REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No.494 OF 2012

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

VERSUS

UNION OF INDIA AND ORS. …. RESPONDENTS

WITH

T.C. (CIVIL) No. 151 OF 2013

T.C. (CIVIL) No. 152 OF 2013

W.P. (CIVIL) No. 833 OF 2013

W.P. (CIVIL) No. 829 OF 2013

W.P. (CIVIL) No. 932 OF 2013

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

T.P. (CIVIL) No. 313 OF 2014

T.P. (CIVIL) No. 312 OF 2014

S.L.P. (CRL) No.2524 OF 2014

W.P. (CIVIL) No. 37 OF 2015

W.P. (CIVIL) No. 220 OF 2015

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

T.P. (CIVIL) No. 921 OF 2015

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

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

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

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

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

AND

W.P. (CIVIL) No. 342 OF 2017

W.P. (CIVIL) No. 372 OF 2017

JUDGMENT

S. A. BOBDE, J.

The Origin of the Reference

1. This reference calls on us to answer questions that would go to the very heart of the liberty and freedom protected by the Constitution of India. It arises in the context of a constitutional challenge to the Aadhaar project, which aims to build a database of personal identity and biometric information covering every Indian – the world's largest endeavour of its kind. To the Petitioners' argument therein that Aadhaar would violate the right to privacy, the Union of India, through its Attorney General, raised the objection that Indians could claim no

constitutional right of privacy in view of a unanimous decision of 8 Judges of this Court in *M.P. Sharma v. Satish Chandra*[1] and a decision by a majority of 4 Judges in *Kharak Singh v. State of Uttar Pradesh*[2].

2. The question, which was framed by a Bench of three of us and travels to us from a Bench of five, was the following:

> "12. We are of the opinion that the cases on hand raise far-reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in *MP Sharma* and *Kharak Singh* are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncements made by larger Benches of this Court cannot be ignored by smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches. With due respect to all the learned Judges who rendered subsequent judgments – where right to privacy is asserted or referred to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.
>
> 13. Therefore, in our opinion to give *quietus* to the kind of controversy raised in this batch of cases once and for all, it is better that the *ratio decidendi* of *MP Sharma* and *Kharak Singh* is scrutinized and the

[1] *MP Sharma v. Satish Chandra*, 1954 SCR 1077
[2] *Kharak Singh v. State of UttarPradesh*, AIR 1963 SC 1295

> jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength[3]."

3. We have had the benefit of submissions from Shri Soli Sorabjee, Shri Gopal Subramanium, Shri Shyam Divan, Shri Arvind Datar, Shri Anand Grover, Shri Sajan Poovayya, Ms. Meenakshi Arora, Shri Kapil Sibal, Shri P.V. Surendranath and Ms. Aishwarya Bhati for the Petitioners, and Shri K.K. Venugopal, learned Attorney General for the Union of India, Shri Tushar Mehta, learned Additional Solicitor General for the Union, Shri Aryama Sundaram for the State of Maharashtra, Shri Rakesh Dwivedi for the State of Gujarat, Shri Arghya Sengupta for the State of Haryana, Shri Jugal Kishore for the State of Chattisgarh and Shri Gopal Sankaranarayanan for an intervenor supporting the Respondents. We would like to record our appreciation for their able assistance in a matter of such great import as the case before us.

[3] *Justice KS Puttaswamy (Retd.) v. Union of India*, W.P. (Civil) No. 494 of 2012, Order dated 11 August 2015

The Effect of *M.P. Sharma* and *Kharak Singh*

4. The question of whether Article 21 encompasses a fundamental right to privacy did not fall for consideration before the 8 Judges in the *M.P. Sharma* Court. Rather, the question was whether an improper search and seizure operation undertaken against a company and its directors would violate the constitutional bar against testimonial compulsion contained in Article 20(3) of the Constitution. This Court held that such a search did not violate Article 20(3). Its reasoning proceeded on the footing that the absence of a fundamental right to privacy analogous to the Fourth Amendment to the United States' constitution in our own constitution suggested that the Constituent Assembly chose not to subject laws providing for search and seizure to constitutional limitations. Consequently, this Court had no defensible ground on which to import such a right into Article 20(3), which was, at any event, a totally different right.

5. *M.P. Sharma* is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution on an independent footing or not, but because it

wrongly took the United States Fourth Amendment – which in itself is no more than a limited protection against unlawful surveillance – to be a comprehensive constitutional guarantee of privacy in that jurisdiction.

6. Neither does the 4:2 majority in *Kharak Singh v. State of Uttar Pradesh* (supra) furnish a basis for the proposition that no constitutional right to privacy exists. Ayyangar, J.'s opinion for the majority found that Regulation 236 (b) of the Uttar Pradesh Police Regulations, which *inter alia* enabled the police to make domiciliary visits at night was "*plainly violative of Article 21*"[4]. In reasoning towards this conclusion, the Court impliedly acknowledged a constitutional right to privacy. In particular, it began by finding that though India has no like guarantee to the Fourth Amendment, "*an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man – an ultimate essential of ordered liberty, if not of the very concept of civilization*"[5]. It proceeded to affirm that the statement in *Semayne's case*[6] that "*the house of everyone is to him as*

[4] *Id., at* p. 350
[5] *Id., at* p. 349
[6] (1604) 5 Coke 91

his castle and fortress as well as for his defence against injury and violence as for his repose" articulated an "*abiding principle which transcends mere protection of property rights and expounds a concept of* "*personal liberty.*" Thus far, the *Kharak Singh* majority makes out the case of the Attorney General. But, in its final conclusion, striking down Regulation 236 (b) being violative of Article 21 could not have been arrived at without allowing that a right of privacy was covered by that guarantee.

7. The *M.P. Sharma* Court did not have the benefit of two interpretative devices that have subsequently become indispensable tools in this Court's approach to adjudicating constitutional cases. The first of these devices derives from *R.C. Cooper v. Union of India*[7] and its progeny – including *Maneka Gandhi v. Union of India*[8] – which require us to read Part III's guarantees of rights together. Unlike *AK Gopalan v. State of Madras*[9] which held the field in *M.P. Sharma's* time, rights demand to be read as overlapping rather than in silos, so that Part III is now conceived as a constellation of harmonious and mutually reinforcing

[7](1970) 1 SCC 248
[8] (1978) 1 SCC 248
[9] AIR 1950 SC 27

guarantees. Part III does not attempt to delineate rights specifically. I take the right to privacy, an indispensable part of personal liberty, to have this character. Such a view would have been wholly untenable in the *AK Gopalan* era.

8. *M.P. Sharma* also predates the practice of the judicial enumeration of rights implicit in a guarantee instantiated in the constitutional text. As counsel for the Petitioners correctly submitted, there is a whole host of rights that this court has derived from Article 21 to evidence that enumeration is a well-embedded interpretative practice in constitutional law. Article 21's guarantee to the right to 'life' is home to such varied rights as the right to go abroad (*Maneka Gandhi v. Union of India*), the right to livelihood (*Olga Tellis v. Bombay Municipal Corporation*[10]) and the right to medical care (*Paramanand Katara v. Union of India*[11]).

9. Therefore, nothing in *M.P. Sharma* and *Kharak Singh* supports the conclusion that there is no fundamental right to privacy in our

[10] (1985) 3 SCC 545
[11] (1989) 4 SCC 286

Constitution. These two decisions and their inconclusiveness on the question before the Court today have been discussed in great detail in the opinions of Chelameswar J., Nariman J., and Chandrachud J., I agree with their conclusion in this regard. To the extent that stray observations taken out of their context may suggest otherwise, the shift in our understanding of the nature and location of various fundamental rights in Part III brought about by *R.C. Cooper* and *Maneka Gandhi* has removed the foundations of *M.P. Sharma* and *Kharak Singh*.

10. Petitioners submitted that decisions numbering atleast 30 – beginning with Mathews, J.'s full-throated acknowledgement of the existence and value of a legal concept of privacy in *Gobind v. State of M.P.*[12] – form an unbroken line of cases that affirms the existence of a constitutional right to privacy. In view of the foregoing, this view should be accepted as correct.

The Form of the Privacy Right

11. It was argued for the Union by Mr. K.K. Venugopal, learned Attorney General that the right of privacy may at best be a common law

[12] (1975) 2 SCC 148

right, but not a fundamental right guaranteed by the Constitution. This submission is difficult to accept. In order to properly appreciate the argument, an exposition of the first principles concerning the nature and evolution of rights is necessary.

12. According to Salmond, rights are interests protected by 'rules of right', *i.e.,* by moral or legal rules[13]. When interests are worth protecting on moral grounds, irrespective of the existence of a legal system or the operation of law, they are given the name of a natural right. Accordingly, Roscoe Pound refers to natural law as a theory of moral qualities inherent in human beings, and to natural rights as deductions demonstrated by reason from human nature[14]. He defines natural rights, and distinguishes them from legal rights (whether at common law or under constitutions) in the following way:

> "*Natural rights mean simply interests which we think ought to be secured demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor state creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these*

[13] PJ FITZGERALD, SALMOND ON JURISPRUDENCE 217 (Twelfth Edition, 1966)
[14] ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 88 (1921)

interests as it is expedient to recognize, are the work of the law and in that sense the work of the state."[15]

Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man.

13. Legal systems, which in India as in England, began as monarchies, concentrated the power of the government in the person of the king. English common law, whether it is expressed in the laws of the monarch and her Parliament, or in the decisions of the Courts, is the source of what the Attorney General correctly takes to be our own common law. *Semayne's case*[16]*,* in which it was affirmed that a man's home is his castle and that even the law may only enter it with warrant, clearly shows that elements of the natural right of privacy began to be received into the common law as early as in 1604. Where a natural law right could not have been enforced at law, the common law right is

[15] *Id.,* at p. 92

[16] (1604) 5 Coke 91

evidently an instrument by which invasions into the valued interest in question by one's fellow man can be addressed. On the very same rationale as *Seymayne*, Chapter 17 of the Indian Penal Code, 1860, treats trespass against property as a criminal offence[17].

14. With the advent of democracy and of limited constitutional government came the state, a new actor with an unprecedented capacity to interfere with natural and common law rights alike. The state differs in two material ways from the monarch, the previous site in which governmental power (including the power to compel compliance through penal laws) was vested. *First*, the state is an abstract and diffuse entity, while the monarch was a tangible, single entity. *Second*, the advent of the state came with a critical transformation in the status of the governed from being subjects under the monarch to becoming citizens,

[17] Several other pre-constitutional enactments which codify the common law also acknowledge a right to privacy, both as between the individuals and the government, as well as between individuals *inter se*. These include:

1. S. 126-9, The Indian Evidence Act, 1872 (protecting certain classes of communication as privileged)
2. S. 4, The Indian Easements Act, 1882 (defining 'easements' as the right to choose how to use and enjoy a given piece of land)
3. S. 5(2), The Indian Telegraph Act, 1885 (specifying the permissible grounds for the Government to order the interception of messages)
4. S. 5 and 6, The Bankers Books (Evidence) Act, 1891 (mandating a court order for the production and inspection of bank records)
5. S. 25 and 26, The Indian Post Office Act, 1898 (specifying the permissible grounds for the interception of postal articles)

and themselves becoming agents of political power *qua* the state. Constitutions like our own are means by which individuals – the Preambular 'people of India' – create 'the state', a new entity to serve their interests and be accountable to them, and transfer a part of their sovereignty to it. The cumulative effect of both these circumstances is that individuals governed by constitutions have the new advantage of a governing entity that draws its power from and is accountable to them, but they face the new peril of a diffuse and formless entity against whom existing remedies at common law are no longer efficacious.

15. Constitutions address the rise of the new political hegemon that they create by providing for a means by which to guard against its capacity for invading the liberties available and guaranteed to all civilized peoples. Under our constitutional scheme, these means – declared to be fundamental rights – reside in Part III, and are made effective by the power of this Court and the High Courts under Articles 32 and 226 respectively. This narrative of the progressive expansion of the types of rights available to individuals seeking to defend their liberties from invasion – from natural rights to common law rights and finally to

fundamental rights – is consistent with the account of the development of rights that important strands in constitutional theory present[18].

16. This court has already recognized the capacity of constitutions to be the means by which to declare recognized natural rights as applicable *qua* the state, and of constitutional courts to enforce these declarations. In *Kesavananda Bharati v. State of Kerala*[19], Mathew, J. borrows from Roscoe Pound to explain this idea in the following terms:

> "While dealing with natural rights, Roscoe Pound states on p. 500 of Vol. I of his Jurisprudence:
>
> "Perhaps nothing contributed so much to create and foster hostility to courts and law and constitutions as **this conception of the courts as guardians of individual natural rights against the State and against society**; this conceiving of the law as a final and absolute body of doctrine declaring these individual natural rights; this theory of constitutions as declaratory of common law principles, which are also natural-law principles, anterior to the State and of superior validity to enactments by the authority of the state; **this theory of Constitutions as having for their purpose to guarantee and maintain the natural rights of individuals against the Government and all its agencies**.In effect, it set up the received traditional social, political, and economic ideals of the legal profession as a super-constitution, beyond the reach of any agency but judicial decision." (*Emphasis supplied*)

[18] MARTIN LOUGHLIN, THE FOUNDATIONS OF PUBLIC LAW 344-46 (2010)
[19] (1973) 4 SCC 225, 1461 at p. 783

This Court also recognizes the true nature of the relation between the citizen and the state as well as the true character and utility of Part III. Accordingly, in *People's Union of Civil Liberties v. Union of India*[20], it has recently been affirmed that the objective of Part III is to place citizens at centre stage and make the state accountable to them. In *Society for Unaided Private Schools of Rajasthan v. Union of India*[21], it was held that *"[f]undamental rights have two aspects, firstly, they act as fetter on plenary legislative powers, and secondly, they provide conditions for fuller development of our people including their individual dignity*."

17. Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two classes of right – of which the nature and content may be the same – lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. Common law rights are horizontal in

[20] (2005) 2 SCC 436
[21] (2012) 6 SCC 1 at 27

their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the 'state', as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the state. It is perfectly possible for an interest to simultaneously be recognized as a common law right and a fundamental right. Where the interference with a recognized interest is by the state or any other like entity recognized by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-state actor, an action at common law would lie in an ordinary court.

18. Privacy has the nature of being *both* a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form.

The Content of the Right of Privacy

19. It might be broadly necessary to determine the nature and content of privacy in order to consider the extent of its constitutional protection. As in the case of 'life' under Article 21, a precise definition of the term 'privacy' may not be possible. This difficulty need not detain us. Definitional and boundary-setting challenges are not unique to the rights guaranteed in Article 21. This feature is integral to many core rights, such as the right to equality. Evidently, the expansive character of any right central to constitutional democracies like ours has nowhere stood in the way of recognizing a right and treating it as fundamental where there are strong constitutional grounds on which to do so.

20. The existence of zones of privacy is felt instinctively by all civilized people, without exception. The best evidence for this proposition lies in the panoply of activities through which we all express claims to privacy in our daily lives. We lock our doors, clothe our bodies and set passwords to our computers and phones to signal that we intend for our places, persons and virtual lives to be private. An early case in the

Supreme Court of Georgia in the United States describes the natural and instinctive recognition of the need for privacy in the following terms:

> "The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature[22]".

The same instinctive resentment is evident in the present day as well. For instance, the non-consensual revelation of personal information such as the state of one's health, finances, place of residence, location, daily routines and so on efface one's sense of personal and financial security. In *District Registrar and Collector v. Canara Bank*[23], this Court observed what the jarring reality of a lack of privacy may entail:

> " ...If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers'. "

[22] *Pavesich v. New England Life Insurance co. et al.*, 50 S.E. 68 (Supreme Court of Georgia)
[23] (2005) 1 SCC 496 at 48

21. 'Privacy' is "*[t]he condition or state of being free from public attention to intrusion into or interference with one's acts or decisions*"[24]. The right to be in this condition has been described as 'the right to be let alone'[25]. What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one's shoulder to eavesdropping directly or through instruments, devices or technological aids.

22. Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place. Privacy has a deep affinity with seclusion (of our physical persons and things) as well as such ideas as repose, solitude, confidentiality and secrecy (in our communications), and

[24] BLACK'S LAW DICTIONARY (Bryan Garner, ed.) 3783 (2004)
[25] Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890)

intimacy. But this is not to suggest that solitude is always essential to privacy. It is in this sense of an individual's liberty to do things privately that a group of individuals, however large, is entitled to seclude itself from others and be private. In fact, a conglomeration of individuals in a space to which the rights of admission are reserved – as in a hotel or a cinema hall –must be regarded as private. Nor is the right to privacy lost when a person moves about in public. The law requires a specific authorization for search of a person even where there is suspicion[26]. Privacy must also mean the effective guarantee of a zone of internal freedom in which to think. The disconcerting effect of having another peer over one's shoulder while reading or writing explains why individuals would choose to retain their privacy even in public. It is important to be able to keep one's work without publishing it in a condition which may be described as private. The vigour and vitality of the various expressive freedoms guaranteed by the Constitution depends on the existence of a corresponding guarantee of cognitive freedom.

[26] Narcotic Drugs and Psychotropic Substances Act, 1985, s. 42

23. Even in the ancient and religious texts of India, a well-developed sense of privacy is evident. A woman ought not to be seen by a male stranger seems to be a well-established rule in the Ramayana. *Grihya Sutras* prescribe the manner in which one ought to build one's house in order to protect the privacy of its inmates and preserve its sanctity during the performance of religious rites, or when studying the Vedas or taking meals. The *Arthashastra* prohibits entry into another's house, without the owner's consent[27]. There is still a denomination known as the *Ramanuj Sampradaya* in southern India, members of which continue to observe the practice of not eating and drinking in the presence of anyone else. Similarly in Islam, peeping into others' houses is strictly prohibited[28]. Just as the United States Fourth Amendment guarantees privacy in one's papers and personal effects, the *Hadith* makes it reprehensible to read correspondence between others. In Christianity, we find the aspiration to live without interfering in the affairs of others in the text of the Bible[29]. Confession of one's sins is a private act[30].

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[27] KAUTILYA'S ARTHASHASTRA189-90 (R. Shamasastri, trans., 1915)
[28] AA MAUDUDI, HUMAN RIGHTS IN ISLAM 27 (1982)
[29] Thessalonians 4:11 THE BIBLE

Religious and social customs affirming privacy also find acknowledgement in our laws, for example, in the Civil Procedure Code's exemption of a *pardanashin* lady's appearance in Court[31].

24. Privacy, that is to say, the condition arrived at after excluding other persons, is a basic pre-requisite for exercising the liberty and the freedom to perform that activity. The inability to create a condition of selective seclusion virtually denies an individual the freedom to exercise that particular liberty or freedom necessary to do that activity.

25. It is not possible to truncate or isolate the basic freedom to do an activity in seclusion from the freedom to do the activity itself. The right to claim a basic condition like privacy in which guaranteed fundamental rights can be exercised must itself be regarded as a fundamental right. Privacy, thus, constitutes the basic, irreducible condition necessary for the exercise of 'personal liberty' and freedoms guaranteed by the Constitution. It is the inarticulate major premise in Part III of the Constitution.

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[30] James 5:16 THE BIBLE
[31] Code of Civil Procedure, 1989, S. 132

Privacy's Connection to Dignity and Liberty

26. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilized societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the exercise of most of these freedoms. *Ex facie*, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

27. Though he did not use the name of 'privacy', it is clear that it is what J.S. Mill took to be indispensable to the existence of the general reservoir of liberty that democracies are expected to reserve to their

citizens. In the introduction to his seminal *On Liberty* (1859), he characterized freedom in the following way:

> "**This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.** The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. **Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character**; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.
>
> **No society in which these liberties are not, on the whole, respected, is** free**, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.** Mankind are greater gainers by suffering

> each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.
>
> Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence."[32] (*Emphasis supplied*)

28. The first and natural home for a right of privacy is in Article 21 at the very heart of 'personal liberty' and life itself. Liberty and privacy are integrally connected in a way that privacy is often the basic condition necessary for exercise of the right of personal liberty. There are innumerable activities which are virtually incapable of being performed at all and in many cases with dignity unless an individual is left alone or is otherwise empowered to ensure his or her privacy. Birth and death are events when privacy is required for ensuring dignity amongst all civilized people. Privacy is thus one of those rights "instrumentally required if one is to enjoy"[33] rights specified and enumerated in the constitutional text.

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[32] JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 15-16 (Stefan Collini ed., 1989) (1859)
[33] Laurence H. Tribe and Michael C. Dorf, *Levels Of Generality In The Definition Of Rights*, 57 U. CHI. L. REV. 1057 (1990) at 1068

29. This Court has endorsed the view that 'life' must mean "something more than mere animal existence"[34] on a number of occasions, beginning with the Constitution Bench in *Sunil Batra (I) v. Delhi Administration*[35]. *Sunil Batra* connected this view of Article 21 to the constitutional value of dignity. In numerous cases, including *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[36], this Court has viewed liberty as closely linked to dignity. Their relationship to the effect of taking into the protection of 'life' the protection of "faculties of thinking and feeling", and of temporary and permanent impairments to those faculties. In *Francis Coralie Mullin,* Bhagwati, J. opined as follows[37]:

> "Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. In Kharak Singh v. State of Uttar Pradesh, Subba Rao J. quoted with approval the following passage from the judgment of Field J. in *Munn v. Illinois* to emphasize the quality of life covered by Article 21:
>
> "*By the term "life" as here used something more is meant than mere animal existence. The inhibition*

[34] *Munn v. Illinois*, (1877) 94 US 113 (*Per* Field, J.) as cited In *Kharak Singh* at p. 347-8
[35] (1978) 4 SCC 494
[36] (1981) 1 SCC 608
[37] *Francis Coralie Mullin* at 7

> *against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an* arm *or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world."*
>
> and this passage was again accepted as laying down the correct law by the Constitution Bench of this Court in the first Sunil Batra case (*supra*). **Every limb or faculty through which life is enjoyed is thus protected by Article 21 and *a fortiori*, this would include the faculties of thinking and feeling.** Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that **any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.**" (*Emphasis supplied)*

Privacy is therefore necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

30. It is difficult to see how dignity – whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights – can be assured to the

individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right of privacy is an integral part of both 'life' and 'personal liberty' under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

Privacy as a Travelling Right

31. I have already shown that the right of privacy is as inalienable as the right to perform any constitutionally permissible act. Privacy in all its aspects constitutes the springboard for the exercise of the freedoms guaranteed by Article 19(1). Freedom of speech and expression is always dependent on the capacity to think, read and write in private and is often exercised in a state of privacy, to the exclusion of those not intended to be spoken to or communicated with. A peaceful assembly requires the exclusion of elements who may not be peaceful or who may have a different agenda. The freedom to associate must necessarily be the

freedom to associate with those of one's choice and those with common objectives. The requirement of privacy in matters concerning residence and settlement is too well-known to require elaboration. Finally, it is not possible to conceive of an individual being able to practice a profession or carry on trade, business or occupation without the right to privacy in practical terms and without the right and power to keep others away from his work.

32. *Ex facie*, privacy is essential to the exercise of freedom of conscience and the right to profess, practice and propagate religion *vide* Article 25. The further right of every religious denomination to maintain institutions for religious and charitable purposes, to manage its own affairs and to own and administer property acquired for such purposes *vide* Article 26 also requires privacy, in the sense of non-interference from the state. Article 28(3) expressly recognizes the right of a student attending an educational institution recognized by the state, to be left alone. Such a student cannot be compelled to take part in any religious instruction imparted in any such institution unless his guardian has consented to it.

33. The right of privacy is also integral to the cultural and educational rights whereby a group having a distinct language, script or culture shall have the right to conserve the same. It has also always been an integral part of the right to own property and has been treated as such in civil law as well as in criminal law *vide* all the offences and torts of trespass known to law.

34. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

Judicial Enumeration of the Fundamental Right to Privacy

35. There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. In the case of Article 21's guarantee of 'personal liberty', this practice is only natural if Salmond's formulation of liberty as "incipient rights"[38] is correct. By the process of enumeration, constitutional courts merely give a name and specify the core of guarantees already present in the residue of constitutional liberty. Over time, the Supreme Court has been able to imply by its interpretative process, that several fundamental rights including the right to privacy emerge out of expressly stated Fundamental Rights. In *Unni Krishnan, J.P. v. State of A.P.*[39], a Constitution Bench of this Court held that "*several unenumerated rights fall within Article 21 since personal liberty is of widest amplitude*"[40] on the way to affirming the existence of a right to education. It went on to supply the following indicative list of such rights, which included the right to privacy:

> "30. The following rights are held to be covered under Article 21:

[38] SALMOND, at p. 228
[39] (1993) SCC 1 645
[40] *Id. at* 29

> 1. The right to go abroad. *Satwant Singh v. D. Ramarathnam A.P. O., New Delhi* (1967) 3 SCR 525.
>
> 2. The right to privacy. *Gobind v. State of M.P.*., (1975)2 SCC 148. In this case reliance was placed on the American decision in *Griswold v. Connecticut*, 381 US 479 at 510.
>
> 3. The right against solitary confinement. *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494 at 545.
>
> 4. The right against bar fetters. *Charles Sobhraj v. Supdt. (Central Jail*0, (1978)4 SCR 104
>
> 5. The right to legal aid. *MH Hoskot v. State of Maharashtra*, (1978) 3 SCC 544.
>
> 6. The right to speedy trial. *Hussainara Khatoon v. Home Secy, State of Bihar*, (1980)1 SCC81
>
> 7. The right against hand cuffing. *Prem Shankar v. Delhi Administration* (1980) 3 SCC 526
>
> 8. The right against delayed execution. *TV Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68.
>
> 9. The right against custodial violence. *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96.
>
> 10. The Right against public hanging. *A.G. of India v. Lachmadevi*, (1989) Supp. 1 SCC264
>
> 11. Doctor's Assistance. *Paramananda Katra v. Union of India*, (1989) 4 SCC 286.
>
> 12. Shelter. *Santistar Builder v. N.KI. Totame,* (1990) 1 SCC 520"

In the case of privacy, the case for judicial enumeration is especially strong. It is no doubt a fair implication from Article 21, but also more. Privacy is be a right or condition, "logically presupposed"[41] by rights expressly recorded in the constitutional text, if they are to make sense.

[41] Laurence H. Tribe And Michael C. Dorf, *Levels Of Generality In The Definition Of Rights*, 57 U. CHI. L. REV. 1057 (1990) at p. 1068

As a result, privacy is more than merely a derivative constitutional right. It is the necessary and unavoidable logical entailment of rights guaranteed in the text of the constitution.

36. Not recognizing character of privacy as a fundamental right is likely to erode the very sub-stratum of the personal liberty guaranteed by the constitution. The decided cases clearly demonstrate that particular fundamental rights could not have been exercised without the recognition of the right of privacy as a fundamental right. Any derecognition or diminution in the importance of the right of privacy will weaken the fundamental rights which have been expressly conferred.

37. Before proceeding to the question of how constitutional courts are to review whether a violation of privacy is unconstitutional, three arguments from the Union and the states deserve to be dealt with expressly.

38. The Learned Attorney General relied on cases holding that there is no fundamental right to trade in liquor to submit by analogy that there can be no absolute right to privacy. Apprehensions that the recognition of privacy would create complications for the state in its exercise of

powers is not well-founded. The declaration of a right cannot be avoided where there is good constitutional ground for doing so. It is only after acknowledging that the right of privacy is a fundamental right, that we can consider how it affects the plenary powers of the state. In any event, the state can always legislate a reasonable restriction to protect and effectuate a compelling state interest, like it may while restricting any other fundamental right. There is no warrant for the assumption or for the conclusion that the fundamental right to privacy is an absolute right which cannot be reasonably restricted given a sufficiently compelling state interest.

39. Learned Additional Solicitor General, Shri Tushar Mehta listed innumerable statutes which protect the right of privacy wherever necessary and urged that it is neither necessary nor appropriate to recognize privacy as a fundamental right. This argument cannot be accepted any more in the context of a fundamental right to privacy than in the context of any other fundamental right. Several legislations protect and advance fundamental rights, but their existence does not make the existence of a corresponding fundamental right redundant.

This is obviously so because legislations are alterable and even repealable unlike fundamental rights, which, by design, endure.

40. Shri Rakesh Dwivedi, appearing for the State of Gujarat, while referring to several judgments of the Supreme Court of the United States, submitted that only those privacy claims which involve a 'reasonable expectation of privacy' be recognized as protected by the fundamental right. It is not necessary for the purpose of this case to deal with the particular instances of privacy claims which are to be recognized as implicating a fundamental right. Indeed, it would be premature to do. The scope and ambit of a constitutional protection of privacy can only be revealed to us on a case-by-case basis.

The Test for Privacy

41. One way of determining what a core constitutional idea is, could be by considering its opposite, which shows what it is not. Accordingly, we understand justice as the absence of injustice, and freedom as the absence of restraint. So too privacy may be understood as the antonym of publicity. In law, the distinction between what is considered a private trust as opposed to a public trust illuminates what I take to be core and

irreducible attributes of privacy. In *Deoki Nandan v. Murlidhar*[42]*,* four judges of this Court articulated the distinction in the following terms:

> "The distinction between a private trust and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."

This same feature, namely the right of a member of public as such to enter upon or use such property, distinguishes private property from public property and private ways from public roads.

42. Privacy is always connected, whether directly or through its effect on the actions which are sought to be secured from interference, to the act of associating with others. In this sense, privacy is usually best understood as a relational right, even as its content frequently concerns the exclusion of others from one's society.

43. The trusts illustration also offers us a workable test for determining when a constitutionally cognizable privacy claim has been made, and the basis for acknowledging that the existence of such a claim

[42] (1956) SCR 756

is context-dependent. To exercise one's right to privacy is to *choose* and *specify* on two levels. It is to *choose* which of the various activities that are taken in by the general residue of liberty available to her she would like to perform, and to *specify* whom to include in one's circle when performing them. It is also autonomy in the negative, and takes in the choice and specification of which activities not to perform and which persons to exclude from one's circle. Exercising privacy is the signaling of one's intent to these specified others – whether they are one's co-participants or simply one's audience – as well as to society at large, to claim and exercise the right. To check for the existence of an actionable claim to privacy, all that needs to be considered is if such an intent to choose and specify exists, whether directly in its manifestation in the rights bearer's actions, or otherwise.

44. Such a formulation would exclude three recurring red herrings in the Respondents' arguments before us. *Firstly*, it would not admit of arguments that privacy is limited to property or places. So, for example, taking one or more persons aside to converse at a whisper even in a public place would clearly signal a claim to privacy, just as broadcasting

one's words by a loudspeaker would signal the opposite intent. *Secondly*, this formulation would not reduce privacy to solitude. Reserving the rights to admission at a large gathering place, such as a cinema hall or club, would signal a claim to privacy. *Finally*, neither would such a formulation require us to hold that private information must be information that is inaccessible to all others.

Standards of Review of Privacy Violations

45. There is no doubt that privacy is integral to the several fundamental rights recognized by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right of privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in *Maneka Gandhi*'s case. This requires that any procedure by

which the state interferes with an Article 21 right to be "*fair, just and reasonable, not fanciful, oppressive or arbitrary*"[43].

46. Once it is established that privacy imbues every constitutional freedom with its efficacy and that it can be located in each of them, it must follow that interference with it by the state must be tested against whichever one or more Part III guarantees whose enjoyment is curtailed. As a result, privacy violations will usually have to answer to tests in addition to the one applicable to Article 21. Such a view would be wholly consistent with *R.C. Cooper v. Union of India.*

Conclusion

47. In view of the foregoing, I answer the reference before us in the following terms:

a. The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. *M.P. Sharma* and the majority opinion in *Kharak Singh* must stand overruled to the extent that they indicate to the contrary.

[43] *Maneka Gandhi v. Union of India (1978) 1 SCC 248 at para 48*

b. The right to privacy is inextricably bound up with *all* exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, *mutatis mutandis*, takes the form of whichever of their enjoyment its violation curtails.

c. Any interference with privacy by an entity covered by Article 12's description of the 'state' must satisfy the tests applicable to whichever one or more of the Part III freedoms the interference affects.

.....J.
[S. A. BOBDE]

New Delhi;
August 24, 2017