IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 494 OF 2012

IN THE MATTER OF:

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

VERSUS

UNION OF INDIA AND OTHERS **...RESPONDENTS**

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WRITTEN SUBMISSIONS BY DR. ARGHYA SENGUPTA, ADVOCATE ON BEHALF OF RESPONDENT NO. 11, THE STATE OF HARYANA AND INTERVENOR, THE TELECOM REGULATORY AUTHORITY OF INDIA

MOST RESPECTFULLY SHOWETH:

These written submissions are presented for the kind perusal of this Hon'ble Court:

1. The reference order dated 18.07.2017 from which the present proceedings arise, states:

   "During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.* - 1950 SCR 1077 by an eight-Judge Constitution Bench, and also, in *Kharak Singh vs. The State of U.P. and Ors.* - 1962 (1) SCR 332 by a six-Judge

Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position."

2. If the Court finds the two aforementioned cases correctly decided, then no question of a fundamental right to privacy arises in the first place. However if the Court finds the two cases wrongly decided or is able to distinguish them, the Court would have to lay down whether there is a right to privacy in Part III of the Constitution; if so, what are its contours and if not, then whether any aspects of privacy are already protected by Part III.

3. Without prejudice to the arguments made earlier regarding the correctness of *MP Sharma v. Satish Chandra, District Magistrate, Delhi,* AIR 1954 SC 300 ("*MP Sharma*") (8 judges) and *Kharak Singh v. State of Uttar Pradesh,* AIR 1963 SC 1295 ("*Kharak Singh*") (6 judges), our submission is as follows:

   A. No general fundamental right to privacy ought to be read in to Part III of the Constitution

      i. The United States Supreme Court, on whose judgments, reliance has been placed by the petitioners, no longer uses the right to privacy to test laws that might have been tested on this ground, were it a well-established part of American constitutional law.

      ii. Reading in a right to privacy from certain privacy interests that may inhere in Part III of the Constitution is conceptually unsound.

      iii. An analysis of existing case law decided on the ground of right to privacy will demonstrate that they either relate to

protections already granted under Article 21 or Article 19 or should not be protected under the Constitution at all.

B. Several concerns relating to privacy breaches raised by the petitioners are the rightful subject matter of a data protection law

i. Data protection and privacy *per se* are overlapping but distinct issues.

ii. Only a comprehensive data protection legislation can effectively address such concerns.

iii. The Government of India is alive to the need for such a law.

A. No general fundamental right to privacy ought to be read in to Part III of the Constitution

i. The United States Supreme Court, on whose judgments, reliance has been placed by the petitioners, no longer uses the right to privacy to test laws that might have been tested on this ground, were it a well-established part of American constitutional law.

4. The petitioners have placed reliance on the decision of the United States Supreme Court in *Katz v. United States* 389 US 347 (1967) ("*Katz*") to contend that the United States Constitution recognises a right to privacy. In *Katz*, the question before the Supreme Court was whether eavesdropping on a conversation through a device placed outside a public phone booth was an unreasonable search and seizure offending the Fourth Amendment. The Fourth Amendment to the US Constitution provides,

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis supplied)

5. Till *Katz*, it was held that such protection was only available for personal property, akin to common law trespass (see Scalia J.'s opinion in *US v. Jones*, 565 US (2012) for precedents). In *Katz*, it was held by Potter Stewart J. (at pp. 350-352):

"In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional right to privacy. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy- his right to be let alone by other people -is, like the protection of his property and of his very life, left largely to the law of the individual States."

"...But this effort to decide whether or not a given "area", viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U. S. 206, 210; United States v. Lee, 274 U. S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U. S. 253; Ex parte Jackson, 96 U. S. 727, 733.
The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye-it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen..." (emphasis supplied).

6. Thus in *Katz*, it was held that privacy protection in the Fourth Amendment extended to public places, moving beyond common law trespass, but did not entail a general right of privacy. It is instructive to note that *Katz* was decided two years after *Griswold v. Connecticut* 381 US 479 (1965), widely

viewed as first incorporating the right to privacy into US constitutional law. In *Griswold,* the question before the Court was whether a Connecticut statute that forbade the use of contraceptives by married couples was unconstitutional. It was struck down by the Court ostensibly for violating the right to privacy. Douglas J. speaking for the Court held (at pp. 485-486),

"The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U. S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." (emphasis supplied)

7. However Justice Stewart, who provided the opinion for the Court two years later in *Katz,* dissented. He said (at p. 530),

   "What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

8. It is thus clear that Justice Stewart's dissenting view in *Griswold* decided in the context of the Fourteenth Amendment and the right to privacy became the controlling view of the Court when it came to the Fourth Amendment, viz. that this Amendment, or the Constitution generally did not espouse any general right to privacy.

9. The law relating to a general right to privacy appeared to be reinstated in the seminal decision of the Supreme Court in *Roe v. Wade* 410 US 113 (1973). In *Roe*, the question before the Court was whether a Texas statute which criminalised abortion except for limited grounds relating to the health of the mother was constitutional. It was struck down with the majority holding (at p. 154),

"We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."

10. Interestingly, Justice Stewart wrote a concurring opinion in *Roe v. Wade* which held that the Texas statute is unconstitutional because it violated the due process clause since a decision fundamental to the individual such as whether to bear or beget a child is central to her liberty, much more than whether children should be allowed to learn a foreign language or not (earlier held to be constitutionally protected). The opinion strikes down the statute for violating liberty in the Fourteenth Amendment and not any general right to privacy. He holds (at pp. 168-170),

""In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U. S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See Schware v. Board of Bar Examiners, 353 U. S. 232, 238- 239; Pierce v. Society of Sisters, 268 U. S.510, 534-535; Meyer v. Nebraska,262U.S.390, 399-400. Cf. Shapiro v. Thompson, 394 U. S.618, 629-630; United States v. Guest, 383 U. S.745, 757-758; Carringtonv. Rash, 380 U. S. 89, 96; Aptheker v. Secretary of State, 378 U. S. 500, 505; Kent v. Dulles, 357 U. S. 116, 127; Bolling v. Sharpe, 347 U. S.497, 499-500; Truax v. Raich, 239 U. S. 33, 41.

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U. S. 1, 12; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra. See also Prince v. Massachusetts, 321 U. S. 158, 166; Skinner v. Oklahoma, 316 U. S. 535, 541. As recently as last Term, in Eisenstadt v. Baird, 405 U. S. 438, 453, we recognized the right of the individual, married or single, to be free from unwarranted

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U. S. 510 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U. S. 390 (1923)." Abele v. Markle, 351 F. Supp. 224. 227 (Conn. 1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment." (emphasis supplied)

11. It is clear that Justice Stewart's view protects the interests of the pregnant woman to bear or beget a child, not as an instance of a general right to privacy not found in the constitutional text, but an instance of liberty that is worthy of protection in the Fourteenth Amendment to the Constitution. It is apparent from the future development of case law in the United States that this is the prevalent point of view. This will become apparent from a discussion of three cases below.

12. In *Whalen v. Roe,* 429 US 589 (1977), the issue before the Supreme Court was whether a New York Statute that required disclosure of certain personal information relating to patients and doctors to whom a particular scheduled drug, which had both a lawful and unlawful market, was prescribed, in order to check abuse, was constitutional. Upholding Justice Stewart's reasoning, it was held by the Court (at pp. 598-600),

"Appellees contend that the statute invades a constitutionally protected "zone of privacy." The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. Appellees argue that both of these interests are impaired by this statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine

concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation." [emphasis supplied]

The Court speaking through Stevens J. held (at pp. 603-604),

"We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.[1]"

13. In fact, Justice Stevens has consistently advocated the return to a wider understanding of 'liberty' in the Fourteenth Amendment in place of reading in new rights such as privacy (the words 'liberty', 'freedom' and 'autonomy' entail the same idea and are used interchangeably). In *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, when he was a judge in the US Court of Appeals in the Seventh Circuit he held (in a case that asked for a husband's right to be in the hospital room at the time of delivery of his baby) (at pp. 719-720),

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"[1] The Roe appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in *Terry v. Ohio*, 392 U. S. 1, 9, at a point where it quotes from *Katz v. United States*, 389 U. S. 347. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.
Likewise the Patient appellees derive a right to individual anonymity from our freedom of association cases such as *Bates v. Little Rock*, 361 U. S. 516, 522-523, and *NAACP v. Alabama*, 357 U. S. 449, 462. But those cases protect "freedom of association for the purpose of advancing ideas and airing grievances," *Bates v. Little Rock, supra*, at 523, not anonymity in the course of medical treatment. Also, in those cases there was an uncontroverted showing of past harm through disclosure, *NAACP* v. *Alabama, supra*, at 462, an element which is absent here." (Per Stevens J., p. 604)

"5. Plaintiffs characterize the right they assert as an aspect of the "right of marital privacy." The source of its constitutional protection is either the so-called penumbra of various provisions of the Bill of Rights or the word "liberty" in the Due Process Clause of the Fourteenth Amendment.

6. It is somewhat unfortunate that claims of this kind tend to be classified as assertions of a right to privacy. For the group of cases that lend support to plaintiffs' position do not rest on the same privacy concept that Brandeis and Warren identified in their article in the 1890 Edition of the Harvard Law Review. These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating "basic values", as being "fundamental", and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases. But can it fairly be said that this is such a case?" (footnotes omitted) [emphasis supplied]

Then at para 12 (at p. 721),

"12. We hold that the so-called right of marital privacy does not include the right of either spouse to have the husband present in the delivery room of a public hospital which, for medical reasons, has adopted a rule requiring his exclusion."

Justice Stevens' jurisprudence and how he was the key judge on the Supreme Court in moving away from a right to privacy to "the long arm of liberty" in the Fourteenth Amendment has been described in Jamal Greene, 'The So-Called Right to Privacy' 43 *UC Davis Law Review* 715-747, at pp. 731-747 (2010) [Professor Jamal Greene is Professor Law, Columbia Law School. The title is taken from a memorandum from then Justice Department Attorney John Roberts to the Attorney General on December 11, 1981 where Roberts wrote of the 'so-called right to privacy'. Roberts is the present Chief Justice of the Supreme Court of the United States of America.]

14. Stewart J. in concurrence held (at pp. 608-609),

> *"The first case referred to, Griswold v. Connecticut, 381 U. S. 479, held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home. Although the broad language of the opinion includes a discussion of privacy, see id., at 484-485, the constitutional protection there discovered also related to (1) marriage, see id., at 485-486; id., at 495 (Goldberg, J., concurring); id., at 500 (Harlan, J., concurring in judgment), citing Poe v. Ullman, 367 U. S. 497, 522 (Harlan, J., dissenting); 381 U. S., at 502-503 (WHITE, J., concurring in judgment); (2) privacy in the home, see id., at 484-485 (majority opinion); id., at 495 (Goldberg, J., concurring); id., at 500 (Harlan, J., concurring in judgment), citing Poe v. Ullman, supra, at 522 (Harlan, J., dissenting); and (3) the right to use contraceptives, see 381 U. S., at 503 (WHTE, J., concurring in judgment); see also Roe v. Wade, 410 U. S. 113, 169-170 (STEWART, J., concurring). Whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information."* [emphasis supplied]

15. Thus it is clear that the Court followed an incremental approach to understanding which facets of liberty in the Fourteenth Amendment would be entitled to protection rather than recognising a general right to privacy. Alternatively put, it was apparent to the Court that when a privacy claim was made, the rationale underlying the same was the need to protect liberty in various critical facets of human life.

16. It is our humble submission that in cases concerning the right to privacy in the Fourteenth Amendment that followed, it was liberty and not privacy that was the controlling interest.[21] Thus in *Planned Parenthood of Southeastern Pennsylvania Et Al. v. Casey, Governor of Pennsylvania, et al.*, 505 U.S. 833 (1992), the Supreme Court in its first significant abortion judgment after *Roe v. Wade*, held (at pp. 846, 851),

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[1] Even in Fourth Amendment cases, the relevance of the 'reasonable expectation of privacy' test in the age of technology has been criticised and a move to a liberty-based rationale advocated. Thomas P. Crocker, 'From Privacy to Liberty: The Fourth Amendment after Lawrence' 57 *UCLA Law Review* 1-69 (2009-10).

"Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since Mugler v. Kansas, 123 U.S. 623, 660-661 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986)....

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey v. Population Services International, 431 U. S., at 685. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, supra, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 US 158 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (emphasis supplied)

17. It is evident that *Casey* involved a creative reinterpretation of *Roe*, and the controlling interest was liberty and not privacy. In fact, the word privacy occurs only twice in the opinion of the Court, once while citing a precedent and another time not linked to protecting a sphere of decision-making, as had been the case in *Roe*.

18. Finally, the falling into deseutude of the right to privacy was confirmed in the case of *Lawrence v. Texas* 539 U.S. 558 (2003). If there were a right to privacy in the Constitution then surely it would have been the primary ground for invalidating a statute that criminalised intimate conduct of same-sex couples. However, the opinion makes it clear that liberty was the controlling interest in this case too. Though the respect for private life was

mentioned, the ground for striking down this law was violation of liberty. The lead opinion of Justice Kennedy begins with the words (at p. 562),

"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."

19. Again, (at p. 567):

"It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." (emphasis supplied).

A catena of decisions in the United States have thus refused to follow the understanding of a right to privacy upheld in *Griswold* and *Roe*. *Katz*, relied upon by the petitioners, was the first to recognise that there was no such general right to privacy. Subsequent cases, such as *Whalen*, *Casey* and *Lawrence* which could have been decided on privacy grounds were instead tested on liberty grounds. On this test, the laws in *Whalen* and *Casey* passed muster, whereas the one in *Lawrence* did not. For a full list of such cases and the argument as to why the right to privacy is "no more", see the article by Professor Jamal Greene [Jamal Greene, 'The So-Called Right to Privacy' 43 *UC Davis Law Review* 715-747 (2010)].

20. Further, this move away from privacy to liberty is not limited to any particular ideological viewpoint prevalent in the United States Supreme

Court. In fact, the loosely described "liberal wing" of the Court, certainly pro-choice in abortion matters, have also jettisoned privacy in favour of liberty. This is clear from the dissenting opinion of Justice Ginsburg in *Gonzales v. Carhart* 550 US (2007), which involved a challenge to the prohibition of a particular technique of abortion (the partial birth abortion ban) which had made no exception for the health of the mother. The Court upheld the prohibition. Justice Ginsburg, in dissent, wrote for herself and Justices Breyer, Souter and Stevens,

"As Casey comprehended, at stake in cases challenging abortion restrictions is a woman's control over her [own] destiny. 505 U. S., at 869 (plurality opinion). See also id., at 852 (majority opinion). There was a time, not so long ago when women were regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Id., at 896-897 (quoting Hoyt v. Florida, 368 U. S. 57, 62 (1961)). Those views, this Court made clear in Casey, are no longer consistent with our understanding of the family, the individual, or the Constitution. 505 U. S., at 897. Women, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Id., at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to their ability to control their reproductive lives. Ibid. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, e.g., Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992); Law, Re- thinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1002ñ1028 (1984)."

21. This move by Justice Ginsburg, away from a general notion of the right to privacy, vindicates the approach followed by Justice Stewart through his dissenting view in *Griswold*, lead opinion in *Katz* and concurring views in *Roe* and *Whalen*. It will be instructive for the Court to note that Justice Stewart's views have been cited by the Indian Supreme Court and High Courts in at least twenty cases, including prominently in *Maneka Gandhi v. Union of India, (1978) 1 SCC 248, Indra Sawhney v. Union of India, (1992) 3*

SCC 217 and *Bachan Singh v. State of Punjab, (1980) 2 SCC 684.* A full list of these cases is annexed [See Annexure 1].

22. On the evidence of the development of the right to privacy in American constitutional law and its falling into disuse with decades of experience, it is humbly submitted that no analogous general fundamental right to privacy ought to be declared as part of the Constitution of India by the Supreme Court in the present proceedings.

ii. Reading in a right to privacy from certain privacy interests that may inhere in Part III of the Constitution is conceptually unsound.

23. It is evident from American constitutional law that there may be certain zones of privacy which inhere in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution. These zones of privacy appear to be nothing but certain interests of immunity from interference which are protected in order to protect the substantive rights in question. As the petitioners have argued, this may also be the position in Indian constitutional law. But the fallacy of translating these zones of privacy into a self-standing and free-floating right has been clearly pointed out by Robert Bork in his seminal work '*The Tempting of America*'. Bork writes,

"It is important to understand Justice Douglas' argument both because the method, though without merit, continually recurs in constitutional adjudication and because the "right of privacy" has become a loose canon in the law. Douglas began by pointing out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." There is nothing exceptional about that thought, other than the language of penumbras and emanations. Courts often give protection to a constitutional freedom by creating a buffer zone, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution. Douglas cited NAACP v. Alabama, in which the Supreme Court held that the state could not force the disclosure of the

organisation's membership lists since that would have a deterrent effect upon the members' first amendment rights of political and legal action. That may well have been part of the purpose of the statute. But for this anticipated effect upon guaranteed freedoms, there would be no constitutional objection to the required disclosure of membership. The right not to disclose has no life of its own independent of the rights specified in the first amendment.

Douglas named the buffer zone or "penumbra" of the first amendment a protection of "privacy," although, in NAACP v. Alabama, of course, confidentiality of membership was required not for the sake of individual privacy but to protect the public activities of politics and litigation. Douglas then asserted that other amendments create "zones of privacy." These were the First, Third (soldiers not to be quartered in private homes), Fourth (ban on unreasonable searches and seizures) and Fifth (freedom from self-incrimination). There was no particularly good reason to use the word "privacy" for the freedom cited, except for the fact that the opinion was building toward those "sacred precincts of marital bedrooms." The phrase "areas of freedom" would have been more accurate since the provisions cited both private and public behaviour....

The Court majority said there was now a right of privacy but did not even intimate an answer to the question, "privacy to do what?" People often take addictive drugs in private, some men physically abuse their wives and children in private, executives conspire to fix prices in private, Mafiosi confer with their button men in private. If these sound bizarre one professor at a prominent law school has suggested that the right of privacy may create a right to engage in prostitution. Moreover, as we shall see, the Court has extended the right of privacy to activities in no sense can be said to be done in private. The truth is that "privacy" will turn out to protect those activities that enough justices to form a majority think ought to be protected and not activities with which they have little sympathy.

If one called the zones of the separate rights of the Bill of Rights zones of "freedom" which would be more accurate, then, should one care to follow Douglas's logic, the zones would add up to a general right of freedom independent of any provision of the Constitution..." (emphasis supplied)

[Robert H. Bork, *The Tempting of America*, Free Press (1990), pp. 97-99]

24. In the same vein, Professor Louis Henkin writes (in the immediate aftermath of *Roe v. Wade*),

"In our day the Justices have newly recognized the "right of privacy." I think that denomination is misleading, if not mistaken. To date, at least, the right has brought little new protection for what most of us think of as "privacy"- freedom from official intrusion. What the Supreme Court has given us, rather, is something essentially different and farther-reaching, an additional zone of autonomy, of presumptive immunity to governmental

regulation. Appreciating what the Supreme Court has wrought suggests the need for new inquiries into our sense of public good, into the comparative weights of different goods in the balances of constitutional jurisprudence, indeed into the very purposes of our constitutional government."

[Louis Henkin, 'Privacy and Autonomy' 74 *Columbia Law Review* 1410-1433, at pp. 1410-1411 (1974)]

25. Thus privacy at its core is nothing but a zone of freedom. This can be stated differently– privacy at its most basic has been understood to be the right to be let alone (Samuel Warren and Louis Brandeis, 'Right to Privacy' IV(5) *Harvard Law Review* 193-220 (1890)). Such a right essentially places a correlative duty on everyone else to stay off. In Hohfeldian terms, this is the exact conception of a liberty. Hohfeld writes,

"In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term "right" in this limited and proper meaning, perhaps the word "claim" would prove the best...
In the example last put, whereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off."

[Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' 23 *Yale Law Journal* 16-59, at p. 32 (1914)]

Please note that in Hohfeldian terms, the term "privilege" is the same as "liberty". See, Hohfeld (at p. 36):

"On grounds already emphasized, it would seem that the line of reasoning pursued by Lord Lindley in the great case of Quinn v. Leathem (1901) A.C. 495, 534, is deserving of comment:

> *"The plaintiff had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal*

with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."

A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as privilege and certainly that is the fair connotation of the term as used the first three times in the passage quoted") (emphasis supplied)

26. This is consistent with the philosophical understanding of privacy as protecting liberty,

"Besides giving us control over the context in which we act, privacy has a more defensive role in protecting our liberty. We may wish to do or say things not forbidden by the restraints of morality, but which are nevertheless unpopular or unconventional. If we thought that our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes."

[Charles Fried, 'Privacy' 77(3) *Yale Law Journal* 475-493, at p. 483 (January 1968)]

27. In this sense privacy achieves nothing more than serving as a substitute for freedom/ liberty since at its conceptual core it essentially is a command to others to 'stay off'. It is thus a purely formal conceptualisation that does not answer any substantive question ("privacy to do what?"). This is evident from the oral observation made by Nariman J. in this case, summarising the position of the petitioners that privacy extends over the body and mind, with the mind aspect having two facets– information and decisions. It is our humble submission that this principle is overbroad and formal. In a formal sense, privacy over body and mind means little but prescribing that others should stay off matters relating to the body and mind since the individual

should have the liberty to do as she pleases in these matters. However this cannot mean that the individual can slash her wrists (a facet of a right over her body) or take drugs (an individual choice) or refuse to give her relationship status when asked on her form (information). This is best exemplified by a question posed by Chandrachud J. in his oral observations that it may not be a constitutional problem if a woman is asked on a form about the number of children she has, but it will be a problem if she is asked the number of abortions she has had. Privacy over information should have made both these instances a violation– but given that the former appears to be a violation and the latter does not, it is clear that there is a substantive notion at play, i.e. the nature of personal liberties which deserve constitutional protection. This cannot be explained simply by reference to "privacy". Instead it is a substantive notion of a constitutionally protected liberty that provides the answer. According to Joseph Raz, this determination of what counts as constitutionally protected rights is done by courts with utmost caution in constitutional review:

"We now have an outline of an account of the proper role of constitutional review in most liberal democracies, in matters of fundamental civil and political rights. Since these fundamental rights inextricably combine issues of individual interest with questions of the public interest, they can and should, like other issues of individual rights, be dealt with by the courts. But at the same time they inevitably involve the courts in politics, since they cannot be settled except by deciding questions concerning the public interest. Since, controversial though these issues are, they are relatively free from conflict of interests and are to be settled on the basis of the central tenets of the political tradition of the country concerned, it is fitting that they should be removed from the ordinary democratic process and be assigned to a separate political process.

This means that the courts are political, but the political issues they deal with in constitutional review of fundamental rights differ for the most part in kind from the stuff that democratic politics is mostly concerned with. This does not mean, of course, that the job of the courts is to arrest the march of time and freeze the process of change which affects a country's political culture, and its common good, just as it affects everything else. All that is meant is that, in responding to change and in encouraging change, the courts should be attuned to the community's political traditions and to changes, which are normally continuous and gradual, in

its common good, and not to short-term swings, however violent, in democratic politics."

[Joseph Raz 'Rights and Individual Well-being' in, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995), at pp. 57-58]

28. It is for this reason that while conceptually privacy essentially protects a liberty interest, several privacy interests have little to do with constitutionally protected liberties (when the question "privacy to do what?" is asked (for eg., appropriation of someone's image). Further, liberty is broader in content than privacy itself (for eg. the freedom to travel abroad has no discernible privacy component). Thus the discussion above evidences a fundamental philosophical conception that privacy is purely formal and does no conceptual work that liberty cannot do, and does not do in the context of constitutionally protected personal liberty.

29. On the basis of the arguments above, even if the petitioners are right that there might be zones of privacy in the Constitution, these are first, not all-pervasive in the Constitution but limited to where liberties exist (there is no necessary zone of privacy in Article 14, for example) and second, they are conceptually zones of liberty. Insofar as they exist in Article 19 (and other freedoms), their site of protection is a constitutionally protected liberty *per se* and insofar as they exist in Article 21, their site of protection may be dignity (protection of medical records), property (unauthorised intrusion into the home) or personal liberty *per se* (freedom of association). Thus reading in a right to privacy from a zone of privacy is conceptually unsound and does not protect anything that is not already protected under Part III.

30. On the contrary, such an expansive and putatively free-floating understanding of the right to privacy might be over-broad in its conceptualisation. Privacy itself at its core does not, and it is our humble submission, cannot answer the question, privacy to do what. As a result, privacy may lead to insulating certain spaces from necessary intervention. This has been the feminist critique of privacy which deserves particular attention:

"But feminist consciousness has exploded the private. For women, the measure of the intimacy has been the measure of the oppression. To see the personal as political means to see the private as public. On this level, women have no privacy to lose or to guarantee. We are not inviolable.

Our sexuality, meaning gender identity, is not only violable, it is (hence we are) our violation. Privacy is everything women as women have never been allowed to be or to have; at the same time the private is everything women have been equated with and defined in terms of men's ability to have. To confront the fact that we have no privacy is to confront our private degradation as the public order. To fail to recognize this place of the private in women's subordination by seeking protection behind a right to that privacy is thus to be cut off from collective verification and state support in the same act. The very place (home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy, selfhood) that feminism finds central to women's subjection form the core of privacy doctrine. But when women are segregated in private, one at a time, a law of privacy will tend to protect the right of men "to be let alone" to oppress us one at a time. A law of the private, in a state that mirrors such a society, will translate the traditional values of the private sphere into individual women's right to privacy, subordinating women's collective needs to the imperatives of male supremacy. It will keep some men out of the bedrooms of other men." (emphasis supplied)

[Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' 8(4) *Signs* 635-658, at p. 656 (Summer 1983)]

31. It is our humble submission that the instant case is the *Griswold* moment in Indian constitutional law. The experience of the United States of America counsels us to be cautionary about creating a free-standing right to privacy,

a conceptually unsound and practically meaningless interpretive exercise. As Hyman Gross wrote of *Griswold*,

> *"The word "privacy" is put to torture until it confesses a constitutional guaranty for everything it designates in household parlance. The encroachment upon solitude and disturbance of repose occasioned by the salesman at the front door is said to involve the matter of privacy, as does the disruption of repose by a loudspeaker on a bus, and loss of autonomy through application of a sterilization law. In this way a verbal groundwork is provided for deciding that something called "privacy" is offended by a state law regulating marital intimacies, an area of accustomed autonomy.*
>
> *Though we may counsel the avoidance of ambiguity, we cannot question that the Supreme Court may fashion whatever words it chooses to comprehend what it has in mind to protect; and that therefore the word "privacy" may be used to designate particular things said to be protected by the Constitution-including freedom from legislative regulation of marital intimacies. But what the Supreme Court cannot do is make an eccentricity in common word usage do the job of legal reasoning in constitutional interpretation. It cannot give autonomy protection under constitutional rights of privacy simply because the word "privacy" is sometimes loosely used to designate autonomy. That is what has been attempted in Griswold."* (emphasis supplied)

[Hyman Gross, 'The Concept of Privacy' 42 *New York University Law Review* 34-54, at p. 43-44 (1967)]

32. In Indian constitutional law, the broad import of the term "personal liberty" is well-established. The Supreme Court has held it to include the right to travel abroad and consequently return to India (*Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi*, (1967) 3 SCR 525), to have interviews with family and friends while imprisoned (*Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608), for women to make reproductive choices (*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1), for self-determination of gender (*National Legal Services Authority v. Union of India*, (2014) 5 SCC 438), amongst others. Thus when any state action is challenged on this ground, it will be ascertained first, whether it affects a liberty interest, secondly, whether the liberty in question is within the

sphere on constitutionally protected liberties and thirdly, whether the interference with such interest is justified by a countervailing legitimate state interest.

33. For the aforesaid reasons, a general fundamental right to privacy should not be read into Part III of the Constitution.

iii. An analysis of existing case law decided on the ground of right to privacy will demonstrate that they either relate to aspects of privacy already protected under Article 21 or Article 19 or should not be protected under the Constitution at all.

34. The conceptual conclusion above will be made good by an analytical exercise. Three Supreme Court cases that have made a determination regarding the right to privacy will be taken and it will be demonstrated that either the same could be decided on alternate grounds, if the privacy interests are constitutional, or should not be decided as a constitutional matter at all, if the privacy interests are not worthy of constitutional protection.

35. In *PUCL v. Union of India*, (1997) 1 SCC 301, it was held that Section 5(2) of the Indian Telegraph Act, 1885 which allowed for wire-tapping of phones was violative of privacy. Several procedural safeguards were read in to prevent such a violation. The Court held (*per* Kuldip Singh, J.):

*"**18**. The right to privacy-by itself-has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone-conversation is a part of modern man's life. It is*

considered so important that more and more people are carrying mobile telephone instruments in their pockets.

Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, in fact Article 21 of the Constitution of India unless it is permitted under the procedure established by law."

36. On this basis, a series of procedural safeguards were read in to ensure that telephone tapping is narrowly tailored to comply with Article 21. However it is clear that conversations on the telephone, irrespective of their content, if tapped, would interfere with the liberty of individuals to speak freely. Further, the opinion in *PUCL* appears to only protect telephone conversation in the privacy of one's home or office, despite recognising the prevalence of mobile phones. Personal liberty provides a clearer ground for testing any phone tapping, not being tied to any particular place, subject of course to any legitimate state interest in doing so.

37. Again, in *R. Rajagopal v. State of Tamil Nadu,* (1994) 6 SCC 632, the question before the Court was whether a direction issued by the Tamil Nadu police to the editor and publisher of a Tamil weekly that was slated to publish the life-story of a notorious criminal Auto Shankar was constitutional. While the case ought to have been decided simply on whether the restriction was reasonable as per Article 19(2), the Court formulated four questions:

"8. Whether a citizen of this country can prevent another person from writing his life-story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitle the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?"

This was owing to the fact that there was an allegation that unauthorized publication of the life-story of the criminal would lead to the violation of his privacy. Regarding the right to privacy, the Court held (*per* Jeevan Reddy, J.):

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

38. On this basis, the Court decided,

*"**29.** Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life-story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life-story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove."*

39. It is humbly submitted that this case did not require any discussion of the constitutional right to privacy. There was no claim by the criminal himself (he was not a party to the case) that any aspect critical to his personhood or liberty would be violated by the publication. On the contrary, as the judgment makes clear, the publication would appear to show corruption in the ranks of the Tamil Nadu police. It cannot be anybody's claim that there is a constitutional privacy interest in protecting such activities from disclosure. This is simply a case of testing the reasonableness of the restriction imposed by the State on publication. Even in the hypothetical case that there was a privacy claim, the same would be a horizontal claim

made by the convict against the publisher claiming that publication might affect his reputation. This could either be a tortious claim or an action for defamation. Given the facts, no constitutional question of privacy ought to have arisen in this case. This represents a privacy interest that ought not to be entitled to constitutional protection and is a cautionary sign against reading in a general right to privacy in the Constitution.

40. Finally, in *Mr. X v. Hospital Z,* (1998) 8 SCC 296, the question before the Court was whether the right to privacy of the patient was violated when his blood test results showing he was HIV+ were disclosed by the hospital to his future wife thereby leading to cancellation of marriage. It was held by the Court (*per* Saghir Ahmad, J.):

> *"**28.** Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."*

41. On this basis, the Court held that the patient's right to privacy would be outweighed by the future wife's right to a healthy life. The merits of such a decision aside, the framing of the issue as a privacy issue, disguises the issue at its core—that the patient should have liberty to decide with whom, when and how we would like to disclose his medical record. This is a liberty interest which is protected by ensuring the dignity of the individual. It is clear from the judgment that disclosure of medical records would certainly lead to disturbance and psychological difficulties. Thus it would affect the patient's sense of dignity, the basis of his personhood. Thus a claim based

on privacy, as significant as it may be in this case, is a liberty interest which has individual dignity as the site of its protection.

42. In the final analysis, the history and development of the law relating to privacy shows an inductive movement from four distinct tortious offences to one consolidated category, a facet of which was deemed worthy of protection, not just in private law, but in constitutional law. As Dean William Prosser wrote in his seminal article on the subject,

"What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone." Without any attempt to exact definition, these four torts may be described as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

[William L. Prosser, 'Privacy', 48(3) *California Law Review* 383-422, at p. 389 (1960)]

It is only a facet of category (1) that has been elevated to constitutional status when it affects a constitutionally protected right, both in the United States and in India. The remaining aspects of privacy continue to be protected in common law or in statute (eg. protection for privileged communications in Sections 123-131 of the Indian Evidence Act, 1872). Reading in a general fundamental right to privacy has the potential to erode these critical distinctions.

43. Reading in such a general fundamental right to privacy suffers from two further difficulties. First, the Court would be creating a redundancy, since as explained above, privacy is nothing but a liberty interest of an individual. In other words, it is 'personal liberty' which is already protected by the Constitution. In a well-established line of precedent, the Court has held while interpreting statutes that Parliament should not be intended to have created redundancies while drafting statutes (See, *Grasim Industries Ltd. v. Collector of Customs, Bombay*, (2002) 4 SCC 297, para 10; *State of Maharashtra v. Marwanjee F. Desai*, (2002) 2 SCC 318, para 11). Similarly the Court too should not create a redundancy itself by using a synonym for what is essentially a 'personal liberty' interest. Creating such a new category would also fall foul of the cardinal philosophical principle of Occam's razor that plurality should not be resorted to in explanation except by necessity. This has been explained by C. Delisle Burns in the leading philosophy journal, *Mind*,

> *"It seems clear, as Mr. Thorburn has shown (MIND, vol. xxiv., N.S., No. 94), that Ockham, even if he ever used the phrase "Entia non sunt multiplicanda," etc., certainly preferred "Pluralitas non est ponenda". The usual form of the razor' seems very clumsy. I have never myself found it in any work of Ockham's; but it is quite possible that he did use it. In any case his preference for the form "Pluralitas non est ponenda" is very reasonable, in view of his complaint against Scotus that the 'doctor subtilis' created imaginary things which did not exist. "Entia non sunt multiplicanda" seems to be a rule about "real things": it seems to imply that one could "multiply" them. But, Ockham might say, if you try as 'hard as you like,' the mind cannot bring any object into existence nor, by knowing it, make any difference to the object known.*
>
> *"Pluralitas non est ponenda" would mean "You must not suppose that more things exist" than you have evidence for. And in the same way "Frustra fit per plura quod potest fieri per pauciora" means that an explanation is useless of what is already explained. This phrase, by the way, may be found in the treatise "de Sacramento altaris" (p. 3) besides the places referred to by Mr. Thorburn."* (emphasis supplied)
>
> [C. Delisle Burns, 'Occam's Razor' 24(96) *Mind* 592, at p. 592 (1915)]

44. On the basis of the aforesaid arguments, it is our submission that privacy interests are purely formal interests that seek to protect liberty. "Personal liberty" in Article 21 is capacious enough to protect such interests. Other privacy interests (that may protect liberties, but not those that in our political and legal culture ought to enjoy constitutional protection) ought not to be read in to Article 21. This distinction is best preserved by not reading in a general right to privacy in the Constitution— a conclusion that follows from comparative experience in the United States of America, philosophical foundations of privacy and a close study of precedents on this subject in Indian constitutional law. Further, given that reading in a derivative right in this case will do no conceptual work, the fundamental tenet that the law must not create a redundancy should be upheld.

45. It is important to note however that contrary to the arguments made by Mr. C Aryama Sundaram, learned counsel for the State of Maharashtra, our submission in this regard is not a critique of the judicial trend of reading in "unenumerated rights" into Part III of the Constitution, as the petitioners have contended. It is our humble submission that the major premise of this contention, that there are unenumerated rights in the Constitution, itself is mistaken. Writing on this subject, Ronald Dworkin said,

"So the distinction between enumerated and unenumerated rights is widely understood to pose an important constitutional issue: the question whether and when courts have authority to enforce rights not actually enumerated in the Constitution as genuine constitutional rights. I find the question unintelligible, however, as I said at the outset, because the presumed distinction makes no sense. The distinction between what is on some list and what is not is of course genuine and often very important. An ordinance might declare, for example, that it is forbidden to take guns, knives, or explosives in hand luggage on an airplane. Suppose airport officials interpreted that ordinance to exclude canisters of tear gas as well, on the ground that the general structure of the ordinance, and the obvious intention behind it, prohibits all weapons that might be taken aboard and used in hijacks or terrorism. We would be right to say that gas was not on the list of what was banned, and that it is a legitimate question

whether officials are entitled to add "unenumerated" weapons to the list. But the distinction between officials excluding pistols, switch-blades and hand-grenades on the one hand, and tear gas on the other, depends upon a semantic assumption: that tear gas falls within what philosophers call the reference of neither "guns" nor "knives" nor "explosives." No comparable assumption can explain the supposed distinction between enumerated and unenumerated constitutional rights. The Bill of Rights, as I said, consists of broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right. The key issue in applying these abstract principles to particular political controversies is not one of reference but of interpretation, which is very different." (emphasis supplied).

[Ronald Dworkin, "Unenumerated Rights: Whether and how Roe should be overruled" 59 *University of Chicago Law Review* 381-432, at p. 387 (1992)].

46. Thus when dealing with constitutional provisions such as Articles 14, 19 and 21 which deal with abstract principles, any interpretation is subject to the charge of creating an unenumerated right. However it is our humble submission that when such an interpretive exercise is resorted to, it is critical that the interest that is now found protected must conceptually be substantive in nature (which is not the case for privacy as a concept) and constitutionally be within the contours of the right it is derived from (which is not the case for the right of privacy, derived from right to personal liberty in Article 21). Neither of these conditions is met in the case of right to privacy and thus it is conceptually unsound to read it into Part III of the Constitution.

B. Several concerns relating to privacy breaches raised by the petitioners will be effectively redressed by a data protection law

i. Data protection and privacy *per se* are overlapping but distinct concerns

47. In the current digital era, several privacy concerns relate to processing of data. The analysis of very large and complex sets of data is done today

through 'Big Data' analytics. Employment of such analytics enables organizations and governments to gain remarkable insights in areas such as health, food security, intelligent transport systems, energy efficiency and urban planning [European Commission, "European Data Protection Reform and Big Data: Factsheet", (2016) available at: <http://ec.europa.eu/justice/data-protection/files/data-protection-big-data_factsheet_web_en.pdf>].

48. For instance, companies such as Google have developed spell-checking systems by applying 'Big Data' analytics to correlate mistyped queries with their correct forms [Viktor Mayer-Schönberger & Kenneth Cukier, *Big Data: A Revolution that will transform how we live, work and think* (Houghton Mifflin Harcourt 2013) 112].

49. However, much of this data is personal data and has the possibility of infringing privacy interests of individuals. As a result of this, over 100 jurisdictions now have data protection laws and over 40 other jurisdictions have pending bills and initiatives [David Banisar, "National Comprehensive Data Protection/Privacy Laws and Bills 2016," available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951416>]

50. Data protection laws govern the processing of 'personal data', which is understood as data relating to an individual who can be identified through such information [See for instance, European Union General Data Protection Regulation adopted by the European Parliament in April 2016, Articles 2 and 4(1); UK Data Protection Act 1998; Canada's Personal Information Protection and Electronics Documents Act, assented to on 13th April 2000; South Africa Protection of Personal Information Act, 2013].

51. While often used synonymously with privacy, conceptually the two are distinct [Herbert Burkert, 'Towards a New Generation of Data Protection

Legislation' in Gutwirth et al (ed.), *Reinventing Data Protection* (Springer 2009), at p. 335]. It is not as an intervener contends, a subset of privacy. This is best exemplified in Articles 7 and 8 of the EU Charter of Fundamental Rights. They read:

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*

52. It is clear that data protection and privacy are two distinct fundamental rights in the EU. This distinction was the product of recognition over a period of time of the independent importance of data protection. Explaining the distinction, Raphael Gellert and Serge Gutwirth write,

"All in all, data protection and privacy overlap on a mode whereby data protection is both broader and narrower than privacy. It is narrower because it only deals with the processing personal data, whereas the scope of privacy is wider. It is broader, however, because it applies to the processing of personal data, even if the latter does not infringe upon privacy. Privacy also is broader and narrower: it might apply to a processing of data which are not personal but nevertheless affects one's privacy, while it will not apply upon a processing of personal data which is not considered to infringe upon one's privacy. It can be said as well that a processing of personal data can have consequences not only in terms of privacy, but also in terms of other constitutional rights, and most obviously, when the processing of data relating to individuals bears risks in terms of discrimination."

[Raphael Gellert and Serge Gutwirth, 'The legal construction of privacy and data protection' 29 *Computer Law & Security Review* 522-530, at p. 526 (2013)]

53. Data protection is narrower than privacy since it is limited to data alone and does not extend to aspects of privacy that are not informational. At the same time it is broader than privacy since it covers all data relating to an identifiable individual and not just information relatable to an individual's private life [Julianne Kokott & Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' 3(4) *International Data Privacy Law* 222-228, at p. 225 (2013)]. The difference in scope is apparent from international instruments relating to data protection and national data protection laws - these contain provisions that are aimed at facilitating data flows and not just protecting privacy. It is pertinent to note that the OECD principles for processing of personal data, which have formed the basis of several data protection laws, were primarily developed to ensure uniformity in laws so as to facilitate trans-border data flows and "allow a full exploitation of the potentialities of modern data processing technologies in so far as this is desirable" [Explanatory Memorandum to the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data (1980)]. The OECD principles are:

"Collection Limitation Principle
There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

Data Quality Principle
Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

Purpose Specification Principle
The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

Use Limitation Principle

Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with (the purpose specification principle) except:
a) with the consent of the data subject; or
b) by the authority of law.

Security Safeguards Principle
Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

Openness Principle
There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

Individual Participation Principle
An individual should have the right:
a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
b) to have communicated to him, data relating to him within a reasonable time;
at a charge, if any, that is not excessive;
in a reasonable manner; and
in a form that is readily intelligible to him;
c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and
d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended.

Accountability Principle
A data controller should be accountable for complying with measures which give effect to the principles stated above.

54. It is apparent that some practices such as ensuring adequate data quality and openness have little to do with privacy but are rather aimed at ensuring accuracy such that the data can be effectively used. The aim of data protection is to ensure fairness in processing of data and it is sought to be achieved through the principles stated above. Thus, neither is the correlation between data protection and privacy exact nor is the former a subset of the latter. Privacy interest protection is an important rationale of data protection law, though it has other rationales; while privacy is not limited to data protection related issues alone.

ii. A comprehensive data protection legislation can address privacy concerns relating to data

55. Arguing for an intervener, a counsel cited *US v. Jones* 565 US (2012) to recommend that privacy protection in the Constitution ought to extend to public information as well. He quoted Justice Sotomayor's concurring view,

"More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

Irrespective of the merits of such a view, the reason why in the United States such information that is already public is not protected is owing to the absence of a comprehensive data protection legislation. The Privacy Act, 1974 only governs personal data in federal government databases. There is no law that governs collection, use and disclosure of data made by individuals to private sector data processors. This is a deliberate regulatory choice, as explained by a White House Report on the subject:

"Despite some important differences, the privacy frameworks in the United States and those countries following the EU model are both based on the FIPPs. The European approach, which is based on a view that privacy is a fundamental human right, generally involves top-down regulation and the imposition of across-the-board rules restricting the use of data or requiring explicit consent for that use. The United States, in contrast, employs a sectoral approach that focuses on regulating specific risks of privacy harm in particular contexts, such as health care and credit. This places fewer broad rules on the use of data, allowing industry to be more innovative in its products and services, while also sometimes leaving unregulated potential uses of information that fall between sectors."

[John Podesta et al, Executive Office of the President, 'Big Data: Seizing Opportunities, Preserving Values, May 2014]

56. Thus in fact, Justice Sotomayor's call for constitutional privacy protection for publicly available data is a response to the absence of a comprehensive data protection legislation in the United States of America. This however is

not a model that deserves emulation. As stated above, a majority of countries regulate the collection, use, disclosure and other processing of data through data protection legislation. This is because it is recognised that rules relating to data protection promote accountability and safeguard against harms from collection, use, sharing, retention, etc. of personal data.

57. It is humbly submitted that the Constitution cannot provide detailed provisions of this nature. The Supreme Court has recognised that matters of detail cannot be provided in the Constitution itself, given it is the basic law of the land, or statutes flowing from the Constitution. In *DS Garewal v. State of Punjab*, AIR 1959 SC 512, while speaking in the context of regulation of recruitment and conditions of service by means of rules, the Supreme Court held *per* Wanchoo J. (as he then was):

> *"7....Regulation of recruitment and conditions of service requires numerous and varied rules, which may have to be changed from time to time as the exigencies of public service require. This could not be unknown to the Constitution makers and it is not possible to hold that the intention of the Constitution was that these numerous and varied rules should be framed by Parliament itself and that any amendment of these rules which may be required to meet the difficulties of day-to-day administration should also be made by Parliament only with all the attending delay which passing of legislation entails. We are, therefore, of opinion that in the circumstances of Article 312 it could not have been the intention of the Constitution that the numerous and varied provisions that have to be made in order to regulate the recruitment and the conditions of service of all-India services should all be enacted as statute law and nothing should be delegated to the executive authorities...."*

58. This has been recognised most clearly in the European Union. Despite the Charter of Fundamental Rights containing privacy and data protection rights, the EU has formulated detailed directives on data protection. The law governing the field has been the EU Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the

protection of individuals with regard to the processing of personal data and on the free movement of such data. However on 27 April 2016, the EU adopted a revised framework– Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Commonly known as the European Union General Data Protection Regulation (GDPR) its date of entry into force is 25 May 2018.

59. In its Preamble, the GDPR provides,

"(6) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.

(7) Those developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced."

60. It is a comprehensive regulation covering 99 provisions that deal with scope of application, legitimate grounds for processing, substantive obligations on data controllers and processors, rights of individuals to access, rectification, erasure and objections and establishment of appropriate enforcement machinery together with imposition of fines which extend up to 20,000,000 EUR, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher [Article 83(5)]. It thus comprehensively covers the fair information

practices laid down by the OECD and builds on them to ensure greater protection of data.

61. The EU GDPR is testament to the proposition that data protection related concerns are best dealt with comprehensively by legislation irrespective of whether a right exists in the Constitution in this regard or not. This is because potential harms to individuals from collection and use of data could happen in multiple ways and specific procedural and substantive rules are necessary in order to protect against the same.

iii. Parliament is alive to such data protection concerns

62. The issue of protection of data has been, and continues to be a topic of consideration in Parliament. A key example of this may be found in the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 ("Aadhaar Act"). The Aadhaar Act contains key data protection principles of informed consent, collection limitation, purpose specification, use limitation, access and correction, accountability and data security. The following provisions are relevant:

8. (1) The Authority shall perform authentication of the Aadhaar number of an Aadhaar number holder submitted by any requesting entity, in relation to his biometric information or demographic information, subject to such conditions and on payment of such fees and in such manner as may be specified by regulations.
(2) A requesting entity shall—
(a) unless otherwise provided in this Act, obtain the consent of an individual before collecting his identity information for the purposes of authentication in such manner as may be specified by regulations; and
(b) ensure that the identity information of an individual is only used for submission to the Central Identities Data Repository for authentication.
(3) A requesting entity shall inform, in such manner as may be specified by regulations, to the individual submitting his identity information for authentication, the following details with respect to authentication, namely:—
(a) the nature of information that may be shared upon authentication; (b) the uses to which the information received during authentication may be

put by the requesting entity; and (c) alternatives to submission of identity information to the requesting entity."

[Collection Limitation, Use Limitation]

28. (1) The Authority shall ensure the security of identity information and authentication records of individuals.

(2) Subject to the provisions of this Act, the Authority shall ensure confidentiality of identity information and authentication records of individuals.

(3) The Authority shall take all necessary measures to ensure that the information in the possession or control of the Authority, including information stored in the Central Identities Data Repository, is secured and protected against access, use or disclosure not permitted under this Act or regulations made thereunder, and against accidental or intentional destruction, loss or damage.

(4) Without prejudice to sub-sections (1) and (2), the Authority shall– (a) adopt and implement appropriate technical and organisational security measures;
(b) ensure that the agencies, consultants, advisors or other persons appointed or engaged for performing any function of the Authority under this Act, have in place appropriate technical and organisational security measures for the information; and
(c) ensure that the agreements or arrangements entered into with such agencies, consultants, advisors or other persons, impose obligations equivalent to those imposed on the Authority under this Act, and require such agencies, consultants, advisors and other persons to act only on instructions from the Authority.
(5) Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone:
Provided that an Aadhaar number holder may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by regulations."

[Security Safeguards Principle]

"29. (1) No core biometric information, collected or created under this Act, shall be–
(a) shared with anyone for any reason whatsoever; or
(b) used for any purpose other than generation of Aadhaar numbers and authentication under this Act.
(2) The identity information, other than core biometric information, collected or created under this Act may be shared only in accordance with the provisions of this Act and in such manner as may be specified by regulations.
(3) No identity information available with a requesting entity shall be–

(a) used for any purpose, other than that specified to the individual at the time of submitting any identity information for authentication; or
(b) disclosed further, except with the prior consent of the individual to whom such information relates.
(4) No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.

[Use Limitation; Purpose Specification]

"31. (1) In case any demographic information of an Aadhaar number holder is found incorrect or changes subsequently, the Aadhaar number holder shall request the Authority to alter such demographic information in his record in the Central Identities Data Repository in such manner as may be specified by regulations.
(2) In case any biometric information of Aadhaar number holder is lost or changes subsequently for any reason, the Aadhaar number holder shall request the Authority to make necessary alteration in his record in the Central Identities Data Repository in such manner as may be specified by regulations.
(3) On receipt of any request under sub-section (1) or sub-section (2), the Authority may, if it is satisfied, make such alteration as may be required in the record relating to such Aadhaar number holder and intimate such alteration to the concerned Aadhaar number holder.
(4) No identity information in the Central Identities Data Repository shall be altered except in the manner provided in this Act or regulations made in this behalf."

[Data Quality Principle; Individual Participation principle]

"32. (1) The Authority shall maintain authentication records in such manner and for such period as may be specified by regulations.
(2) Every Aadhaar number holder shall be entitled to obtain his authentication record in such manner as may be specified by regulations.
(3) The Authority shall not, either by itself or through any entity under its control, collect, keep or maintain any information about the purpose of authentication."

[Accountability Principle]

63. At the same time, both Parliament and the Union of India are alive to the fact that concerns relating to data protection go beyond Aadhaar. Thus a Private Member's Bill was introduced recently on 21 July 2017 on the subject of data privacy and protection. Further, the Attorney-General for India mentioned in open Court on 18 April 2017 that the Union of India is

actively considering a comprehensive data protection legislation which should be enacted soon [*Karmanya Singh Sareen v. Union of India*, SLP (C) No. 804/2017, Order dated 18 April 2017]. Since then, the Government has taken several steps towards this end.

64. The aforementioned arguments are only in response to the argument made by the petitioners and an intervener that significant data protection concerns necessitate a reading in of a right to privacy in the Constitution. Such an argument is flawed since data protection concerns require a comprehensive legislation to be fully tackled. Thus no right ought to be read into the Constitution on this basis. Without prejudice, the horizontality of data protection issues means that the manner of implementing and enforcing any constitutional dimensions of the right be left to Parliament to decide by law as it is only a comprehensive statute that can ensure necessary protection.

C. CONCLUSION

For the aforementioned reasons, it is humbly submitted that the Hon'ble Supreme Court be pleased to not read in a general fundamental right to privacy in the Constitution of India.

ANNEXURE 1: INDIAN CASES CITING JUSTICE POTTER STEWART OF THE UNITED STATES SUPREME COURT

1. *Bachan Singh v. State of Punjab*, (1982) 3 SCC 24
2. *Bishnu Deo Shaw v. State of West Bengal*, (1979) 3 SCC 714
3. *Chaluvegowda and Ors. v. State By Circle Inspector of Police*, (2012) 13 SCC 538
4. *G.K. Krishnan and Ors. v. State of Tamil Nadu*, (1975) 1 SCC 375
5. Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217
6. *Jagmohan Singh v. The State of U.P.*, (1973) 1 SCC 20
7. *Kerala Hotel and Restaurant Association v. State of Kerala*, (1990) 2 SCC 502
8. *Md. Sukur Ali v. State of Assam*, (2011) 4 SCC 729
9. *Mrs. Maneka Gandhi v. Union of India*, AIR 1978 SC 597
10. *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646
11. *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) 6 SCC 498
12. *Sociedade De Fomento Industrial Pvt. Ltd. v. Mormugao Dock Labour Board*, 1995 Supp (1) SCC 534
13. *State of Bihar v. Sachchidanand Kishore Prasad Sinha*, (1995) 3 SCC 86
14. *State of Punjab v. Dalbir Singh*, (2012) 3 SCC 346
15. *Subramanian Swamy v. Union of India (UOI), Ministry of Law and Ors.*, (2016) 7 SCC 221
16. *Sunil Batra v. Delhi Administration and Ors.*, (1978) 4 SCC 494
17. *Swamy Sharaddananda alias Murali Manohar Mishra v. State of Karnataka*, (2007) 12 SCC 288
18. *Venkateshwara Theatre v. State of Andhra Pradesh and Others*, (2007) 12 SCC 288
19. *3 Aces v. Commissioner of Police, Hyderabad City*, (1981) 2 AP LJ 460 (AP)
20. *Maqbool Fida Husain v. Raj Kumar Pandey*, 2008 Cr L.J 4107 (Del)

ANNEXURE - 2

I. Table of Contents – GDPR