Congress enacted the Right to Financial Privacy Act, 1978, doing away with the substratum of this judgment. Shri Dwivedi's argument must, therefore, stand rejected.

60. Shri Gopal Sankaranarayanan, relying upon the statement of law in **Behram Khurshid Pesikaka** v. **State of Bombay**, (1955) 1 SCR 613, **Basheshar Nath** v. **CIT**, (1959) Supp. (1) SCR 528 and **Olga Tellis** v. **Bombay Municipal Corporation**, (1985) 3 SCC 545, has argued that it is well established that fundamental rights cannot be waived. Since this is the law in this country, if this Court were to hold that the right to privacy is a fundamental right, then it would not be possible to waive any part of such right and consequently would lead to the following complications:

- All the statutory provisions that deal with aspects of privacy would be vulnerable.

- The State would be barred from contractually obtaining virtually any information about a person, including identification, fingerprints, residential address, photographs, employment details, etc., *unless* they were all found to be not a part of the right to privacy.

- The consequence would be that the judiciary would be testing what aspects of privacy could be *excluded* from Article 21 rather than what can be *included* in Article 21.

This argument again need not detain us. Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well. A simple example would suffice. If a person was to paste on Facebook

vital information about himself/herself, such information, being in the public domain, could not possibly be claimed as a privacy right after such disclosure. But, in pursuance of a statutory requirement, if certain details need to be given for the concerned statutory purpose, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right – viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest.

The Fundamental Right to Privacy

61. This conclusion brings us to where the right to privacy resides and what its contours are. But before getting into this knotty question, it is important to restate a few constitutional fundamentals.

62. Never must we forget the great John Marshall, C.J.'s admonition that it is a Constitution that we are expounding. [(see: McCulloch v. Maryland, 17 U.S. 316 at 407 (1819)]. Indeed a Constitution is meant to govern people's lives, and as

people's lives keep evolving and changing with the times, so does the interpretation of the Constitution to keep pace with such changes. This was well expressed in at least two judgments of this Court. In **Ashok Tanwar & Anr.** v. **State of H.P. & Ors.,** (2005) 2 SCC 104, a Constitution Bench stated as follows:

> "This apart, the interpretation of a provision of the Constitution having regard to various aspects serving the purpose and mandate of the Constitution by this Court stands on a separate footing. A constitution unlike other statutes is meant to be a durable instrument to serve through longer number of years, i.e., ages without frequent revision. It is intended to serve the needs of the day when it was enacted and also to meet needs of the changing conditions of the future. This Court in *R.C. Poudyal v. Union of India*, 1994 Supp (1) SCC 324, in paragraph 124, observed thus:
>
> > "124. In judicial review of the vires of the exercise of a constitutional power such as the one under Article 2, the significance and importance of the political components of the decision deemed fit by Parliament cannot be put out of consideration as long as the conditions do not violate the constitutional fundamentals. In the interpretation of a constitutional document, 'words are but the framework of concepts and concepts may change more than words themselves'. The significance of the change of the concepts themselves is vital and the

> constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details'."

In the *First B.N. Rau Memorial Lecture on "Judicial Methods"* M. Hidayatullah, J. observed:

> "More freedom exists in the interpretation of the Constitution than in the interpretation of ordinary laws. This is due to the fact that the ordinary law is more often before courts, that there are always dicta of judges readily available while in the domain of constitutional law there is again and again novelty of situation and approach."

Chief Justice Marshall while deciding the celebrated *McCulloch v. Maryland* [4 Wheaton (17 US) 316 : 4 L Ed 579 (1819)] (Wheaton at p. 407, L.Ed. at p. 602) made the pregnant remark—"we must never forget that it is the constitution we are expounding"— meaning thereby that it is a question of new meaning in new circumstances. Cardozo in his lectures also said: "*The great generalities of the Constitution have a content and a significance that vary from age to age.*" Chief Justice Marshall in *McCulloch v. Maryland* [4 Wheaton (17 US) 316 : 4 L Ed 579 (1819)] (L.Ed at pp 603-604) declared that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs". In this regard it is worthwhile to see the observations made in paragraphs 324 to 326 in *Supreme Court*

Advocates-on-Record Assn, (1993) 4 SCC 441: (SCC pp. 645-46)

> "324. The case before us must be considered in the light of our entire experience and not merely in that of what was said by the framers of the Constitution. *While deciding the questions posed before us we must consider what is the judiciary today and not what it was fifty years back. The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions.* An eminent jurist observed that 'constitutional interpretation is as much a process of creation as one of discovery.'
>
> 325. It would be useful to quote hereunder a paragraph from the judgment of Supreme Court of Canada in *Hunter v. Southam Inc.* (1984) 2 SCR 145: [SCR at p.156 (Can)]
>
> 'It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. *The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate*

> *exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended*. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American Courts "not to read the provisions of the Constitution like a last will and testament lest it become one".'
>
> 326. The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. *The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution*. In *Minister of Home Affairs v. Fisher* [(1979) 3 All ER 21 : 1980 AC 319] dealing with Bermudian Constitution, Lord Wilberforce reiterated that a Constitution is a document 'sui generis, calling for principles of interpretation of its own, suitable to its character'."

This Court in *Aruna Roy v. Union of India*, (2002) 7 SCC 368, recalled the famous words of the Chief Justice Holmes that "spirit of law is not logic but it has been experience" and observed that these words apply with greater force to constitutional law.

> In the same judgment this Court expressed that Constitution is a permanent document framed by the people and has been accepted by the people to govern them for all times to come and that the words and expressions used in the Constitution, in that sense, have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution. The same thing cannot be said in relation to interpreting the words and expressions in a statute."
>
> (at pages 114-116)

63. To similar effect is the judgment of a 9-Judge Bench in **I.R. Coelho (dead) by LRs** v. **State of Tamil Nadu & Ors.**, (2007) 2 SCC 1, which states:

> "42. The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law."
>
> (at page 79)

64. It is in this background that the fundamental rights chapter has been interpreted. We may also refer to paragraph 19 in **M. Nagaraj & Ors.** v. **Union of India & Ors.**, (2006) 8 SCC 212, for the proposition that any true interpretation of fundamental rights must be expansive, like the universe in which we live.

The content of fundamental rights keeps expanding to keep pace with human activity.

65. It is as a result of constitutional interpretation that after **Maneka Gandhi** (supra), Article 21 has been the repository of a vast multitude of human rights[8].

66. In India, therefore, the doctrine of originalism, which was referred to and relied upon by Shri Sundaram has no place. According to this doctrine, the first inquiry to be made is

[8] (1) The right to go abroad. **Maneka Gandhi** v. **Union of India** (1978) 1 SCC 248 at paras 5, 48, 90, 171 and 216; (2) The right of prisoners against bar fetters. **Charles Sobraj** v. **Delhi Administration** (1978) 4 SCC 494 at paras 192, 197-B, 234 and 241; (3) The right to legal aid. **M.H. Hoskot** v. **State of Maharashtra** (1978) 3 SCC 544 at para 12; (4) The right to bail. **Babu Singh** v. **State of Uttar Pradesh** (1978) 1 SCC 579 at para 8; (5) The right to live with dignity. **Jolly George Varghese** v. **Bank of Cochin** (1980) 2 SCC 360 at para 10; (6) The right against handcuffing. **Prem Shankar Shukla** v. **Delhi Administration** (1980) 3 SCC 526 at paras 21 and 22; (7) The right against custodial violence. **Sheela Barse** v. **State of Maharashtra** (1983) 2 SCC 96 at para 1; (8) The right to compensation for unlawful arrest. **Rudul Sah** v. **State of Bihar** (1983) 4 SCC 141 at para 10; (9) The right to earn a livelihood. **Olga Tellis** v. **Bombay Municipal Corporation** (1985) 3 SCC 545 at para 37; (10) The right to know. **Reliance Petrochemicals Ltd.** v. **Proprietors of Indian Express Newspapers** (1988) 4 SCC 592 at para 34; (11) The right against public hanging. **A.G. of India** v. **Lachma Devi** (1989) Supp (1) SCC 264 at para 1; (12) The right to doctor's assistance at government hospitals. **Paramanand Katara** v. **Union of India** (1989) 4 SCC 286 at para 8; (13) The right to medical care. **Paramanand Katara** v. **Union of India** (1989) 4 SCC 286 at para 8; (14) The right to shelter. **Shantistar Builders** v. **N.K. Totame** (1990) 1 SCC 520 at para 9 and 13; (15) The right to pollution free water and air. **Subhash Kumar** v. **State of Bihar** (1991) 1 SCC 598 at para 7; (16) The right to speedy trial. **A.R. Antulay** v. **R.S. Nayak** (1992) 1 SCC 225 at para 86; (17) The right against illegal detention. **Joginder Kumar** v. **State of Uttar Pradesh** (1994) 4 SCC 260 at paras 20 and 21; (18) The right to a healthy environment. **Virender Gaur** v. **State of Haryana** (1995) 2 SCC 577 at para 7; (19) The right to health and medical care for workers. **Consumer Education and Research Centre** v. **Union of India** (1995) 3 SCC 42 at paras 24 and 25; (20) The right to a clean environment. **Vellore Citizens Welfare Forum** v. **Union of India** (1996) 5 SCC 647 at paras 13, 16 and 17; (21) The right against sexual harassment. **Vishaka and others** v. **State of Rajasthan and others** (1997) 6 SCC 241 at paras 3 and 7; (22) The right against noise pollution. **In Re, Noise Pollution** (2005) 5 SCC 733 at para 117; (23) The right to fair trial. **Zahira Habibullah Sheikh & Anr.** v. **State of Gujarat & Ors.** (2006) 3 SCC 374 at paras 36 and 38; (24) The right to sleep. **In Re, Ramlila Maidan Incident** (2012) 5 SCC 1 at paras 311 and 318; (25) The right to reputation. **Umesh Kumar** v. **State of Andhra Pradesh** (2013) 10 SCC 591 at para 18; (26) The right against solitary confinement. **Shatrugan Chauhan & Anr.** v. **Union of India** (2014) 3 SCC 1 at para 241.

whether the founding fathers had accepted or rejected a particular right in the Constitution. According to the learned Attorney General and Shri Sundaram, the right to privacy has been considered and expressly rejected by our founding fathers. At the second level, according to this doctrine, it is not open to the Supreme Court to interpret the Constitution in a manner that will give effect to a right that has been rejected by the founding fathers. This can only be done by amending the Constitution. It was, therefore, urged that it was not open for us to interpret the fundamental rights chapter in such a manner as to introduce a fundamental right to privacy, when the founding fathers had rejected the same. It is only the Parliament in its constituent capacity that can introduce such a right. This contention must be rejected having regard to the authorities cited above. Further, in our Constitution, it is not left to all the three organs of the State to interpret the Constitution. When a substantial question as to the interpretation of the Constitution arises, it is this Court and this Court alone under Article 145(3) that is to decide what the interpretation of the Constitution shall

be, and for this purpose the Constitution entrusts this task to a minimum of 5 Judges of this Court.

67. Does a fundamental right to privacy reside primarily in Article 21 read with certain other fundamental rights?

68. At this point, it is important to advert to the U.S. Supreme Court's development of the right of privacy.

The earlier cases tended to see the right of privacy as a property right as they were part of what was called the 'Lochner era' during which the doctrine of substantive due process elevated property rights over societal interests[9]. Thus in an early case, **Olmstead** v. **United States**, 277 U.S. 438 at 474, 478 and 479 (1928), the majority of the Court held that wiretaps attached to telephone wires on public streets did not constitute a "search" under the Fourth Amendment since there was no physical entry into any house or office of the defendants. In a classic dissenting judgment, Louis Brandeis, J. held that this

[9] This era lasted from the early 20th Century till 1937, when the proverbial switch in time that saved nine was made by Justice Roberts. It was only from 1937 onwards that President Roosevelt's New Deal legislations were upheld by a majority of 5:4, having been struck down by a majority of 5:4 previously.

was too narrow a construction of the Fourth Amendment and said in words that were futuristic that:

> "Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?"

69. Also in a ringing declaration of the right to privacy, that great Judge borrowed from his own co-authored article, written almost 40 years earlier, in order to state that the right of privacy is a constitutionally protected right:

> "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and

> satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

Brandeis, J.'s view was held as being the correct view of the law in **Katz** (supra).

70. A large number of judgments of the U.S. Supreme Court since **Katz** (supra) have recognized the right to privacy as falling in one or other of the clauses of the Bill of Rights in the U.S. Constitution. Thus, in **Griswold** v. **Connecticut**, 381 U.S. 479 (1965), Douglas, J.'s majority opinion found that the right to privacy was contained in the penumbral regions of the First, Third, Fourth and Fifth Amendments to the U.S. Constitution. Goldberg, J. found this right to be embedded in the Ninth Amendment which states that certain rights which are not enumerated are nonetheless recognized as being reserved to the people. White, J. found this right in the due process clause

of the Fourteenth Amendment, which prohibits the deprivation of a person's liberty without following due process. This view of the law was recognized and applied in **Roe** v. **Wade**, 410 U.S. 113 (1973), in which a woman's right to choose for herself whether or not to abort a fetus was established, until the fetus was found "viable". Other judgments also recognized this right of independence of choice in personal decisions relating to marriage, **Loving** v. **Virginia,** 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, **Skinner** v. **Oklahoma**, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, **Eisenstadt** v. **Baird**, 405 U.S. 438, 453-454, 92 S.Ct. 1029, 1038-1039, 31 L.Ed.2d 349 (1972), family relationships, **Prince** v. **Massachusetts**, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, **Pierce** v. **Society of Sisters**, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925).

71. In a recent decision of the U.S. Supreme Court in **United States** v. **Jones,** 565 U.S. 400 (2012), the U.S. Supreme Court's majority judgment traces the right of privacy through the

labyrinth of case law in Part II of Scalia, J.'s opinion, and regards it as a constitutionally protected right.

72. Based upon the prevalent thinking of the U.S. Supreme Court, a seminal judgment was delivered by Mathew, J. in **Gobind** (supra). This judgment dealt with the M.P. Police Regulations, similar to the Police Regulations contained in **Kharak Singh** (supra). After setting out the majority and minority opinions in the said judgment, Mathew, J. went on to discuss the U.S. Supreme Court judgments in **Griswold** (supra) and **Roe** (supra). In a very instructive passage the learned Judge held:

> "22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not

be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

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

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

27. There are two possible theories for protecting privacy of home. The first is that activities in the

> home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.
>
> 28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."
>
> (at pages 155-157)

The Police Regulations were, however, not struck down, but were termed as being perilously close to being unconstitutional.

73. Shri Sundaram has brought to our notice the fact that Mathew, J. did not declare privacy as a fundamental right. By this judgment, he reached certain conclusions on the assumption that it was a fundamental right. He is correct in this submission. However, this would not take the matter very

much further inasmuch as even though the later judgments have referred to **Gobind** (supra) as the starting point of the fundamental right to privacy, in our view, for the reasons given by us in this judgment, even *dehors* **Gobind** (supra) these cases can be supported on the ground that there exists a fundamental right to privacy.

74. In **R. Rajagopal** v. **State of Tamil Nadu**, (1994) 6 SCC 632, this Court had to decide on the rights of privacy vis-a-vis the freedom of the press, and in so doing, referred to a large number of judgments and arrived at the following conclusion:

> "26. We may now summarise the broad principles flowing from the above discussion:
>
> (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent—whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

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

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

power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media."[10]

(at pages 649-651)

75. Similarly, in **PUCL** v. **Union of India**, (1997) 1 SCC 301,

this Court dealt with telephone tapping as follows:

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

18. The right to privacy—by itself—has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on

[10] It will be noticed that this judgment grounds the right of privacy in Article 21. However, the Court was dealing with the aforesaid right not in the context of State action, but in the context of press freedom.

> the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."
>
> (at page 311)

The Court then went on to apply Article 17 of the International Covenant on Civil and Political Rights, 1966 which recognizes the right to privacy and also referred to Article 12 of the Universal Declaration of Human Rights, 1948 which is in the same terms. It then imported these international law concepts to interpret Article 21 in accordance with these concepts.

76. In **Sharda** v. **Dharmpal** (supra), this Court was concerned with whether a medical examination could be ordered by a Court in a divorce proceeding. After referring to some of the judgments of this Court and the U.K. Courts, this Court held:

> "81. To sum up, our conclusions are:
>
> 1. A matrimonial court has the power to order a person to undergo medical test.
>
> 2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
>
> 3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."
>
> (at page 524)

In **Canara Bank** (supra), this Court struck down Section 73 of the Andhra Pradesh Stamp Act, as it concluded that the involuntary impounding of documents under the said provision would be violative of the fundamental right of privacy contained in Article 21. The Court exhaustively went into the issue and cited many U.K. and U.S. judgments. After so doing, it analysed some of this Court's judgments and held:

> "53. Once we have accepted in *Gobind* [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct

view of the law, we cannot accept the line of *Miller*, 425 US 435 (1976), in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality.

56. In *Smt. Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248, a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given *additional protection* under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21."

(at pages 523 and 524)

In **Selvi** v. **State of Karnataka** (supra), this Court went into an in depth analysis of the right in the context of lie detector tests used to detect alleged criminals. A number of judgments of this Court were examined and this Court, recognizing the difference between privacy in a physical sense and the privacy of one's mental processes, held that both received constitutional protection. This was stated in the following words:

> "224. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the "right to privacy" we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.
>
> 225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a

> component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties."
>
> (at pages 369-370)

77. All this leads to a discussion on what exactly is the fundamental right of privacy – where does it fit in Chapter III of the Constitution, and what are the parameters of its constitutional protection.

78. In an instructive article reported in Volume 64 of the California Law Review, written in 1976, Gary L. Bostwick suggested that the right to privacy in fact encompasses three separate and distinct rights. According to the learned author, these three components are the components of repose,

sanctuary, and intimate decision. The learned author puts it thus (at pages 1482-1483):-

> "The extent of constitutional protection is not the only distinction between the types of privacy. Each zone protects a unique type of human transaction. Repose maintains the actor's peace; sanctuary allows an individual to keep some things private, and intimate decision grants the freedom to act in an autonomous fashion. Whenever a generalized claim to privacy is put forward without distinguishing carefully between the transactional types, parties and courts alike may become hopelessly muddled in obscure claims. The clear standards that appear within each zone are frequently ignored by claimants anxious to retain some aspect of their personal liberty and by courts impatient with the indiscriminate invocation of privacy.
>
> Finally, it should be recognized that the right of privacy is a continually evolving right. This Comment has attempted to show what findings of fact will lead to the legal conclusion that a person has a right to privacy. Yet the same findings of fact may lead to different conclusions of law as time passes and society's ideas change about how much privacy is reasonable and what kinds of decisions are best left to individual choice. Future litigants must look to such changes in community concerns and national acceptance of ideas as harbingers of corresponding changes in the contours of the zones of privacy."

79. Shortly thereafter, in 1977, an instructive judgment is to be found in **Whalen** v. **Roe**, 429 U.S. 589 at 598 and 599 by the U.S. Supreme Court. This case dealt with a legislation by

the State of New York in which the State, in a centralized computer file, registered the names and addresses of all persons who have obtained, pursuant to a Doctor's prescription, certain drugs for which there is both a lawful and unlawful market. The U.S. Supreme Court upheld the statute, finding that it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support the legislation at hand. In an instructive footnote – 23 to the judgment, the U.S. Supreme Court found that the right to privacy was grounded after **Roe** (supra) in the Fourteenth Amendment's concept of personal liberty. Having thus grounded the right, the U.S. Supreme Court in a very significant passage stated:

> "At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control…
>
> …Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

80. In fact, in the Constitution of South Africa of 1996, which Constitution was framed after apartheid was thrown over by the South African people, the right to privacy has been expressly declared as a fundamental freedom as follows:

> "10. **Human dignity**
>
> Everyone has inherent dignity and the right to have their dignity respected and protected.
>
> 12. **Freedom and security of the person**
>
> (1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent.
>
> 14. **Privacy**
>
> Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."

The Constitutional Court of South Africa in **NM & Ors.** v. **Smith & Ors.,** 2007 (5) SA 250 (CC), had this to say about the fundamental right to privacy recognized by the South African Constitution:

> "131. The right to privacy recognizes the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human being asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.
>
> 132. This first reason for asserting the value of privacy therefore lies in our constitutional understanding of what it means to be a human being. An implicit part of this aspect of privacy is the right to choose what personal information of ours is released into the public space. The more

> intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information. That decision should not be made by others. This aspect of the right to privacy must be respected by all of us, not only the state..."
>
> (Emphasis Supplied)

81. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21;

ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on 'privacy' being a vague and nebulous concept need not, therefore, detain us.

82. We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.

83. In his well-known thesis "On Liberty", John Stuart Mill, as far back as in 1859, had this to say:

> "…. the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good

reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

(…)

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

> No society in which these liberties are not, on the whole, respected, is free, whatever may be its form or government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."

Noting the importance of liberty to individuality, Mill wrote:

> "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it, and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them….. The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly obtained at the expense of the development of other people…. To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing valuable, except such force of character as may unfold itself in resisting the restraint. If acquiesced in, it dulls

> and blunts the whole nature. To give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives."
>
> (Emphasis Supplied)

84. "Liberty" in the Preamble to the Constitution, is said to be of thought, expression, belief, faith and worship. This cardinal value can be found strewn all over the fundamental rights chapter. It can be found in Articles 19(1)(a), 20, 21, 25 and 26. As is well known, this cardinal constitutional value has been borrowed from the Declaration of the Rights of Man and of the Citizen of 1789, which defined "liberty" in Article 4 as follows:

> "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law."

Even in this limited sense, privacy begins where liberty ends – when others are harmed, in one sense, issues relating to reputation, restraints on physical locomotion etc. set in. It is, therefore, difficult to accept the argument of Shri Gopal

Subramanium that "liberty" and "privacy" are interchangeable concepts. Equally, it is difficult to accept the Respondents' submission that there is no concept of "privacy", but only the constitutional concept of "ordered liberty". Arguments of both sides on this score must, therefore, be rejected.

85. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.[11] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of

[11] In 1834, Jacques-Charles Dupont de l'Eure associated the three terms liberty, equality and fraternity together in the Revue Républicaine, which he edited, as follows:

> "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity."

Many of our decisions recognize human dignity as being an essential part of the fundamental rights chapter. For example, see **Prem Shankar Shukla** v. **Delhi Administration**, (1980) 3 SCC 526 at paragraph 21, **Francis Coralie Mullin** v. **Administrator, Union Territory of Delhi & Ors.**, (1981) 1 SCC 608 at paragraphs 6, 7 and 8, **Bandhua Mukti Morcha** v. **Union of India**, (1984) 3 SCC 161 at paragraph 10, **Maharashtra University of Health Sciences** v. **Satchikitsa Prasarak Mandal**, (2010) 3 SCC 786 at paragraph 37, **Shabnam** v. **Union of India**, (2015) 6 SCC 702 at paragraphs 12.4 and 14 and **Jeeja Ghosh** v. **Union of India**, (2016) 7 SCC 761 at paragraph 37.

these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted.

86. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the

said Article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

87. It is important to advert to one other interesting argument made on the side of the petitioner. According to the petitioners, even in British India, the right to privacy was always legislatively recognized. We were referred to the Indian Telegraph Act of 1885, vintage and in particular Section 5 thereof which reads as under:-

> "5. (1) On the occurrence of any public emergency, or in the interest of the public safety, the Governor General in Council or a Local Government, or any officer specially authorized in this behalf by the Governor General in Council, may–
>
> (a) take temporary possession of any telegraph established, maintained or worked by any person licensed under this Act; or
>
> (b) order that any message or class of messages to or from any person or class of persons, or

relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government or an officer thereof mentioned in the order.

(2) If any doubt arises as to the existence of a public emergency, or whether any act done under sub-section (1) was in the interest of the public safety, a certificate signed by a Secretary to the Government of India or to the Local Government shall be conclusive proof on the point."

We were also referred to Section 26 of the Indian Post Office Act, 1898 for the same purpose.

"26. **Power to intercept postal articles for public good**.— (1) On the occurrence of any public emergency, or in the interest of the public safety or tranquility, the Central Government, or a State Government, or any officer specially authorized in this behalf by the Central or the State Government may, by order in writing, direct that any postal article or class or description of postal articles in course of transmission by post shall be intercepted or detained, or shall be disposed of in such manner as the authority issuing the order may direct.

(2) If any doubt arises as to the existence of a public emergency, or as to whether any act done under sub-section (1) was in the interest of the public safety or tranquility, a certificate of the Central Government or, as the case may be, of the State Government shall be conclusive proof on the point."

88. Coming to more recent times, the Right to Information Act, 2005 in Section 8(1)(j) states as follows:-

> "8. **Exemption from disclosure of information**.—(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) to (i) xxx xxx xxx
>
> (j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:
>
> Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

It will be noticed that in this statutory provision, the expression "privacy of the individual" is specifically mentioned. In an illuminating judgment, reported as **Thalappalam Service Co-operative Bank Limited & Ors.,** v. **State of Kerala & Ors.,** (2013) 16 SCC 82, this Court dealt with the right to information as a facet of the freedom of speech guaranteed to every individual. In certain instructive passages, this Court held:

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

58. The right to privacy is also recognized as a basic human right under Article 12 of the Universal Declaration of Human Rights Act, 1948, which states as follows:

> "12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

59. Article 17 of the International Covenant on Civil and Political Rights Act, 1966, to which India is a party also protects that right and states as follows:

> "17. (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation."

60. This Court in *R. Rajagopal*, (1994) 6 SCC 632 held as follows: (SCC pp. 649-50, para 26)

> "(1)… The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters."

62. The public authority also is not legally obliged to give or provide information even if it is held, or under its control, if that information falls under clause (j) of sub-section (1) of Section 8. Section 8(1)(j) is of considerable importance so far as this case is concerned, hence given below, for ready reference:-

> "8. **Exemption from disclosure of information** – (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen –
>
> (a) to (i) xxx xxx xxx
>
> (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest

justifies the disclosure of such information:

Provided that the information which cannot be denied to Parliament or a State Legislature shall not be denied to any person."

63. Section 8 begins with a non obstante clause, which gives that section an overriding effect, in case of conflict, over the other provisions of the Act. Even if, there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (a) to (j). The public authority, as already indicated, cannot access all the information from a private individual, but only those information which he is legally obliged to pass on to a public authority by law, and also only those information to which the public authority can have access in accordance with law. Even those information, if personal in nature, can be made available only subject to the limitations provided in Section 8(j) of the RTI Act. Right to be left alone, as propounded in *Olmstead v. United States* [72 L Ed 944 : 277 US 438 (1928)], is the most comprehensive of the rights and most valued by civilized man.

64. Recognizing the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not subserve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information. Reference may be made to a recent judgment of this Court in *Girish Ramchandra Deshpande* v. *Central Information Commissioner* (2013) 1 SCC 212,

> wherein this Court held that since there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the Act. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from whom information is sought for, has also a right to privacy guaranteed under Article 21 of the Constitution."
>
> (at page 112-114)

89. There can be no doubt that counsel for the petitioners are right in their submission that the legislature has also recognized the fundamental right of privacy and, therefore, it is too late in the day to go back on this. Much water has indeed flowed under the bridge since the decisions in **M.P. Sharma** (supra) and **Kharak Singh** (supra).

The Inalienable Nature of the Right to Privacy

90. Learned counsel for the petitioners also referred to another important aspect of the right of privacy. According to learned counsel for the petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in paragraph 12, refers to this aspect of the fundamental right contained. It was, therefore, argued before us that given the

international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognized and given the status of being fundamental. There is no doubt that the petitioners are correct in this submission. However, one important road block in the way needs to be got over.

91. In **Additional District Magistrate, Jabalpur** v. **S.S. Shukla**, (1976) 2 SCC 521, a Constitution Bench of this Court arrived at the conclusion (by majority) that Article 21 is the sole repository of all rights to life and personal liberty, and, when suspended, takes away those rights altogether.

A remarkable dissent was that of Khanna,J.[12]

[12] Khanna, J. was in line to be Chief Justice of India but was superseded because of this dissenting judgment. Nani Palkhivala in an article written on this great Judge's supersession ended with a poignant sentence, "To the stature of such a man, the Chief Justiceship of India can add nothing." Seervai, in his monumental treatise "Constitutional Law of India" had to this to say:

> "53. If in this Appendix the dissenting judgment of Khanna J. has not been considered in detail, it is not for lack of admiration for the judgment, or the courage which he showed in delivering it regardless of the cost and consequences to himself. It cost him the Chief Justiceship of India, but it gained for him universal esteem not only for his courage but also for his inflexible judicial independence. If his judgment is not considered in detail it is because under the theory of precedents which we have adopted, a dissenting judgment, however valuable, does not lay down the law and the object of a critical examination of the majority judgments in this Appendix was to show that those judgments are untenable in law, productive of grave public mischief and ought to be overruled at the earliest opportunity. The conclusion which Justice Khanna has reached on the effect of the suspension of Article 21 is correct. His reminder that the rule of law did not merely mean giving effect to an enacted law was timely, and was reinforced by his reference to the mass murders of millions of Jews in Nazi concentration camps under an enacted law.

The learned Judge held:-

"525. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that article for obtaining relief from the court during the period of emergency. Question then arises as to whether the rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life

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However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given." (at Appendix pg. 2229).

and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be derived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with, considerable success to give material content to "the rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements was the *Declaration of Delhi*, *1959*. This resulted from a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. "Respect for the supreme value of human personality" was stated to be the basis of all law (see page 21 of the *Constitutional and Administrative Law* by O. Hood Phillips, 3rd Ed.).

531. I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation

> or, according to the dictum laid down by Mukherjea, J. in *Gopalan's case*, such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the pre-constitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution."
>
> (at pages 747 and 751)

92. According to us this is a correct enunciation of the law for the following reasons:

(i) It is clear that the international covenants and declarations to which India was a party, namely, the 1948 Declaration and the 1966 Covenant both spoke of the right to life and liberty as being "inalienable". Given the fact that this has to be read as being part of Article 21 by virtue of the judgments referred to supra, it is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they were

"inalienable"; that they inhere in every human being by virtue of the person being a human being;

(ii) Secondly, developments after this judgment have also made it clear that the majority judgments are no longer good law and that Khanna, J.'s dissent is the correct version of the law. Section 2(1)(d) of the Protection of Human Rights Act, 1993 recognises that the right to life, liberty, equality and dignity referable to international covenants and enforceable by Courts in India are "human rights". And international covenants expressly state that these rights are 'inalienable' as they inhere in persons because they are human beings. In **I.R. Coelho** (supra), this Court noticed in paragraph 29 that, "The decision in *ADM Jabalpur*, (1976) 2 SCC 521, about the restrictive reading of the right to life and liberty stood impliedly overruled by various subsequent decisions.", and expressly held that these rights are natural rights that inhere in human beings thus:-

> "61. The approach in the interpretation of fundamental rights has been evidenced in a

recent case *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, in which the Court noted:

"20. *This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value.* The converse does not apply. *A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State.* A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In *Sakal Papers (P) Ltd. v. Union of India* [AIR 1962 SC 305 : (1962) 3 SCR 842], this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a

manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras* [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383]. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. *After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan [A.K. Gopalan v. State of Madras (AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383)] and held in its landmark judgment in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right*. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees."

(at pages 85-86)

(iii) Seervai in a trenchant criticism of the majority judgment states as follows:

> "30. The result of our discussion so far may be stated thus: Article 21 does not *confer* a right to life or personal liberty: Article 21 assumes or recognizes the fact that those rights exist and affords protection against the deprivation of those rights to the extent there provided. The expression "procedure established by law" does not mean merely a procedural law but must also include substantive laws. The word "law" must mean a valid law, that is, a law within the legislative competence of the legislature enacting it, which law does not violate the limitations imposed on legislative power by fundamental rights. "Personal liberty" means the liberty of the person from external restraint or coercion. Thus Article 21 protects life and personal liberty by putting restrictions on legislative power, which under Articles 245 and 246 is subject to the provisions of "this Constitution", and therefore subject to fundamental rights. The precise nature of this protection is difficult to state, first because among other things, such protection is dependent on reading Article 21 along with other Articles conferring fundamental rights, such as Articles 14, 20 and 22(1) and (2); and, secondly, because fundamental rights from their very nature refer to ordinary laws which deal with the subject matter of those rights.
>
> 31. The right to life and personal liberty which inheres in the body of a living person is recognized and protected not merely by

> Article 21 but by the civil and criminal laws of India, and it is unfortunate that in the *Habeas Corpus Case* this aspect of the matter did not receive the attention which it deserved. Neither the Constitution nor any law *confers* the right to life. That right arises from the existence of a living human body. The most famous remedy for securing personal liberty, the writ of *habeas corpus*, requires the production before the court of *the body* of the person alleged to be illegally detained. The Constitution gives protection against the deprivation of life and personal liberty; so do the civil and criminal laws in force in India…"
> (See, Seervai, Constitutional Law of India (4th Edition) Appendix pg. 2219).

We are of the view that the aforesaid statement made by the learned author reflects the correct position in constitutional law. We, therefore, expressly overrule the majority judgments in **ADM Jabalpur** (supra).

93. Before parting with this subject, we may only indicate that the majority opinion was done away with by the Constitution's 44th Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the

Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being.

Conclusion

94. This reference is answered by stating that the inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. **M.P. Sharma** (supra) and the majority in **Kharak Singh** (supra), to the extent that they indicate to the contrary, stand overruled. The later judgments of this Court recognizing privacy as a fundamental right do not need to be revisited. These cases are, therefore, sent back for adjudication on merits to the original Bench of 3 honourable Judges of this Court in light of the judgment just delivered by us.

…….J.
(R.F. Nariman)

New Delhi;
August 24, 2017.