IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

WRIT PETITION (c) No.494/2012

IN THE MATTER OF:

K.S.Puttaswamy & Ors., …Petitioners

Versus

Union of India & Ors., …Respondents

WRITTEN SUBMISSIONS OF Gopal Sankaranarayanan, ADVOCATE

ON BEHALF OF

RESPONDENT No.39 [Centre for Civil Society]

The ISSUE

This Bench of nine Hon'ble Judges has been constituted to ascertain the correctness of the judgments of this Hon'ble Court in *M.P.Sharma* and *Kharak Singh*, vis-à-vis their observations concerning the fundamental right to privacy. The Petitioners have *inter alia* argued that neither of these judgments deal with the issue of privacy; that the observations therein are obiter; that even if it were part of the ratio, that was in the context of the *Gopalan* compartmentalisation, and in any case, ought to be overruled. In light of these submissions and those made by the Respondents, there appear to be three alternatives available to this Hon'ble Court:

1. To decide that *M.P.Sharma* and *Kharak Singh* are correctly decided **and** that there is no fundamental right to privacy.
2. To decide that *M.P.Sharma* and *Kharak Singh* are correctly decided **but** as per an earlier legal regime that no longer prevails, and that there is a fundamental right to privacy.
3. To decide that *M.P.Sharma* and *Kharak Singh* are correctly decided **regardless** of the legal regime, and that only certain aspects of the right to

privacy can be protected as fundamental rights, while others are protected as legal rights.

The QUESTIONS

I. What is the scope of the Right to Privacy? How is it to be defined?

II. How much of this Right to Privacy can be elevated to the status of a fundamental right? Are there aspects which are protected as a legal right, without more?

III. How would such a fundamental Right to Privacy be controlled? What tests would be made applicable under Article 21?

IV. What are the consequences of a declaration of a right as a fundamental right? What obligations follow on the State, and if at all, on non-State actors? Can such a right be waived? Where aspects of these rights are protected by law, what else would follow if they are raised to the level of a fundamental right?

The PROPOSITIONS

I. *M.P.Sharma* and *Kharak Singh* are correctly decided. The findings concerning privacy being a fundamental right are part of the ratio of these two judgments.

II. There has been no change in the constitutional context from *Gopalan* through *Cooper & Maneka* till now.

III. Privacy is incapable of precise definition and ought not to elevated in all aspects, dimensions and sub-species to the level of a fundamental right.

   a. The <u>fundamental aspect</u>: The words "life" and "personal liberty" in Article 21 have already been widely interpreted to include many facets of what the Petitioners refer to as Privacy.

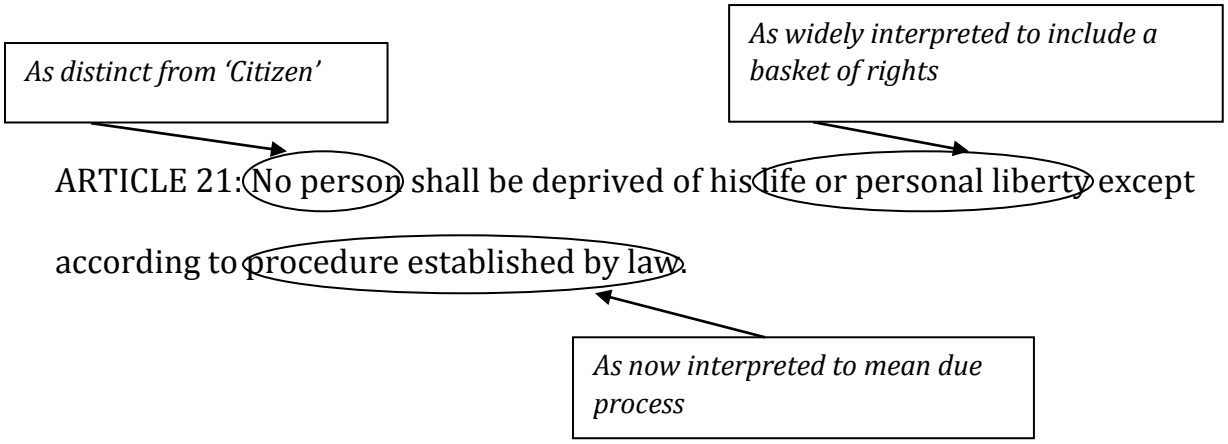
   b. The <u>legal aspect</u>: Those facets which are not protected by Article 21 but have statutory and regulatory protection.

c. The unprotected residue: Those facets which have sociological and philosophical underpinnings but are not presently subject to protection either by Article 21 or by statute.

IV. Two aspects that need to be considered on recognizing aspects of the rights to privacy are:
   a. They cannot be waived; and
   b. The test to protect against their invasion is whether such State action is just, fair and reasonable (and not to concern itself with the interest of the State);

V. The international legal regime is no different from the Indian experience, but caution ought to be exercised in importing approaches out of context.

A BRIEF BACKDROP ON INTERPRETATION



DETAILED SUBMISSIONS

I. M.P.Sharma & Kharak Singh are correctly decided

1.1. M.P.Sharma v. Satish Chandra, 1954 SCR 1077

1.1.1. In the context of search warrants, the Court first considers the proposition placed before it in the following words:

> "It is urged that both search and seizure of a document and a compelled production thereof on notice or summons serve the same purpose of being available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force and has the apparent support of the Supreme Court of the United States of America in *Boyd* v. *United States*."

1.1.2. In order to understand the context of *Boyd*, the Court then proceeded to extract the 4th and 5th Amendments to the Constitution and then extracted the following phrase from the majority judgment:

> "The compulsory production of a man's private papers is search and seizure."
>
> and again thus
>
> "We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

1.1.3. The judgment then proceeds in noting that the majority held that the order for production was vulnerable not only on the ground of the 5th Amendment (self-incrimination) but also the 4th Amendment (illegal search). It then rejects the applicability of *Boyd* to the Indian context and concludes as follows:

> "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the

> protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

1.1.4. The "totally different fundamental right" referred to here is obviously Article 20(3) which was relied upon by the Petitioner in the case. That in itself makes no difference to the present case where the Petitioners contend that the right to privacy is located in Part III of the Constitution. The verdict in *M.P.Sharma* directly negates such a contention, having concluded that the fundamental right to privacy is not recognized in our Constitution.

1.2. Kharak Singh v. State of U.P.(1964) 1 SCR 332

1.2.1. The majority judgment penned by Ayyangar, J proceeds to deal with the challenge to Regulation 236 of the U.P.Police Regulations which had 6 sub-clauses. The Court first records that the challenge raised by the Petitioner is also on violation of personal liberty as enshrined in Article 21 and then proceeds to deal with each of the regulations seriatim.

1.2.2. In the context of (b) which dealt with nocturnal domiciliary visits, the Court adverted to the words of Field, J in *Munn* v. *Illinois*, 94 US 113 speaking in the context of the due process clauses in the 5th and 14th Amendments to say:

> "By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world ... By the term liberty,

> as used in the provision something more is meant than mere freedom from physical restraint or the bounds of a prison."

1.2.3. The Court then states that our own Article 21 must be given the widest interpretation and concludes that "life" be given the same interpretation as that given by Field, J. Then, in order to interpret "personal liberty", the Court refers to Frankfurter, J in *Wolf* v. *Colorado,* 338 US 25 where he said:

> "The security of one's privacy against arbitrary intrusion by the police ... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples ... We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment."

1.2.4. It is therefore apparent that the question of privacy squarely arose in the context of interpreting the "personal liberty" clause in the light of American case law. The judgement then draws a contrast after extracting the 4th Amendment to say that "our Constitution does not in terms confer any like Constitutional guarantee".

1.2.5. This is precisely why, immediately thereafter, when the validity of Clauses (c), (d) & (e) dealing with shadowing and reporting the movements of suspects are concerned, the Court says:

> "Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is

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

1.2.6. The very basis for the majority sustaining Clauses(c), (d) & (e) is that there is no right to privacy in our Constitution. This is the ratio of the ruling, absent which there is no rationale to save the impugned clauses.

1.3. Admittedly, several judgments of this Hon'ble Court have attributed the genesis of the discussion on the right to privacy to these two judgments. Hence, there ought not to be much doubt that *indeed* they did deal with the issue. The only misdirection appears to be what the ratio was attributed to be. See **APPENDIX 1** for a list of these cases.

II. There has been no change in the Constitutional context from Gopalan till now

2.1. Mr.Subramanium's Written Submissions commence with the following paragraph:

> "It is submitted that the decisions in M.P. Sharma & Ors., v. Satish Chandra & Ors., [1954 SCR 1077] and Kharak Singh v. State of U.P. & Ors. [1964] 1 SCR 332], *to the extent they interpret fundamental rights on a distinctive basis* (as recognized in A.K. Gopalan v. State of Madras [1950 SCR 88]) are no longer good law. In view of the fact that A.K. Gopalan's case stands overruled in R.C. Cooper v. Union of India [(1970) 1 SCC 248], it follows a fortiori that neither of the above decisions are effective."

2.2. It has unfortunately been accepted without question that:

a. *A.K.Gopalan* had decided that all fundamental rights are to be decided on a distinctive basis; and

b. *R.C.Cooper* laid down new law in overruling this proposition of *Gopalan.*

2.3. Justice Shah, speaking for the majority of 10 judges in *R.C.Cooper* said (and this has been reproduced in Para 9 of Mr.Subramanium's submissions):

> "The majority of the Court (Kania, C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.), held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article".

As a consequence, the judgment went on to conclude that:

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

2.4. It is doubtless that on the latter proposition (object vs. effect), *Gopalan* was correctly overruled by *Cooper*. However, on the former (individual rights being complete codes), there appears to be a doubt whether the premise of Justice Shah's majority judgment is correct. A careful perusal of the individual judgments in *Gopalan* would show that in fact only one of the judges (Mahajan, J) had *agreed with the Attorney General's complete code argument*.

2.5. The following are the relevant extracts from the judgements in *Gopalan*:

> **Kania, CJ**: The learned Attorney-General contended that the subject of preventive detention does not fall under Article 21 at all and is covered wholly by Article 22. According to him, Article 22 is a complete code. I am unable to accept that contention. [Para 26 / P.115]
>
> **Fazl Ali, J:** To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap

each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. [Para 58]

Sastri, J: The learned Attorney-General contended that Article 21 did not apply to preventive detention at all, as Article 22 clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view. [Para 133/ P.207]

Das, J: The learned Attorney-General, on the other hand has at one stage of his argument, urged that Article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by Article 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also. [Para 291/ P.324]

[See **APPENDIX 2** for relevant extracts of these judgments]

2.6. It is thus evident that the majority in *Gopalan* did not say what the majority in *Cooper* erroneously presumed they did, i.e. that the complete code theory was accepted and applied. In fact, on the very facts of the case, the detention of the Petitioner was examined with reference to Article 22 *and* Article 21 with the latter taken to supplement the former. If the above complete code proposition was correct, there would have been no reason for the *Gopalan* judgment to become the *cause celebre* in our Constitutional history for its rejection of the due process argument.

NOTE: Advertence may also be made to the fact that the arguments on Article 19 were countenanced but rejected, not because of the complete code theory, but because reading Articles 19 & 21 as overlapping would cause the entire penal law to become vulnerable, leading to chaos.

2.7. Despite the error, *Cooper* has been repeatedly referred to as having overruled *Gopalan* on the complete code theory, most notably in Shambhu Nath Sarkar v. State of West Bengal (1973) 1 SCC 856 and Khudiram v. State of West Bengal (1975) 2 SCC 81. The same propositions were followed without question by the majority in Maneka Gandhi v. Union of India, (1978) 1 SCC 248 speaking through Bhagwati, J:

> "The decision in A.K. Gopalan case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to the protection of distinct rights, but this theory was overturned in R.C. Cooper case" [Para 5]

However, it was Kailasam, J in that very case who entered upon a detailed analysis of the *Gopalan* and *Cooper* verdicts and stated as follows:

> **"**We are not concerned in this case as to whether the decision in *Bank Nationalisation case* is in the nature of obiter dicta so far as it held that Articles 19(1) and 31(2) are interrelated. But it is necessary to state that the decision proceeded on some erroneous assumptions. At p. 571 of *Bank Nationalisation case* it was assumed : "The majority of the Court (Kania, C.J. and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.) held that Article 22 being a complete code relating to preventive detention the validity of an order of detention must be determined strictly according to the terms and within the four corners of that article." This statement is not borne out from the text of the judgments in *Gopalan case*. … The Court has not considered the reasoning in *Gopalan case* and overruled it." [Para 158]

2.8. It is submitted that in as many as 96 cases from 1950 to 1970, challenges were tested against multiple fundamental rights, without any cloistered approach as has been attributed to the *Gopalan* dictum. A list of these cases where the validity of State action was tested against various separate fundamental rights is found in

APPENDIX 3 annexed to these submissions. It was therefore an error on the part of the *Cooper* majority to presume that for the previous two decades the law had been to exercise judicial review on individual fundamental rights without going further.

2.9. As a result of the above, the proposition put forward by the Petitioners that in view of *Cooper* overruling *Gopalan*, the judgments in *M.P.Sharma* and *Kharak* are no longer good law does not hold.

2.10. The above submission is quite apart from the fact that the judgments in *M.P.Sharma* and *Kharak* dealt with the content of "life and personal liberty" in Article 21 and did not concern itself with the "complete code" theory. In fact, this is even acknowledged by Bhagwati, J in Maneka Gandhi in the following words:

> "The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in A.K. Gopalan v. State of Madras [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal

liberty" came up pointedly for consideration for the first time before this Court." [Para 5]

WITHOUT PREJUDICE…

III. Only certain aspects of the Right to Privacy can be elevated to fundamental right status

3.1. There does not appear to be any cavil with the fact that a right to privacy exists. However, privacy being an omnibus term which the Petitioners have admitted they cannot define, great care must be taken before subjecting the entire genus of privacy rights to a hallowed protection.

3.2. Privacy, not strictly being a jural term, appears across many disciplines concerning man – ethics, philosophy, psychology and medicine. Notwithstanding the various forays made in the legal field into understanding its full import, some assistance could be received from the classification available in the medical field. The Winter 2016 edition of the Stanford Encyclopedia of Philosophy, in its chapter entitled "Privacy and Medicine" classifies privacy into 5 groups:

- *Informational Privacy* [confidentiality, data, secrecy of diagnosis, anonymity while testing, IVF]
- *Physical Privacy* [solitude for the sick & dying, bodily modesty, non-consensual testing and imaging]
- *Associational Privacy* [regulating visitors, levels of access]
- *Proprietary Privacy* [blood, tissue samples, fluids]
- *Decisional Privacy* [birth control, abortion, gender selection, right to refuse care]

[The chapter is found in **APPENDIX 4** to these submissions]

3.3. Each of the above groups would equally apply to any aspect of human conduct, even outside the medical realm. In India, many of these are protected or regulated by law, with restrictions on their invasion, conditions for their use and liabilities for transgressions. Several other aspects have been specifically recognized as part of the phrases "life" and "personal liberty" under Article 21 of the Constitution, thereby according to them the status of a fundamental right.

3.3.1. <u>The fundamental rights</u>

Over the course of the last 67 years, Article 21 has been gradually expanded to include a whole host of rights that are essential to individuals. Particularly, the phrase "personal liberty" includes within it the aspects of autonomy, self-determination and personhood. When the right to health, shelter and education are among the dozens of rights that have been read into this compendious term, very little remains, and which probably ought not to be raised to that standard by way of the indirect acceptance of the word 'privacy'. It would be best to leave the specifics to a case-by-case determination. A list of the rights read in by way of judicial precedent into Article 21 is at **APPENDIX 5** to these submissions.

In addition, it may be relevant to consider that in the decisions where a right to privacy has been specifically considered by this Hon'ble Court, the contexts are extremely limited and does not encompass the entire width of privacy as is being presently canvassed. A list of these cases with their contexts is at **APPENDIX 6** to these submissions.

3.3.2. The legal rights

As correctly submitted by the Petitioners, there are several laws and regulations in place which perceive the necessity to protect the privacy of individuals. These provisions, including the Regulations made under the Aadhaar Act, 2016 itself recognize the right to privacy and acknowledge the fact that it requires protection. However, the legislature in its wisdom has chosen certain specific categories of privacy rights and afforded them statutory security, which includes procedural protections and penal consequences in the event of breaches. A list of 14 of these statutes with their provisions extracted can be found at **APPENDIX 7** to these submissions.

It is of note that even the 271st Report of the Law Commission entitled "Human DNA Profiling" submitted as recently as 26th July 2017 acknowledges the existence of such a right very clearly. In its conclusions while enclosing the DNA Based Technology (Use and Regulation) Bill, 2017, the Commission states:

> "**7.5** The Bill of 2017 provides provisions intended to protect the right to privacy. The mechanism provided permits for processing of DNA samples only for 13 CODIS loci which would not violate in any way the privacy of a person and as a result will never go beyond identification of a particular person. The strict adherence to 13 CODIS loci will eliminate the apprehension of revealing genetic traits."

3.3.3. It is submitted that the residue of the privacy rights that do not at the moment have protection as fundamental rights via judicial dictum or as legal rights by legislation will have to be specifically enunciated and brought forward in a fit case in

order to secure the protection of this Hon'ble Court under Article 21.

3.4. As a result, it is submitted that a careful analysis would be required in specific cases to accord the protection of Article 21 to the various species of privacy rights.

IV. Once so declared, the fundamental right must withstand the established constitutional norms

4.1. WAIVER

4.1.1. It has been well established since the celebrated decision in *Basheshar Nath* v. *CIT*, 1959 Supp (1) SCR 528 that fundamental rights cannot be waived. In fact, the enunciation can be traced back to the following passage from the majority judgment of Chief Justice Mahajan in *Behram Khurshid Pesikaka* v. *State of Bombay*, (1955) 1 SCR 613:

> "Again, we are not able to subscribe to the view that in a criminal prosecution it is open to an accused person to waive his constitutional right and get convicted. A reference to *Cooley's Constitutional Limitations*, Vol. I, p. 371, makes the proposition clear. Therein the learned professor says that a party may consent to waive rights of property, but the trial and punishment for public offences are not within the province of individual consent or agreement. In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should have been raised on the basis of such a theory. The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a

> necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, Articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Articles 20 and 21."

4.1.2. While in *Basheshar Nath*, Justices Bhagwati and Subba Rao adopted the position that no fundamental right could be waived, Justices Das and Kapur restricted that principle only to Article 14. However, in *Olga Tellis* v. *Bombay Municipal* Corporation, (1985) 3 SCC 545 at Paras 27-29, the Constitution Bench applied the principle to Article 21 and the right to dwell on pavements. This position has remained the law of the land till date without any detraction. The relevant Paragraphs of *Olga Tellis* are **APPENDIX 8** to these submissions.

4.1.3. This being the position, if this Hon'ble Court were to hold that the right to privacy *as a whole* were a fundamental right, then it would not be possible to waive any part of it. This would lead to the following complications:

- All the statutory provisions that deal with aspects of privacy as detailed in Appendix 5 would be vulnerable.

- The State would be barred from contractually obtaining virtually any information about a person, including identification, fingerprints, residential address, photographs, employment details, etc., *unless* they were all found to be not a part of the right to privacy.
- The consequence would be that the judiciary would be testing what aspects of privacy could be *excluded* from Article 21 rather than what can be *included* in Article 21.

4.1.4. As a consequence, it is submitted that the best approach would be to recognize that certain aspects of the right to privacy may be a part of Article 21, but that they would be determined on a case by case basis.

4.2. THE ARTICLE 21 TEST

4.2.1. During the arguments before this Hon'ble Court, a question has arisen regarding the test to be applied to a right that emanates from one or more of the fundamental rights and is then located in Article 21.

4.2.2. The opinion of the majority in *Maneka Gandhi* was that the procedure prescribed by law has to be "fair, just and reasonable, not fanciful, oppressive or arbitrary". It was precisely this test that was applied in *Mithu* v. *State of Punjab*, (1983) 2 SCC 277 to strike down Section 303 of the Indian Penal Code [Paras 6 &23 per Chandrachud, CJ and Para 24 per Reddy, J).

4.2.3. It is submitted that merely because privacy is traceable to Articles 14 and 19 of the Constitution does not automatically qualify it to be a fundamental right. This is in fact the view of the majority in *Maneka,* speaking through Bhagwati, J in the following words:

> "**29. ...**It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right.
>
> **33.** We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right."

4.2.4. It is evident therefore that it is only the core (the umbra) of the facilitating unnamed right which would be recognized as protected by Article 21 and not what has been often referred to as the *penumbral* right of privacy.

4.2.5. It is submitted that the concepts of "legitimate State interest" and "compelling State interest" are concepts alien to the Indian constitutional scheme and therefore find no mention within it. It would be inappropriate to place an additional burden on the State by testing whether the State's interest is at all involved – a question that is in fact properly left to the legislature as the people's representative. For example, if, based on military intelligence that enemy incursions are possible at the border, the State enacts law mandating border residents to compulsorily register themselves at the district headquarters, the legitimacy of the State's action ought not to be examined by this Hon'ble Court.

4.2.6. Thus, if and when any aspect of privacy is read into Article 21, the only test that would apply is the one enunciated in *Maneka* and followed till date.

V. The international legal regime is as limited as India (if not more so) in the recognition of a fundamental right to privacy

5.1. It is clear that the American case law has evolved in a completely different context, hailing from a bare bones Constitutional text with a context-specific interpretation emanating from its Supreme Court. The decisions which have touched upon privacy over the last century fall broadly into the few categories of surveillance, search & seizure, bodily autonomy and sexual choice. It is difficult to conclude from these few instances that a wide right to privacy exists in the United States. A table of these American cases along with their categorisation and short notes are at **APPENDIX 9** to these submissions.

5.2. The House of Lords in *Wainwright and another* v. *Home Office* [2003] UKHL 53 was very clear in enunciating that there existed no common law right to privacy and no remedy could be granted in tort. In fact, it was specifically stated that the remedies would lie in other actions (battery, trespass, etc.,) or via statutory remedies provided in the Interception of Communications Act 1985 and Police Act 1997. This is not unlike the Indian context as has been detailed above.

5.3. Care must be taken not to confuse the issue of the right to privacy as a tort as against its existence as a fundamental right. Even the celebrated Harvard article of Warren and Brandeis dealt exclusively with the existence of the private right with no advertence to its public law element.

5.4. It is submitted that the foreign experiences in the context of the right to privacy pale in significance to the robust development of Constitutional law in India. It would be apposite to apply the dicta of the Indian courts which reflect the Indian societal experience rather than to import without a context.

APPENDIX 1: INDIAN CASES ON PRIVACY CITING SHARMA / KHARAK

1. Gobind v. State of M.P., (1975) 2 SCC 148 @Paras 13,15,28 [3 Judges]
2. Malak Singh v. State of P&H, (1981) 1 SCC 420 @Para 5 [2 Judges]
3. Unni Krishnan, J.P. v. State of A.P., (1993) 1 SCC 645 @Para30 [5 Judges]
4. R. Rajagopal v. State of T.N., (1994) 6 SCC 632 @Para 9 [2 Judges]
5. People's Union for Civil Liberties (PUCL) v. UoI, (1997) 1 SCC 301 @Para 12 [2 Judges]
6. Mr. 'X' v. Hospital 'Z' (1998) 8 SCC 296 @Para21 [2 Judges]
7. PUCL v. UoI (2003) 4 SCC 399 @Para 43 [3 Judges]
8. Sharda v. Dharmpal (2003) 4 SCC 493 @Paras 58-60 [3 Judges]
9. Kapila Hingorani v. State of Bihar (2003) 6 SCC 1 @para 57 [2 Judges]
10. People's Union for Civil Liberties v. UoI (2004) 9 SCC 580 @Para 37 [2 Judges]
11. District Registrar and Collector v. Canara Bank (2005) 1 SCC 496 @Paras 36-38 [2 Judges]
12. Directorate of Revenue v. Mohd. Nisar Holia (2008) 2 SCC 370 @Para 15 [2 Judges]
13. Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat (2008) 5 SCC 33 @Para 27 [2 Judges]
14. State of Maharashtra v. Bharat Shanti Lal Shah (2008) 13 SCC 5 @Para 57 [3 Judges]
15. Bhavesh Jayanti Lakhani v. State of Maharashtra (2009) 9 SCC 551 @Paras 102-105 [2 Judges]
16. Bhabani Prasad Jena v. Orissa State Commission for Women (2010) 8 SCC 633 @Para 18 [2 Judges]
17. Ramlila Maidan Incident, In re: (2012) 5 SCC 1 @Paras 310-313 [2 Judges]

18. Suresh Kumar Kaushal v. Naaz Foundation (2014) 1 SCC 1 @Para 70 [2 Judges]
19. Talappalam Service Coop. Bank v. State of Kerala (2013) 16 SCC 82 @Para 57 [2 Judges]
20. Sahara India Real Estate Corp. Ltd. v. SEBI (2012) 10 SCC 603 @Para 3 [5 Judges]

APPENDIX 2: COOPER, GOPALAN & MANEKA

SHAH, J. IN R.C. COOPER [SPEAKING FOR THE MAJORITY OF 10:1]

44. But this Court has held in some cases to be presently noticed that Article 19(1)(f) and Article 31(2) are mutually exclusive.

45. Early in the history of this Court the question of inter-relation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. In A.K. Gopalan v. State of Madras [(1950) SCR 88] a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act, 4 of 1950 applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of the Court (Kania, C.J., and PatanjaliSastri, Mahajan, Mukherjea and Das, JJ.), held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19(1)(d) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than acceding to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to protection of distinct rights.

55. We have found it necessary to examine the rationale of the two lines of authority and determine whether there is anything in the Constitution which justifies this apparently inconsistent development of the law. In our judgment, the assumption in A.K. Gopalan case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct. We hold that the validity of "law" which authorises deprivation of property and "a law" which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. A citizen may claim in an appropriate case that the law authorising compulsory acquisition of property imposes fetters upon his right to hold property which are not reasonable restrictions in the interests of the general public.

It is immaterial that the scope for such challenge may be attenuated because of the nature of the law of acquisition which providing as it does for expropriation of property of the individual for public purpose may be presumed to impose reasonable restrictions in the interests of the general public.

A.K. GOPALAN ON ARTICLE 22 BEING A COMPLETE CODE

KANIA, C.J.

26. The learned Attorney-General contended that the subject of preventive detention does not fall under Article 21 at all and is covered wholly by Article 22. According to him, Article 22 is a complete code. I am unable to accept that contention. It is obvious that in respect of arrest and detention Article 22(1) and (2) provide safeguards. These safeguards are excluded in the case of preventive detention by Article 22(3), but safeguards in connection with such detention are provided by clauses (4) to (7) of the same article. It is therefore clear that Article 21 has to be read as supplemented by Article 22. Reading in that way the proper mode of construction will be that to the extent the procedure is prescribed by Article 22 the same is to be observed; otherwise Article 21 will apply. But if certain procedural safeguards are expressly stated as not required, or specific rules on certain points of procedure are prescribed, it seems improper to interpret these points as not covered by Article 22 and left open for consideration under Article 21. To the extent the points are dealt with, and included or excluded, Article 22 is a complete code. On the points of procedure which expressly or by necessary implication are not dealt with by Article 22, the operation of Article 21 will remain unaffected. It is thus necessary first to look at Article 22(4) to (7) and next at the provisions of the impugned Act to determine if the Act or any of its provisions are ultra vires. It may be noticed that neither the American nor the Japanese Constitution contain provisions permitting preventive detention, much less laying down limitations on such right of detention, in normal times i.e. without a declaration of emergency. Preventive detention in normal times i.e. without the existence of an emergency like war, is recognised as a normal topic of legislation in List I, Entry 9, and List III, Entry 3, of the Seventh Schedule. Even in the Chapter on fundamental rights Article 22 envisages legislation in respect of preventive detention in normal times. The provisions of Article 22(4) to (7) by their very wording leave unaffected the large powers of legislation on this point and emphasize particularly by Article 22(7) the power of Parliament to deprive a person of a right to have his case considered by an Advisory Board. Part III and Article 22 in particular are the only restrictions on that power and but for those provisions the power to legislate on this subject would have been quite unrestricted. Parliament could have made a law without any safeguard or any procedure for preventive detention. Such an autocratic supremacy of the legislature is certainly cut down by Article 21. Therefore, if the legislature prescribes a procedure by a validly enacted law and such procedure in the case of preventive detention does not come in conflict with the express provisions of Part III or

Article 22(4) to (7), the Preventive Detention Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed under such Act.

FAZL ALI, J.

58. To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other. The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d). That there are other instances of overlapping of articles in the Constitution may be illustrated by reference to Article 19(1)(f) and Article 31 both of which deal with the right to property and to some extent overlap each other. It appears that some learned High Court Judges, who had to deal with the very question before us, were greatly impressed by the statement in the report of the Drafting Committee of the Constituent Assembly on Article 15 (corresponding to the present Article 21), that the word "liberty" should be qualified by the insertion of the word "personal" before it for otherwise it may be construed very widely so as to include the freedoms dealt with in Article 13 (corresponding to the present Article 19). I am not however prepared to hold that this statement is decisive on the question of the construction of the words used in Article 19(1)(d) which are quite plain and can be construed without any extraneous help. Whether the report of the Drafting Committee and the debates on the floor of the House should be used at all in construing the words of a statute, which are words of ordinary and common use and are not used in any technical or peculiar sense, is a debatable question; and whether they can be used in aid of a construction which is a strain upon the language used in the clause to be interpreted is a still more doubtful matter. But, apart from these legal considerations, it is, I think, open to us to analyse the statement and see whether it goes beyond adding a somewhat plausible reason — a superficially plausible reason — for a slight verbal change in Article 21. It seems clear that the addition of the word "personal" before "liberty" in Article 21 cannot change the meaning of the words used in Article 19, nor can it put a matter which is inseparably bound up with personal liberty beyond its place. Personal liberty and personal freedom, in spite of the use of the word "personal", are, as we find in several books, sometimes used in a wide sense and embrace freedom of speech, freedom of association etc. These rights are some of the most valuable phases or elements of liberty and they do not cease to be so by the addition of the word "personal". A general statement by the Drafting Committee referring to freedom in plural cannot take the place of an authoritative exposition of the meaning of the words used in Article 19(1)(d), which has not been specifically referred to and cannot be such an overriding consideration as to compel us to put a meaning opposed to reason and authority. The words used in Article 19(1)(d) must be construed as they stand, and we have to decide upon the words themselves whether in

the case of preventive detention the right under Article 19(1)(d) is or is not infringed. But, as I shall point out later, however literally we may construe the words used in Article 19(1)(d) and however restricted may be the meaning we may attribute to those words, there can be no escape from the conclusion that preventive detention is a direct infringement of the right guaranteed in Article 19(1)(d).

SASTRI, J.

133. The question next arises as to how far the protection under Article 21, such as it has been found to be, is available to persons under preventive detention. The learned Attorney-General contended that Article 21 did not apply to preventive detention at all, as Article 22 clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view. The language of Article 21 is perfectly general and covers deprivation of personal liberty or incarceration, both for punitive and preventive reasons. If it was really the intention of the framers of the Constitution to exclude the application of Article 21 to cases of preventive detention, nothing would have been easier than to add a reference to Article 21 in clause (3) of Article 22 which provides that clauses (1) and (2) of the latter shall not apply to any person who is arrested or detained under any law providing for preventive detention. Nor is there anything in the language of clauses (4) to (7) of Article 22 leading necessarily to the inference that Article 21 is inapplicable to preventive detention. These clauses deal only with certain aspects of preventive detention such as the duration of such detention, the constitution of an Advisory Board for reviewing the order of detention in certain cases, the communication of the grounds of detention to the person detained and the provision of an opportunity to him of making a representation against the order. It cannot be said that these provisions form an exhaustive code dealing with all matters relating to preventive detention and cover the entire area of protection which Article 21, interpreted in the sense I have indicated above, would afford to the person detained. I am, therefore, of opinion that Article 21 is applicable to preventive detention as well.

MAHAJAN, J. (AGREEING WITH THE ATTORNEY GENERAL)

153. Having examined the provisions of Article 22, I now proceed to consider the first question that was canvassed before us by the learned Attorney-General i.e. that Article 22 of the Constitution read with the entries in the 7th Schedule was a complete Code on the subject of preventive detention, and that being so, the other articles of Part III could not be invoked in the consideration of the validity of the impugned statute. It was conceded by the learned counsel for the petitioner that to the extent that express provisions exist in Article 22 on the topic of preventive detention those provisions would prevail and could not be controlled by the other provisions of Part III. It was, however, urged that on matters on which this article had made no special provision on this topic the other provisions of Part III of the Constitution had application, namely, Articles 19 and 21 and to that extent laws made on this subject were justiciable. In order to draw the inference that the framers of the

Constitution intended the provisions as regards preventive detention in Article 22 to be self-contained a clear indication of such an intention has to be gathered. If the provisions embodied in this article have dealt with all the principal questions that are likely to arise in matters of procedure or on questions of the reasonableness of the period of detention, the inference of such an indication would be irresistible. Ordinarily when a subject is expressly dealt with in a constitution in some detail, it has to be assumed that the intention was to exclude the application of the general provisions contained therein elsewhere. Express mention of one thing is an exclusion of the other. Expressiouniusestexclusioalterius. I am satisfied on a review of the whole scheme of the Constitution that the intention was to make Article 22 self-contained in respect of the laws on the subject of preventive detention. It was contended that all the articles in the Constitution should be read in an harmonious manner and one article should not be read as standing by itself and as having no connection with the other articles in the same part. It was said that they were all supplementary to one another. In this connection it was argued that a law made under Article 22 would not be valid unless it was in accord with the provisions of Article 21 of the Constitution. This article provides that no person shall be deprived of life or liberty except according to procedure established by law. It was contended that in substance the article laid down that no person will be deprived of life or liberty without having been given a fair trial or a fair hearing and that unless a law of preventive detention provided such a hearing that law would be in contravention of this article and thus void. Conceding for the sake of argument (but without expressing any opinion on it) that this contention of the learned counsel is correct, the question arises whether there is anything in Article 22 which negatives the application of Article 21 as above construed to a law on preventive detention. In my opinion, sub-clause (5) of Article 22 read with clauses (1) and (2) leads to the inference that the contention raised by the learned counsel is unsound. Clause (5), as already stated, provides that notice has to be given to a detenu of the grounds of his detention. It also provides a limited hearing inasmuch as it gives him an opportunity to establish his innocence. As, in my opinion, the consideration of a representation made by a detained person by an unbiassed authority is implicit in clause (5), it gives to the detained person all that he is entitled to under the principles of natural justice. The right to consult and to be represented by a counsel of his own choice has been denied in express terms to such a person by the Constitution. He is also denied an opportunity of appearing before a Magistrate. When the Constitution has taken away certain rights that ordinarily will be possessed by a detained person and in substitution thereof certain other rights have been conferred on him even in the matter of procedure, the inference is clear that the intention was to deprive such a person of the right of an elaborate procedure usually provided for in judicial proceedings. Clause (6) of Article 22 very strongly supports this conclusion. There would have been no point in laying down such detailed rules of procedure in respect of a law of preventive detention if the intention was that such a law would be subject to the provisions of Article 21 of the Constitution. In its ultimate analysis the argument of the learned counsel for the petitioner resolves itself to this: that the impugned statute does not provide for an impartial tribunal for a consideration of the representation of the detained

person and to this extent it contravenes Article 21 of the Constitution. As discussed above, in my opinion, such a provision is implicit within Article 22 itself and that being so, the application of Article 21 to a law made under Article 22 is excluded.

MUKHEREA (NOT ANSWERING THE QUESTION)

227. In the view that I have taken, the question raised by MrNambiar that the Preventive Detention Act is invalid, by reason of the fact that the procedure it lays down is not in conformity with the rules of natural justice, does not fall for consideration. It is enough, in my opinion, if the law is a valid law which the legislature is competent to pass and which does not transgress any of the fundamental rights declared in Part III of the Constitution. It is also unnecessary to enter into a discussion on the question raised by the learned Attorney-General as to whether Article 22 by itself is a self-contained Code with regard to the law of preventive detention and whether or not the procedure it lays down is exhaustive. Even if the procedure is not exhaustive, it is not permissible to supplement it by application of the rules of natural justice.

DAS, J.

291. The learned Attorney-General, on the other hand has at one stage of his argument, urged that Article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by Article 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also. The true position, as I apprehend it, lies between the two extreme views. Article 21, to my mind, gives protection to life and personal liberty to the extent therein mentioned. It does not recognise the right to life and personal liberty as an absolute right but delimits the ambit and scope of the right itself. The absolute right is by the definition in that article cut down by the risk of its being taken away in accordance with procedure established by law. It is this circumscribed right which is substantively protected by Article 21 as against the executive as well as the legislature, for the Constitution has conditioned its deprivation by the necessity for a procedure established by law made by itself. While sub-clauses (2) to (6) of Article 19 have put a limit on the fundamental rights of a citizen, Articles 21 and 22 have put a limit on the power of the State given under Article 246 read with the Legislative Lists. Under our Constitution our life and personal liberty are balanced by restrictions on the rights of the citizens as laid down in Article 19 and by the checks put upon the State by Articles 21 and 22 preventive detention deprives a person of his personal liberty as effectively as does punitive detention and, therefore, personal liberty, circumscribed as it is by the risk of its being taken away, requires protection against punitive as well as preventive detention. The language of Article 21 is quite general and is wide enough to give its limited protection to personal liberty against all forms of detention. It protects a person against preventive detention by the executive without the sanction of a law made by the legislature. It prevents the legislature from taking away a person's personal liberty except in accordance with procedure established by law, although such law is to be by itself. If, as contended by the learned Attorney-General and held by me, Article 19 only protects the

rights of a free citizen as long as he is free and does not deal with total deprivation of personal liberty and if, as contended by the learned Attorney-General, Article 21 does not protect a person against preventive detention then where is the protection for life and personal liberty as substantive rights which the procedural provisions of Article 22 may protect? What is the use of procedural protection if there is no substantive right? In my judgment Article 21 protects the substantive rights by requiring a procedure and Article 22 gives the minimum procedural protection.

292. Clauses (1) and (2) of Article 22 lay down the procedure that has to be followed when a man is arrested. They ensure four things: (a) right to be informed regarding grounds of arrest, (b) right to consult, and to be defended by, a legal practitioner of his choice, (c) right to be produced before a Magistrate within 24 hours and (d) freedom from detention beyond the said period except by order of the Magistrate. These four procedural requirements are very much similar to the requirements of the procedural due process of law as enumerated by Willis. Some of these salutary protections are also to be found in our Code of Criminal Procedure. If the procedure has already been prescribed by Article 21 incorporating the principles of natural justice or the principles underlying our Code of Criminal Procedure what was the necessity of repeating them in clauses (1) and (2) of Article 22? Why this unnecessary overlapping? The truth is that Article 21 does not prescribe any particular procedure but in defining the protection to life and personal liberty merely envisages or indicates the necessity for a procedure and Article 22 lays down the minimum rules of procedure that even Parliament cannot abrogate or overlook. This is so far as punitive detention is concerned. But clause (3) of Article 22 expressly provides that none of the procedure laid down in clauses (1) and (2) shall apply to an alien enemy or to a person who is arrested or detained under any law providing for preventive detention. It is thus expressly made clear that a detenu need not be produced before the Magistrate and he is not to have the assistance of any lawyer for consultation or for defending him. Such being the express provision of our Constitution nobody can question its wisdom. So I pass on.

293. Clauses (4), (5), (6) and (7) of Article 22 in terms relate to preventive detention. Article 246 authorises the appropriate legislature to make a law for preventive detention in terms of Entry 9 in List I and/or Entry 3 in List III of the Seventh Schedule. On this legislative power are imposed certain limitations by Article 22(4) to (7). According to this the legislature, whether it be Parliament or a State Legislature, is reminded that no law made by it for preventive detention shall authorise the detention of a person for a longer period than three months except in two cases mentioned in sub-clauses (a) and (b). The proviso to sub-clause (a) and sub-clause (b) refer to a law made only by Parliament under clause (7). Under clause (7) it is Parliament alone and not any State Legislature that may prescribe what are specified in the three sub-clauses of that clause. Although a State Legislature may make a law for preventive detention in terms of Entry 3 in List III of the Seventh Schedule no such law may authorise detention for more than three months unless the provisions of sub-clauses (a) and (b) of clause (4) sanction such detention. Even a law

made by Parliament cannot authorise detention for more than three months unless it is a law made under the provisions of clause (7). In short, clause (4) of Article 22 provides a limitation on the legislative power as to the period of preventive detention. Apart from imposing a limitation on the legislative power, clause (4) also prescribes a procedure of detention for a period longer than three months by providing for an Advisory Board. Then comes clause (5). It lays down the procedure that has to be followed when a person is detained under any law providing for preventive detention, namely, (a) the grounds of the order of detention must be communicated to the detenu as soon as may be, and (b) the detenu must be afforded the earliest opportunity of making a representation against the order. The first requirement takes the place of notice and the second that of a defence or hearing. These are the only compulsory procedural requirements laid down by our Constitution. There is nothing to prevent the legislature from providing an elaborate procedure regulating preventive detention but it is not obliged to do so. If some procedure is provided as envisaged by Article 21 and the compulsory requirements of Article 22 are obeyed and carried out nobody can, under our Constitution, as I read it, complain of the law providing for preventive detention.

MANEKA GANDHI

Bhagwati, J.

5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in A.K. Gopalan v. State of Madras [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the

majority and explained their position in the following words: “No doubt the expression ‘personal liberty’ is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression ‘personal liberty’ in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.” There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the Full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to the protection of distinct rights, but this theory was overturned in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] where Shah, J., speaking on behalf of the majority pointed out that “Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights.”The conclusion was summarised in these terms : “In our judgment, the assumption in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] that certain articles in the Constitution exclusively deal with specific matters — cannot be accepted as correct”. It was held in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] — and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., PatanjaliSastri, J., Mahajan, J., Mukherjea, J., and S.R. Das, J., in A.K. Gopalan case — that even where a person is detained in accordance with the procedure prescribed by law, as mandated be Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1).This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21

having to meet the challenge of a fundamental right under Article 19(1)….[I]t was held by a Bench of seven Judges of this Court in Shambhu Nath Sarkar v. State of West Bengal [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] that such a law would have to satisfy the requirement inter alia of Article 19(1), clause (d) and in Haradhan Saha v. State of West Bengal [(1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778] which was a decision given by a Bench of five Judges, this Court considered the challenge of clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression "personal liberty" as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in so many terms in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court in Satwant Singh case [AIR 1967 SC 1836 : (1967) 3 SCR 525 : (1968) 1 SCJ 178] that "personal liberty" within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh case [AIR 1967 SC 1836 : (1967) 3 SCR 525 : (1968) 1 SCJ 178] was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means "enacted law" or "state law" (vide A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383]). Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with

the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that it lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney-General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazl Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willis' book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law". Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

The inter-relationship between Articles 14, 19 and 21

6. We may at this stage consider the inter-relation between Article 21 on the one hand and Articles 14 and 19 on the other. We have already pointed out that the view taken by the majority in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] was that so long as a law of preventive detention satisfies the requirements of Article 22, it would be within the terms of Article 21 and it would not be required to meet the challenge of Article 19. This view proceeded on the assumption that "certain articles in the Constitution exclusively deal with specific matters" and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that article, no recourse can be had to a fundamental right conferred by another article. This doctrine of exclusivity was seriously questioned in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] and it was over-ruled by a majority of

the full Court, only Ray, J., as he then was, dissenting. The majority Judges held that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven Judges of this Court in Shambhu Nath Sarkar v. State of West Bengal [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] . The learned Judge there said (SCC p. 879):

> *"In Gopalan case [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] the majority court had held that Article 22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and 21. The view of Fazl Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(1)(d) and that a law providing for preventive detention had to be subject to such judicial review as is obtained under clause (5) of that article. In R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the aforesaid premise of the majority in Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] was disapproved and therefore it no longer holds the field. Though Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] to be incorrect."*

Subsequently, in Haradhan Saha v. State of West Bengal [(1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778] also, a Bench of five Judges of this Court, after referring to the decisions in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] and R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] agreed that the Maintenance of Internal Security Act, 1971, which is a law of preventive detention, has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] and Shambhu Nath Sarkar case [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] and proceeded to consider the challenge of Article 19, to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that the Act did not violate any of the constitutional guarantees enshrined in Article 19. The same view was affirmed once again by a Bench of four Judges of this Court in Khudiram Das v. State of West Bengal [(1975) 2 SCC 81 : 1975 SCC (Cri) 435 : (1975) 2 SCR 832] . Interestingly, even prior to these decisions, as pointed out by Dr Rajeev Dhavan, in his book, The Supreme Court of India at p. 235, reference was made by this Court in Mohd. Sabir v. State of Jammu and Kashmir [(1972) 4 SCC 558 : 1971 Cri LJ 1271] to Article 19(2) to justify preventive detention. The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a

law prescribing a procedure for depriving a person of "personal liberty" and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] , Shambhu Nath Sarkar case [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] and Haradhan Saha case [(1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778] Now, if a law depriving a person of "personal liberty" and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex-hypothesi it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney-General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, State of West Bengal v. Anwar Ali Sarkar [AIR 1952 SC 75 : 1952 SCR 284 : 1952 Cri LJ 510] and KathiRaningRawat v. State of Saurashtra [AIR 1952 SC 123 : 1952 SCR 435 : 1952 Cri LJ 805] where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, KathiRaningRawat case [AIR 1952 SC 123 : 1952 SCR 435 : 1952 Cri LJ 805] he validity was upheld and in the other, namely, Anwar Ali Sarkar case [AIR 1952 SC 75 : 1952 SCR 284 : 1952 Cri LJ 510] it was struck down. It was held in both these cases that the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14.

…

29. Now, it may be pointed out at the outset that it is not our view that a right which is not specifically mentioned by name can never be a fundamental right within the meaning of Article 19(1). It is possible that a right does not find express mention in any clause of Article 19(1) and yet it may be covered by some clause of that article. Take for example, by way of illustration, freedom of the press. …Thus freedom of the press constitutes one of the pillars of democracy and indeed lies at the foundation of democratic organisation and yet it

is not enumerated in so many terms as a fundamental right in Article 19(1), though there is a view held by some constitutional jurists that this freedom is too basic and fundamental not to receive express mention in Part III of the Constitution. But it has been held by this Court in several decisions, of which we may mention only three, namely, Express Newspapers case, Sakal Newspapers case and Bennett Coleman & Co. case, that freedom of the press is part of the right of free speech and expression and is covered by Article 19(1)(a). The reason is that freedom of the press is nothing but an aspect of freedom of speech and expression. It partakes of the same basic nature and character and is indeed an integral part of free speech and expression and perhaps it would not be incorrect to say that it is the same right applicable in relation to the press. …It would thus be seen that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is, the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression. …Freedom of movement at home and abroad is a part of our heritage and, as already pointed out, it is a highly cherished right essential to the growth and development of the human personality and its importance cannot be over-emphasised. But it cannot be said to be part of the right of free speech and expression. It is not of the same basic nature and character as freedom of speech and expression. When a person goes abroad, he may do so for a variety of reasons and it may not necessarily and always be for exercise of freedom of speech and expression. Every travel abroad is not an exercise of right of free speech and expression and it would not be correct to say that whenever there is a restriction on the right to go abroad, ex necessitae it involves violation of freedom of speech and expression. It is no doubt true that going abroad may be necessary in a given case for exercise of freedom of speech and expression, but that does not make it an integral part of the right of free speech and expression. Every activity that may be necessary for exercise of freedom of speech and expression or that may facilitate

such exercise or make it meaningful and effective cannot be elevated to the status of a fundamental right as if it were part of the fundamental right of free speech and expression. Otherwise, practically every activity would become part of some fundamental right or the other and the object of making certain rights only as fundamental rights with different permissible restrictions would be frustrated.

...

33. We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right. This much is clear as a matter of plain construction, but apart from that, there is a decision of this Court which clearly and in so many terms supports this conclusion. That is the decision in All-India Bank Employees' Association v. National Industrial Tribunal [(1962) 3 SCR 269 : AIR 1962 SC 171 : (1961) 2 LLJ 385 : 21 FJR 63 : (1962) 32 Com Cas 414] . The legislation which was challenged in that case was Section 34-A of the Banking Companies Act and it was assailed as violative of Article 19(1)(c). The effect of Section 34-A was that no tribunal could compel the production and inspection of any books of account or other documents or require a bank to furnish or disclose any statement or information if the Banking Company claimed such document or statement or information to be of a confidential nature relating to secret reserves or to provision for bad and doubtful debts. If a dispute was pending and a question was raised whether any amount from the reserves or other provisions should be taken into account by a tribunal, the tribunal could refer the matter to Reserve Bank of India whose certificate as to the amount which could be taken into account, was made final and conclusive. Now, it was conceded that Section 34-A did not prevent the workmen from forming unions or place any impediments in their doing so, but it was contended that the right to form association protected under Article 19(1)(c) carried with it a guarantee that the association shall effectively achieve the purpose for which it was formed without interference by law except on grounds relevant to the preservation of public order or morality set out in Article 19(4). In other words, the argument was that the freedom to form unions carried with it the concomitant right that such unions should be able to fulfil the object for which they were formed. This argument was negatived by a unanimous Bench of this Court. The Court said that unions were not restricted to workmen, that employers' unions may be formed in order to earn profit and that a guarantee for the effective functioning of the unions would lead to the conclusion that restrictions on their right to earn profit could be put only in the interests of public order or morality. Such a construction would run basically counter to the scheme of Article 19 and to the provisions of Article 19(1)(c) and (6). The restrictions which could be imposed on the right to form an association were limited to restrictions in the interest of public order and morality. The restrictions which could be imposed on the

right to carry on any trade, business, profession or calling were reasonable restrictions in the public interest and if the guarantee for the effective functioning of an association was a part of the right, then restrictions could not be imposed in the public interest on the business of an association. Again, an association of workmen may claim the right of collective bargaining and the right to strike, yet the right to strike could not by implication be treated as part of the right to form association, for, if it were so treated, it would not be possible to put restrictions on that right in the public interest as is done by the Industrial Disputes Act, which restrictions would be permissible under Article 19(6), but not under Article 19(4). The Court, therefore, held that the right to form unions guaranteed by Article 19(1)(c) does not carry with it a concomitant right that the unions so formed should be able to achieve the purpose for which they are brought into existence, so that any interference with such achievement by law would be unconstitutional unless the same could be justified under Article 19(4).

34. The right to go abroad cannot, therefore, be regarded as included in freedom of speech and expression guaranteed under Article 19(1)(a) on the theory of peripheral or concomitant right. This theory has been firmly rejected in the All-India Bank Employees Association case and we cannot countenance any attempt to revive it, as that would completely upset the scheme of Article 19(1) and to quote the words of RajagopalAyyanger, J., speaking on behalf of the Court in All-India Bank Employees Association case "by a series of ever-expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result". So also, for the same reasons, the right to go abroad cannot be treated as part of the right to carry on trade, business, profession or calling guaranteed under Article 19(1)(g). The right to go abroad is clearly not a guaranteed right under any clause of Article 19(1) and Section 10(3)(c) which authorises imposition of restrictions on the right to go abroad by impounding of passport cannot be held to be void as offending Article 19(1)(a) or (g), as its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade, business, profession or calling.

35. But that does not mean that an order made under Section 10(3)(c) may not violate Article 19(1)(a) or (g). While discussing the constitutional validity of the impugned order impounding the passport of the petitioner, we shall have occasion to point out that even where a statutory provision empowering an authority to take action is constitutionally valid, action taken under it may offend a fundamental right and in that event, though the statutory provision is valid, the action may be void. Therefore, even though Section 10(3)(c) is valid, the question would always remain whether an order made under it is invalid as contravening a fundamental right. The direct and inevitable effect of an order impounding a passport may, in a given case, be to abridge or take away freedom of speech and expression or the right to carry on a profession and where such is the case, the order

would be invalid, unless saved by Article 19(2) or Article 19(6). Take for example, a pilot with international flying licence. International flying is his profession and if his passport is impounded, it would directly interfere with his right to carry on his profession and unless the order can be justified on the ground of public interest under Article 19(6), it would be void as offending Article 19(1)(g). Another example may be taken of an evangelist who has made it a mission of his life to preach his faith to people all over the world and for that purpose, sets up institutions in different countries. If an order is made impounding his passport, it would directly affect his freedom of speech and expression and the challenge to the validity of the order under Article 19(1)(a) would be unanswerable unless it is saved by Article 19(2). We have taken these two examples only by way of illustration. There may be many such cases where the restriction imposed is apparently only on the right to go abroad but the direct and inevitable consequence is to interfere with the freedom of speech and expression or the right to carry on a profession. A musician may want to go abroad to sing, a dancer to dance, a rising professor to teach and a scholar to participate in a conference or seminar. If in such a case his passport is denied or impounded, it would directly interfere with his freedom of speech and expression. If a correspondent of a newspaper is given a foreign assignment and he is refused passport or his passport is impounded, it would be direct interference with his freedom to carry on his profession. Examples can be multiplied, but the point of the matter is that though the right to go abroad is not a fundamental right, the denial of the right to go abroad may, in truth and in effect, restrict freedom of speech and expression or freedom to carry on a profession so as to contravence Article 19(1)(a) or 19(1)(g). In such a case, refusal or impounding of passport would be invalid unless it is justified under Article 19(2) or Article 19(6), as the case may be. …

…

37. But we do not think that the impugned Order in the present case violates either Article 19(1)(a) or Article 19(1)(g). What the impugned Order does is to impound the passport of the petitioner and thereby prevent her from going abroad and at the date when the impugned Order was madethere is nothing to show that the petitioner was intending to go abroad for the purpose of exercising her freedom of speech and expression or her right to carry on her profession as a journalist. The direct and inevitable consequence of the impugned Order was to impede the exercise of her right to go abroad and not to interfere with her freedom of speech and expression or her right to carry on her profession. But we must hasten to point out that if at any time in the future the petitioner wants to go abroad for the purpose of exercising her freedom of speech and expression or for carrying on her profession as a journalist and she applies to the Central Government to release the passport, the question would definitely arise whether the refusal to release or in other words, continuance of the impounding of the passport is in the interests of public order, decency or morality in the first case, and in the interests of the general public in the second,

and the restriction thus imposed is reasonable so as to come within the protection of Article 19(2) or Article 19(6). That is, however, not the question before us at present.

Chandrachud, J.:

48. But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19.

Kailasam, J.:

158. It may also be noted that as the Court ruled that the impugned Act violated Article 31(2) by not laying down the necessary principles, the decision of the interrelationship between Articles 19(1)(*f*) and 31(2) was not strictly necessary for the purpose of giving relief to the petitioner. We are not concerned in this case as to whether the decision in *Bank Nationalisation case* is in the nature of obiter dicta so far as it held that Articles 19(1) and 31(2) are interrelated. But it is necessary to state that the decision proceeded on some erroneous assumptions. At p. 571 of *Bank Nationalisation case* it was assumed : "The majority of the Court (Kania, C.J. and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.) held that Article 22 being a complete code relating to preventive detention the validity of an order of detention must be determined strictly according to the terms and within the four corners of that article." This statement is not borne out from the text of the judgments in *Gopalan case*. At p. 115 of *Gopalan case* Kania, C.J. has stated : "The learned Attorney-General contended that the subject of preventive detention does not fall under Article 21 at all and is covered wholly by Article 22. According to him, Article 22 is a complete code. I am unable to accept that contention." Patanjali Sastri, J. at p. 207 of the judgment said : "The learned Attorney-General contended that Article 21 did not apply to preventive detention at all, as Article 22, clauses (4) to (7) formed a complete code of constitutional safeguards in respect of preventive detention, and, provided only these provisions are conformed to, the validity of any law relating to preventive detention could not be challenged. I am unable to agree with this view." Das, J. in referring to the Attorney-General's argument at p. 324 stated "that Article 21 has nothing to do with preventive detention at all and that preventive detention is wholly covered by Article 22(4) to (7) which by themselves constitute a complete code. I am unable to accede to this extreme point of view also". Mukherjea, J. at p. 279 of that judgment observed : "It is also unnecessary to enter into a discussion on the question raised by the learned Attorney-General as to whether Article 22 by itself is a self-contained Code with regard to the law of preventive detention and whether or not the procedure it lays down is exhaustive." Justice Mahajan at p. 226 held that "I am satisfied on a review of the whole

scheme of the Constitution that the intention was to make Article 22 self-contained in respect of the laws on the subject of preventive detention." It is thus seen that the assumption in *Bank Nationalisation case* that the majority of the Court held that Article 22 is a complete code is erroneous and the basis of the decision stands shaken. If the obiter dicta based on the wrong assumption is to be taken as the correct position in law, it would lead to strange results. If Article 19(1)(*a*) to (*e*) and (*g*) are attracted in the case of deprivation of personal liberty under Article 21, a punitive detention for an offence committed under the Indian Penal Code such as theft, cheating or assault would be illegal as pointed out in *Gopalan case* by Kania, CJ. and Patanjali Sastri, J. for the reasonable restriction in the interest of public order would not cover the offences mentioned above. As held in *Gopalan case* and in *Saha case* there can be no distinction between punitive detention under the Penal Code and preventive detention. As pointed out earlier even though Fazl Ali, J. dissented in *Gopalan case* the same view was expressed by His Lordship so far as punitive detention was concerned. He said : "The Indian Penal Code does not primarily or necessarily impose restrictions on the freedom of movement and it is not correct to say that it is a law imposing restrictions on the right to move freely." The conclusion that Article 19(1) and Article 21 were mutually exclusive was arrived at on an interpretation of language of Article 19(1)(*d*) read with Article 19(5) and not on the basis that Articles 19(1) and 21 are exclusive and Article 21 is a complete code. The words "personal liberty" based on the Draft Committee report on Article 15 (now Article 21) was added to the word "personal" before the word "liberty" with the observation that the word "liberty" should be qualified by the word "personal" before it for otherwise it may be construed very wide so as to include even the freedoms already dealt with in Article 13 (now Article 19). In *Gopalan case* it was also pointed out by the Judges that Articles 19(1) and 21 did not operate on the same field as Articles 19(1) and 31(2) of the Constitution. The right under Article 21 is different and does not include the rights that are covered under Article 19. Article 19(1) confers substantive right as mentioned in clauses (*a*) to (*g*) on citizen alone and does not include the right of personal liberty covered in Article 21. For the reasons stated above obiter dicta in *Bank Nationalisation case* that a legislation under Article 21 should also satisfy the requirements of Article 19(1) cannot be taken as correct law. The Court has not considered the reasoning in *Gopalan case* and overruled it.

APPENDIX 3: 1950-1970 (NO COMPLETE CODE PRINCIPLE APPLIED)

No.	Judgement	Articles considered
1.	Charanjit Lal Chowdhury v. Union of India, 1950 SCR 869	14, 19(1)(f), 31
2.	State of Bombay v. F.N.Balsara, 1951 SCR 682	14, 19(1)(g)
3.	State of Bihar v. Kameshwar Singh, 1952 SCR 889	14, 19(1)(f), 31
4.	D.K. Nabhirajiah v. State of Mysore, 1952 SCR 744	14, 19(1)(f), 31
5.	State of Punjab v. Ajaib Singh, 1953 SCR 254	14, 19, 22
6.	Harman Singh v. RTA, Calcutta Region, 1954 SCR 371	14, 19(1)(g),
7.	Raja Kulkarni v. State of Bombay, 1954 SCR 384	14, 19(1)(a) & (c)
8.	Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co., 1954 SCR 674	14, 19, 31
9.	M.B. Cotton Assn. Ltd. v. Union of India, AIR 1954 SC 634	14, 19(1)(g)
10.	Saghir Ahmad v. State of U.P., (1955) 1 SCR 707	14, 19(1)(g)
11.	Sakhawat Ali v. State of Orissa, (1955) 1 SCR 1004	14, 19(1)(g)
12.	Hans Muller of Nuremberg v. Supdt., Presidency Jail, Calcutta, (1955) 1 SCR 1284	14, 21, 22
13.	Thakur Amar Singhji v. State of Rajasthan, (1955) 2 SCR 303 : AIR 1955 SC 504	14, 19
14.	Kishan Singh v. State of Rajasthan, (1955) 2 SCR 531	14, 19(1)(f), 31
15.	Tika Ramji v. State of U.P., 1956 SCR 393	14, 19, 31
16.	Pannalal Binjraj v. Union of India, 1957 SCR 233	14, 19
17.	Niemla Textile Finishing Mills Ltd. v. Second Punjab Tribunal, 1957 SCR 335	14, 19
18.	Sardar Inder Singh v. State of Rajasthan, 1957 SCR 605	14, 19
19.	P. Balakotaiah v. Union of India, 1958 SCR 1052	14, 19
20.	Express Newspaper (P) Ltd. v. Union of India, 1959 SCR 12	14, 19(1)(a), 19(1)(g)
21.	Mohd. Hanif Quareshi v. State of Bihar, 1959 SCR 629	14, 19(1)(g)
22.	Basheshar Nath v. CIT, 1959 Supp (1) SCR 528	14, 19
23.	P.V. Sivarajan v. Union of India, 1959 Supp (1) SCR 779	14, 19

24.	Mahant Moti Das v. S.P. Sahi, 1959 Supp (2) SCR 563	14, 19, 25, 26
25.	Lord Krishna Sugar Mills Ltd. v. Union of India, (1960) 1 SCR 39	14, 19
26.	Narendra Kumar v. Union of India, (1960) 2 SCR 375	14, 19
27.	Hamdard Dawakhana v. Union of India, (1960) 2 SCR 671	14, 19
28.	Parbhani Transport Coop. Society Ltd. v. Regional Transport Authority, (1960) 3 SCR 177	14, 19
29.	In re Sant Ram v., (1960) 3 SCR 499	14, 21
30.	Hathising Manufacturing Co. Ltd. v. Union of India, (1960) 3 SCR 528	14, 19
31.	K.K. Kochuni v. States of Madras and Kerala, (1960) 3 SCR 887	14, 19, 31
32.	Akadasi Padhan v. State of Orissa, 1963 Supp (2) SCR 691: AIR 1963 SC 1047	19(1)(f), 19(1)(g)
33.	Rashbihari Panda v. State of Orissa, (1969) 1 SCC 414	19(1)(g), 14
34.	State of U.P. v. Kaushailiya, (1964) 4 SCR 1002: AIR 1964 SC 416	19(1)(d), 19(1)(e), 14
35.	Nazeria Motor Service v. State of A.P., (1969) 2 SCC 576	19(1)(g), 14
36.	Ram Bux Chaturbhuj v. State of Rajasthan, AIR 1963 SC 351	19(1)(g), 14
37.	N.S. Gujral v. Custodian of Evacuee Property, (1968) 1 SCR 497: AIR 1968 SC 457	19(1)(f), 14
38.	India Bank Employees' Assn. v. National Industrial Tribunal, (1962) 3 SCR 269: AIR 1962 SC 171	19(1)(c), 14
39.	Balaji v. ITO, (1962) 2 SCR 983: AIR 1962 SC 123	19(1)(f), 19(1)(g)
40.	Raja Jagannath Baksh Singh v. State of U.P., (1963) 1 SCR 220: AIR 1962 SC 1563	19(1)(f), 14
41.	Parbhani Transport Coop. Society Ltd. v. Regional Transport Authority, (1960) 3 SCR 177: AIR 1960 SC 801	19(1)(g), 14
42.	British India Corpn. Ltd. v. CCE, (1963) 3 SCR 642 : AIR 1963 SC 104	14, 19(1)(f), 31
43.	Steelsworth Ltd. v. State of Assam, 1962 Supp (2) SCR 589	19(1)(f), 14
44.	Jyoti Pershad v. Administrator for Union Territory of Delhi, (1962) 2 SCR 125: AIR 1961 SC 1602	19(1)(f), 14
45.	Lachhman Dass v. State of Punjab, (1963) 2 SCR 353 : AIR 1963 SC 222	19(1)(f), 19(1)(g), 14
46.	Hathising Manufacturing Co. Ltd. v. Union of India, (1960) 3 SCR 528 :	14, 19(1)(g), 20

	AIR 1960 SC 923	
47.	J.Y. Kondala Rao v. A.P. State Road Transport Corpn., (1961) 1 SCR 642: AIR 1961 SC 82	19(1)(g), 14
48.	Swami Motor Transports (P) Ltd. v. Sri Sankaraswamigal Mutt, 1963 Supp (1) SCR 282 : AIR 1963 SC 864	19(1)(f), 14
49.	Glass Chatons Importers & Users' Assn. v. Union of India, (1962) 1 SCR 862 : AIR 1961 SC 1514	14, 31
50.	Bhau Ram v. Baij Nath Singh, 1962 Supp (3) SCR 724 : AIR 1962 SC 1476	19(1)(f), 14
51.	Khyerbari Tea Co. v. State of Assam, (1964) 5 SCR 975 : AIR 1964 SC 925	19(1)(f), 14
52.	Kunnathat Thatehunni Moopil Nair v. State of Kerala, (1961) 3 SCR 77 : AIR 1961 SC 552	19(1)(f), 14
53.	State of W.B. v. Naba Kumar Seal, (1961) 1 SCR 368 : AIR 1961 SC 16	19(1)(f), 14
54.	Raghubar Dayal Jai Parkash v. Union of India, (1962) 3 SCR 547 : AIR 1962 SC 263	14, 19(1)(f), 19(1)(g)
55.	Khajamian Wakf Estates v. State of Madras, (1970) 3 SCC 894	14, 19, 26, 31
56.	Customs v. Nathella Sampathu Chetty, (1962) 3 SCR 786 : AIR 1962 SC 316	19(1)(f), 19(1)(g)
57.	Khem Chand v. Union of India, 1963 Supp (1) SCR 229 : AIR 1963 SC 687	19(1)(f), 14
59.	Bhikusa Yamasa Kshatriya v. Sangamner Akola Taluka Bidi Kamgar Union, 1963 Supp (1) SCR 524 : AIR 1963 SC 806	19(1)(f), 14
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66.	S.P. Jinadathappa v. R.P. Sharma, (1962) 2 SCR 22 : AIR 1961 SC 1523	14, 19(1)(f)
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70.	Epari Chinna Krishna Moorthy v. State of Orissa, (1964) 7 SCR 185 : AIR 1964 SC 1581	14, 19(1)(g)
71.	V.S. Rice and Oil Mills v. State of A.P., (1964) 7 SCR 456 : AIR 1964 SC 1781	14, 19(1)(f), 19(1)(g)
72.	Raja Bira Kishore Deb v. State of Orissa, (1964) 7 SCR 32 : AIR 1964 SC 1501	14, 19(1)(f)
73.	Navnit Lal C. Javeri v. K.K. Sen, (1965) 1 SCR 909 : AIR 1965 SC 1375	19(1)(f), 19(1)(g)
74.	Ramchand Jagdish Chand v. Union of India, (1962) 3 SCR 72 : AIR 1963 SC 563	14, 19(1)(g)
75.	Mannalal Jain v. State of Assam, (1962) 3 SCR 936 : AIR 1962 SC 386	14, 19(1)(f), 19(1)(g)
76.	Gujarat Pottery Works v. B.P. Sood, (1967) 1 SCR 695 : AIR 1967 SC 964	14, 19(1)(f), 31
77.	Joseph Kuruvilla Vellukunnel v. Reserve Bank of India, 1962 Supp (3) SCR 632 : AIR 1962 SC 1371	14, 19(1)(f), 19(1)(g)
78.	Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, (1964) 6 SCR 594 : AIR 1964 SC 1140	14, 19, 31
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83.	Madhubhai Amathalal Gandhi v. Union of India, (1961) 1 SCR 191 : AIR 1961 SC 21	14, 19(1)(g)
84.	R.L. Arora v. State of U.P., (1964) 6 SCR 784: AIR 1964 SC 1230	14, 31

85.	Somawanti v. State of Punjab, (1963) 2 SCR 774: AIR 1963 SC 151	14, 19(1)(f)
86.	State of Gujarat v. Shantilal Mangaldas, (1969) 1 SCC 509	14, 19(1)(f), 31
87.	A.P. Grain and Seed Merchants Assn. v. Union of India, (1970) 2 SCC 71	14, 19(1)(g), 20(3)
88.	K.L. Gupte v. Municipal Corpn. of Greater Bombay, (1968) 1 SCR 274 : AIR 1968 SC 303	14, 19(1)(f), 19(1)(g), 31
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90.	Maharana Jayvantsinghji Ranmalsinghji v. State of Gujarat, 1962 Supp (2) SCR 411 : AIR 1962 SC 821	14, 19(1)(f), 31
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APPENDIX 4: PRIVACY AND MEDICINE

Allen, Anita, "Privacy and Medicine", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.)

Individuals, institutions and governments practice, value and protect medical privacy (Beauchamp and Childress 2008; Humber and Almeder 2001; Englehardt 2000b). As a general rule, they try to limit access to health information and biospecimens, respect health-related decisions, and honor both individual and community expectations of bodily modesty, intimacy, bodily integrity, and self-ownership (Winslade 2014).

First, while information-sharing has grown more common ,individuals commonly keep some health concerns to themselves, whether out of personal taste, ethical reserve, etiquette, fear or shame (Rosenberg 2000; Buss 1980; Westin 1967). When they share sensitive health concerns with others, most individuals employ culturally appropriate discretion and reserve (Nissenbaum 2009; Goffman 1959, 1963). Because of such privacy practices, families, friends, employers, researchers and governments may not acquire all the medical information they want, when they want it (Currie 2005; Etzioni 2000). The rise of social media, smart phones, wearable health monitoring devices and personal possession of electronic copies of medical records represent diverse opportunities for intended and unintended disclosures of health-related images and information. The practical ability of individuals to control and protect their health privacy is partly a function of their knowledge of contemporary medical data management practices and their social-economic position (Marx 2007). Children, along with adults in active military service, judged mentally incompetent, dependent on government entitlement programs or incarcerated, lack substantial control over medical privacy (Annas et al. 2013).

Second, many medical professionals, hospitals, insurers and other entities with access to health information regard maintaining the confidentiality of medical communications and the security of medical information as paramount professional responsibilities (IOM 1994, 2000). This sensibility extends to social work, mental health and pharmacy records. Moreover, clinical health care providers and medical researchers generally seek to accommodate patients' reasonable expectations of privacy and are required to do so by state and national laws (Allen 2011).

Third, societies impose major privacy and private choice-related legal obligations on their members (Westin 1967). Legal obligations of privacy bind citizens to one another and also bind health care providers, insurers, health-data processors, health researchers, public health officials and government (CDT 2008, in Other Internet Resources; DHHS 2015; GAO 2001). Thus in a number of legal systems, disclosing a private medical fact or breaching medical confidentiality can result in civil liability (Solove 2004, 2008). The law imposes obligations to respect informational privacy (e.g., confidentiality, anonymity, secrecy and data security); physical privacy (e.g., modesty and bodily integrity); associational privacy (e.g., intimate sharing of death, illness and recovery); proprietary privacy (e.g., self-ownership and control over personal

identifiers, genetic data, and biospecimens); and decisional privacy (e.g., autonomy and choice in medical decision-making) (Allen 2011).

CONTENTS

1. Informational Privacy

This section will highlight philosophical issues relating to informational privacy and medicine. In medical contexts, the "privacy" at issue is very often "confidentiality" (DeCew 2000). Health care professionals acknowledge ethical duties to keep medical information private (APA 2002; AAMFT 2001; APhA 1994). Physicians, nurses, hospitals, pharmacists, and insurers are required by law and professional codes to practice confidentiality. Since the 1990s, in policy discussions of health policy and reform, concerns about confidentiality have often been prominent (Sharpe 2005; Schwartz 1995).

1.1 Confidentiality

"Privacy" in medicine often denotes the confidentiality of patient-provider encounters (including the very fact that an encounter has taken place), along with the secrecy and security of information memorialized in physical, electronic and graphic records created as a consequence of patient-provider encounters (DeCew 2000; Parent 1983). Confidentiality is defined as restricting information to persons belonging to a set of specifically authorized recipients (Allen 1997; Kenny 1982). Confidentiality can be achieved through professional silence and secure data management (Sharpe 2005; Baer et al. 2002. Hence Sissela Bok characterized confidentiality as referring "to the boundaries surrounding shared secrets and to the process of guarding these boundaries" (Bok 1982: 119).

Philosophers tend to agree that health is a vital component of human flourishing (Faden et al. 2013; Moore 2005; Rössler 2004; Rosenberg 2000; Schoeman 1984; Boone 1983). Maimonides maintained that bodily health is among the means and ends of a good life (Weiss 1991). Modern philosophers generally hold that a just society will be committed to securing the material and political bases of public health (Powers and Faden 2008). Philosophers of medicine, ethicists and bioethicists tend to agree that, with a handful of exceptions, respecting patient confidentiality benefits both individual and public health (Kamoie and Hodge 2004). They defend the practice of confidentiality by diverse appeals to utility, dignity and virtue (Easter et al. 2004).

Building on the 5th century BCE Hippocratic tradition of medical caregiver secrecy, western philosophers defend confidentiality on several utilitarian or other consequentialist grounds (Frey 2000; Hare 1993; Freedman 1978). They argue that preventive medicine, early diagnosis and treatment save human lives and money. Individuals will be more inclined to get medical attention if they believe they can do so privately. Policy experts maintain that the cost of health care and insurance would be considerably higher if people avoided routine check-ups and prompt medical attention because confidentiality was not credibly promised (Fairchild et al. 2007a). Confidentiality practices are believed to promote both seeking care and frank disclosures of health concerns in the context of care. Symptoms of illness and decline, such as incontinence, memory loss, or hallucinations can be embarrassing to talk about,

even with sympathetic professional clinicians. In addition, promises of confidentiality can make persons more willing to participate in health research (Presidential Commission 2012; Easter et al. 2004).

Medical confidentiality promotes the individual's medical autonomy, by sheltering those seeking morally controversial medical care from outside criticism and interference with decisions (Dworkin et al. 2007; Englehardt 2000a; Feinberg 1983). Patients seeking abortion or fertility treatments might not wish others to know their plans. Members of the general public have from time to time attempted to influence choices strangers make relating to the care of disabled infants, comatose or brain dead kin, and abortions. Spouses, partners, parents and siblings have sought involvement, with arguably greater moral warrant. H.J. McCloskey suggested that loving personal relationships call for mutual accountability (McCloskey 1971). Of course some health problems—morbid obesity, scoliosis, paralysis—simply cannot be concealed from intimates. Bioethicists, consistent with public health considerations and laws, commonly argue that hidden contagious conditions or exposures should not be concealed from vulnerable associates and in extreme cases could justify non-voluntary isolation or public health quarantine (Presidential Commission 2015a).

Philosophers have also offered deontological grounds for protecting informational privacy (Benn 1988). Centuries of philosophical thought depict human beings as vulnerable bodies and self-aware souls (Lackoff and Johnson 1999). Informational privacy promotes respect for human dignity, philosophers have said. Caregivers display concern for moral persons with rational interests and feelings of their own when they keep information about their health and health needs private (Freedman 1978).

Individuals concerned about discrimination, shame or stigma have an interest in controlling the flow of information about their health, and arguably the moral right to do so. Mental and other behavioral health care consumers continue to face stigma and discrimination in a world in which getting what they need requires a virtual surrender of confidentiality to a bevy of other people, including family members, doctors, social workers, teachers, hospitals, insurers, and law enforcement (APA 2002; AAMFT 2001; Dickson 1998).

Notions of moral fairness play into arguments for confidentiality. Confidentiality is arguably required by fair relations with government and businesses (Workplace Fairness, 2009, Other Internet Resources). Since "knowledge is power", special concerns have been raised about the manner in which government collects and manages personal medical information. Pervasive ideals of fair information practices require that personal data collected about individuals be limited, accurate, secure and disclosed to third-parties only with consent. Some patients believe they own personal information about themselves, and that is it only fair that they, not others, control its release. They may believe they own medical information because they have purchased medical services (Martin 1981: 624–25). Or they may believe they own medical information, especially genetic information, because it reveals information of a highly personal and unique sort (Laurie 2002; Rothstein 1997).

Philosophers have identified duties of welfare promotion, care, dignity and fairness to support the case for privacy and confidentiality (Schoeman 1984). Virtue ethics suggests its own set of grounds for informational privacy in health care. Jennifer Radden has argued that the special vulnerability of mental health patients and the stigma attached to their problems turns confidentiality into a particular brand of excellence for mental health care practitioners (Radden 2004). She has argued that the demand for confidentiality in psychiatric medicine is inadequately accounted for on theories that fail to take into account the virtues of trust and reserve that are hallmarks of mental health care.

In the context of health research, ethics committees and institutional review boards impose ethical obligations on researchers to protect the confidentiality of research subjects and their medical information (Fisher 2006; Hiatt 2003; IOM 2000). The obligation of confidentiality may require the use of "identifiers" rather than names or "de-identification" procedures such as data aggregation (Presidential Commission 2012). Researchers may need to publish genomic data in ways calculated to obscure the identities of whole families. Patient confidentiality can be compromised in the setting of medical lectures and ground rounds, and in the publication and archiving of medical lectures, scholarly articles and personal papers. The question of whether there are privacy concerns when only statistical use is made of individuals' health data has arisen. It has been argued that individuals have an interest in the uses to which data sets that include their data is put, even if they are not personally identified by researchers (Newcombe 1994).

Privacy theorists caution that deprivation of privacy can amount to injustice and inhumanity (Gandy 1993). Most privacy theorists focus on the harms that stem from invading the privacy people value. Theorists have begun also to consider the harms that stem from voluntary self-disclosure (Allen 2011). Individuals freely disclose medical and other sensitive information about themselves. They do it in published memoirs, in social media postings and in forums devoted to illnesses, medical procedures, prescription medications, and alternative medicine. Women have webcast childbirth and mastectomy, citing public health education goals (Allen 2000).

Privacy is not typically defended as an absolute good (Hixson 1987; Boone 1983; Louch 1982; Pennock and Chapman 1971; Negley 1966). Confidentiality, for example, is seldom described as an absolute good in health care (Bok 1982). Philosophers recommend major exceptions to the practice of confidentiality. First, all health care providers and responsible adults should be obligated to report evidence of child neglect and abuse, such as multiple unexplained fractures and malnutrition (Dickson 1998). Second, mental health providers and others have an ethical duty to warn police or potential victims of mentally disturbed patients' violent intentions (Gates and Arons 1999). These exceptions reflect a belief that avoiding physical injury to third parties is more important than invariably deferring to patients' preferences, sparing their feelings and preserving their trust in relationships. Important philosophical questions arise about the extent of "Good Samaritan" duties, whistle-blowing obligations and the

duty to warn in health care settings. Ascribing such duties potentially infringes the liberty persons otherwise enjoy to act and refrain from acting as they see fit so long as they do not affirmatively harm others. Arguably the person who declines to help or warn is not the responsible cause of the abuse and violence that befalls others. Yet beneficence argues for low risk, low cost interventions to prevent serious harm.

Third, there may be situations in which medical confidentiality should not be protected because the public has a right to know. One category of information which the public or public health officials are commonly thought to have a right to know is information about instances of contagious disease such as flu, measles or HIV/AIDS. Another category of information deemed not suitable for confidentiality is information the media has a right to publish as a matter of its newsworthiness. Dramatic medical rescues of automobile accident victims are understandably newsworthy events. It has been argued that the public has a right to know about public officials' serious medical problems, perhaps more than authorities have typically disclosed (Robins and Rothschild 1988). In the United States, plaintiffs in personal injury lawsuits are asked to submit to medical examination; and lawyers and grand juries have the authority to subpoena medical information for use in legal proceedings and investigations, placing highly sensitive medical information at risk of public disclosure (Wolf and Zandecki 2006). Like legal process demands, the demands of public health surveillance argue against unqualified rights of medical confidentiality (El Emam and Moher 2013).

1.2 Secrecy

Sissela Bok defined secrecy as intentional concealment (Bok 1982). Secrecy practices loom large in health care. Some people do not share the knowledge of medical symptoms even with their closest friends and family members. A person may secretly know he or she is ill before he or she admits it to family members or consults a physician. Reluctance to share knowledge of medical symptoms with associates or kin and medical professionals may stem from fear of disability or death; avoidance of discrimination in insurance, employment and education; or dread of social stigma, shame, embarrassment or rejection. Questions have arisen about the obligations of dentists and other health care providers to refrain from secrecy and disclose their HIV positive status to patients. Fertility patients may want to conceal the fact of infertility or the use of donated sperm or eggs, due to the social and religious consequences of disclosure (Birenbaum-Carmeli et al. 2008).

Paternalistic secrecy is a major feature of medical practice, more prevalent in some countries, communities and families than others. Moral ideals of autonomy and agency argue for informing patients of their medical conditions, truthfully and fully. Yet, medical news is sometimes deliberately kept from patients. The adult children of a 95 year old woman might think it unduly cruel to reveal the diagnosis of operable bowel cancer when she would be better able to cope with the fib that she has benign diverticulitis. The parents of a young child might think it kind-hearted to conceal his terminal leukemia from him, on the ground that he is too young to understand death.

Some moralists would agree. Yet if deception is categorically wrong, then secrecy about medical adversity would surely be unethical.

It is common—though much less common than it once was—to paternalistically withhold medical knowledge as the secrets of doctors, healthy spouses and adult children. But there is no guarantee that patients will believe medical truths or diagnoses squarely placed before them by qualified physicians. Denial of unpleasant truths is commonplace. Self-deception is a powerful phenomenon. Some people sincerely believe refusing to accept an unwanted diagnosis by maintaining a positive attitude will shield them from medical catastrophe. Mental disorders can trick one into thinking one is happy and insightful, rather than the manic, delusional person the psychiatrist may diagnose.

Certain medical procedures are commonly shrouded in secrecy. People may try to keep secret the fact of their elective vanity cosmetic procedures, medically indicated sex reassignment surgery, abortions, fertility treatments, and sterilizations. Another kind of secrecy practiced in medicine is the concealment of surgical wounds and scars. Cosmetic surgeons hide scars inside hairlines and in the creases behind the ears. Breast cancer is no longer the cause for secrecy it once was, yet reconstruction surgery following mastectomy is a kind of concealment. The lure of minimally invasive laparoscopic surgery is not only that it may both reduce the length of hospital stays and the risk of infection, but also that it leaves less prominent and visible scars. Advances in medical imagining, such as the X-ray, MRI, CT scan and ultrasound, allow providers to enter the body and capture information without leaving tell-tale signs of having done so.

Neuroimaging, brain imagining technologies (BIT) generally, and advanced lie-detection raise critical questions about whether secret thoughts should be available for discernment, and if so under what circumstances (Presidential Commission 2014; Farahany 2012). The issue is one of coerced self-disclosure and,if someday criminal guilt could be reliably discerned from imaging, self-incrimination.

1.3 Data Protection and Security

The moral significance attached to medical privacy is reflected in data protection and security laws adopted by local and national authorities around the world. The point of these laws is to regulate the collection, quality, storing, sharing and retention of health data, including the electronic health record (EHR) (CDT 2009, in Other Internet Resources). Health privacy statutes limit disclosure in the absence of informed consent; but typical statutes recognize numerous exceptions for routine uses, research, public health reporting, and legal process and law enforcement. The policy consensus seems to be that, while medical privacy is important, patients' medical information may be disclosed to third-parties for socially important purposes unrelated to their own care. Electronically stored and produced medical information is by its very nature mobile. Those with access can transmit EHR data across town or across state and national borders. Patients today have unprecedented access to their own health information.

Patients may transmit medical data over email, entrust it to third party cloud data storage providers, or collect health data via apps and wearable devices with little attention to third part access and use.

Some jurisdictions have special rules for management of certain health information. Data regarding HIV/AIDS, mental health and genetics are afforded special treatment in U.S. law, for example. Philosophers ponder whether particular conditions merit such exceptionalism. The argument for HIV/AIDS exceptionalism recalls the early days of the global epidemic when knowledge of the illness was poor, treatment was ineffective, and social stigma attached to affliction. The argument for mental health exceptionalism is that patients do and must "bare their souls" to mental and behavioral health providers, making disclosures socially costly (Radden 2004). A U.S. federal statute prohibits basing employment or health insurance decisions on information about a person's DNA or genetic predispositions (GINA 2008). The leading argument for genetic data exceptionalism appears to be that genetic data conveys uniquely detailed information about a person and her biological family, information a person might have a right to know or a right not to know (Chadwick et al. 2014). Some genetic information can foretell a person's health future (Laurie 2002; Rothstein 1997).

The use of electronic technology is described as a boon for health care delivery and administration (Burton 2004; National Research Council 1991). Yet heightened concerns for privacy follow increased portability of health data (HIPAA 1996) and third-party (cloud) data storage. The obligation to protect medical data held by the state or private companies has taken on a new urgency as more and more health data is being transmitted and stored electronically. It has been argued that information managers owe it to the public to take stringent measures to prevent data breaches and to appropriately respond and remediate when a breach occurs. A data breach can result from the theft of a laptop; fraudulent or accidental access to data; sabotage by dishonest or disgruntled employees; or the loss of data storage devices. Major hospitals, health agencies and insurers have experienced highly publicized data breaches affecting millions of consumers whose names, addresses, health identification numbers and other data were compromised. (Privacy Rights Clearing House, 2009, in Other Internet Resources). A philosophical question raised by data breaches is how to define and morally repair harm. Medical identity theft and public disclosure of private facts are generally regarded as "harms" (Biegelman 2009). But it has been argued that negligently causing increased risks of identity theft and public disclosure of private facts are harms, too. If risk amplification is harm, though, it is unclear what should count as fair compensation or moral repair.

1.4 Anonymity

Anonymity has value in a variety of public health and medical research contexts. Although a number of prominent scientists and lay people have made their genomes public, genetics research and scholarly publication standards call for protection of the identities of research subjects and their families. Concerns can arise about whether

particular methods of anonymization adequately shield research subjects from invasion of privacy and breaches of confidentiality. The use of the anonymously deployed personal diary for learning about and assessing health-related behavior has become commonplace (Minichiello et al. 2000). Research subjects are asked to record contraception use, condom use and other sexual practices in diaries which become research tools. Researchers must take care to warn research subjects about the dangers of disclosing information which could expose them to social or legal sanctions.

Anonymous HIV/AIDS testing has been controversial among ethicists. Anonymity has been defended on the ground that it encourages testing by individuals with concerns about when, whether and to whom to disclose their HIV/AIDS status (Fairchild et al. 2007a) Behavioral surveillance is recognized as a potentially useful component of protecting public health (Fairchild et al. 2007b; Gallagher et al. 2007); in some situations, anonymous testing could make tracking patterns of infection more difficult. Yet the case for individual privacy, confidentiality and anonymity in the context of a stigmatizing illness may be exceptionally strong, counterbalanced by a case for aggressive public health surveillance of severe illnesses without true cures (Burr 1999). It has been suggested that anonymous testing allows persons with AIDS to engage in dangerous, morally irresponsible behavior without accountability. Proponents of anonymous testing reply that policy-makers and ethicists should not assume that men and women who learn they are HIV positive on the basis of anonymous tests will egoistically conceal their status from sexual partners. Some individuals have knowingly imposed serious risks on others. But newly informed positive test-takers may responsibly notify past and future partners, refrain from risky behaviors, and seek medical care.

1.5 Accountability

Confidentiality thrives as a legal duty and institutional practice, despite the emergent trend towards voluntary openness about personal medical information. The specifics of health and medical care have become acceptable topics of ordinary conversation outside the family circle. In the U.S., public figures have taken the lead, speaking out about their AIDS, erectile dysfunction, dementia, Parkinson's disease, melanoma, prostate cancer and breast cancer. Disclosures that would have been considered indelicate or stigmatizing thirty years ago are made freely today, whether to make conversation, share a concern, educate the public, or endorse a non-profit or pharmaceutical product.

To a noteworthy degree, openness is also compelled by morals and law. Medical accountability is a feature of modern life. In the wake of the AIDS epidemic, SARS, and Ebola, new levels of accountability gained public acceptance. World-wide, people are coming to think of minor and major contagious illnesses as conditions giving rise to public accountability. In the United States a reemergence of measles in 2015 renewed questions of how to balance duties to safeguard one's own children from perceived risk against duties to protect the wider community affected by decisions whether to

vaccinate. In Japan, it is now expected that people with cold and flu will wear surgical face masks to protect others from the spread of cold and flu viruses. International travelers entering Tokyo are politely invited to report symptoms of illness to officials. International visitors to Taipei have their body temperatures scanned for fever automatically as they proceed to customs. In the U.S., where hand-shaking is a common greeting, people with colds and flu are begging off from the custom out of regard for others' health.

Many people speak openly about health matters with strangers as a condition of receiving and paying for health care. For example, a family needing the assistance of a regional mental health/mental retardation agency unavoidably places reams of sensitive information in the hands of government. The same is true of a family which needs to apply for government benefits for aging or disabled kin. The more disclosures a family must make, the wider the circle of confidentiality and the lesser the medical privacy. Questions of distributive justice are raised by mandatory disclosures to government made as a condition of access to care. Poor and disabled persons dependent upon medical assistance from government have substantially less informational privacy *vis-à-vis*government than wealthy and healthy persons. The risks and burdens of state knowledge of the individual are disproportionately borne by the least well off segments of society.

1.6 Professional Norms

The duty of confidentiality is a core consensus norm within health care (Currie 2005). One important manifestation of this consensus in the U.S. has been the development of the "certificate of confidentiality" whereby researchers declare that confidentiality is of especial interest to their subjects (Wolf and Zandecki 2006, Wolf et al. 2004). The technological age has given rise to the call for health care providers, even those who work alone or in small groups, to be aggressive in the adoption of responsible information practices. All would agree that office practices can and should be designed to protect the identity of clients and the privacy of conversations. Common understandings are that practitioners should be judicious in the collection of information; they should store treatment notes and records in a secure manner; they should share information only with consent or as required by law; and they should protect sensitive information in its online and off-line forms using locks, passwords, encryption and other appropriate devices. Sensitive information that is no longer needed should not be retained indefinitely.

Health Care providers are ascribed ethical obligations to avoid casually discussing confidential patient matters in social media or in e-mail that may not be entirely private or secure (Chretien et al. 2011). They must avoid discussing patient matters on mobile phones in public places, such as in office corridors, hospital lobbies and on trains. Confidentiality can be violated by unauthorized recordings and disclosure of medical photographs. Photography plays a role in medical specializations including dermatology and plastic surgery, giving raise to concerns about ethical uses of graphic

images of patients' faces and bodies. At a minimum informed consent would appear to be required for making and disclosing photographs on whose basis a person could be identified. Ethically imperative consent was not obtained in a notorious U.S. case: it came to light in 2013 that a physician affiliated with Johns Hopkins University Hospital secretly videotaped hundreds of his obstetrics and gynecology patients with pornographic intent. (Allen 2015) Videotaping has come to play a routine role in family therapy and is not considered unethical by typical practitioners (AAMFT 2001). Many clinicians believe the therapeutic and training benefits of videotaping outweigh the risks of unauthorized use or disclosure. Even if unauthorized use or disclosure were not a concern, an ethical question would remain. Should behavioral health clients be called upon to create recordings which inherently sacrifice the privacy of their homes, communications and expressions of emotions?

Physicians are debating whether to increase the use of video and audio-taping in routine clinical practice, surgery and research, and bioethicists are weighing in (Blaauw et al. 2014; Makary 2013). Should office visits be recorded as part of the standard medical record? On the one hand, recordings would address the problem of faulty memory and incomplete encounter notes. Recordings could document informed consent procedures and provide evidence to avert or support malpractice suits. On the other hand, recordings could inhibit patients and increase their discomfort. Recording practices might encourage physicians to be less attentive to the patients in front of them on the theory that they can always "go back to the tape" for details.

2. Physical Privacy

There has been relatively little attention paid by philosophers to physical privacy concerns in medicine compared to informational concerns. Yet typical patients bring a bevy of strong expectations of modesty, solitude and bodily integrity to doctors' offices, hospitals and other health care settings. These expectations that they will not be needlessly touched, crowded, gawked at or imaged relate to the need for psychological comfort, dignity and security. In the future, the use of internet communications may make some routine primary health care possible without patients having to venture from home and be touched by providers (Chepesiuk 1999). "Telemedicine" will allow doctors and nurses to evaluate common medical complaints remotely. In the meantime, health care typically involves physical contact with others.

2.1 Solitude

Solitude is a form of physical privacy of special interest to medical ethics (Storr 2005; Barbour 2004). The sick do not want to be lonely and abandoned, but they may want personal space and time alone. Solitude has value as a context for quiet reflection about the significance of illness and injury. A period of solitude after consultation and self-education is a useful condition in which to make up one's mind about treatment options.

The sickest patients may both crave and fear solitude. When alone they come face-to-face with the potentially cruel reality of impending death. Yet in company they may feel patronized or guilty about the burdens they impose on family and friends. Whether the suffering is the agony of injury, childbirth, recovering from major surgery or dying, persons may feel that they should not have to deal with others while in such a state or at such a time. Implicit social norms validate deferring to wishes of the sick or dying for seclusion and solitude (Post 1989; Nissenbaum 2009). These wishes may arise and be violated not only in hospital, hospice or nursing home settings, but also in mental hospitals and prisons, where panoptic policies of monitoring and surveillance prevail (Bozovic 1995; Holmes and Federman 2006: 16–17; Foucault 1977).

2.2 Bodily Modesty

Philosophers in the virtue ethics and Christian ethics traditions have identified modesty as a moral virtue (Schueler 1999). Modesty is a form of physical privacy of special interest to medical ethics. If patients are to receive the best care, they must be willing to expose their bodies to medical personnel and technicians. Removing one's clothing for purposes of examination and testing is routine for most health care consumers. Busy emergency rooms and neighborhood clinics may be unable to cloak or seclude patients at all. Harried physicians may forget "bedside manners" and fail sufficiently to honor patients' modesty expectations. In-patients in teaching hospitals are expected to adapt to diminished physical privacy, since medical students and researchers accompany attending physicians on rounds and participate in care.

Yet feelings of modesty and felt obligations of bodily modesty are commonplace. Many individuals understand bodily modesty as a moral virtue, and act accordingly. Under some religious traditions, such as those of Muslims, Orthodox Jews and the Amish, bodily modesty is a requirement of faith. Being asked to disrobe, even for a good reason, may impose the cost of going against principle or desire (Kato and Mann 1996).

Health care providers respond to the modesty values of their patients in a number of ways. They provide special modesty garments and sheeting to minimize nudity. They ask patients to uncover only those portions of the body which must be exposed, and then only for the period of time necessary. While hospitals cannot offer every in-patient a private room, shared rooms are generally dividable by curtains that grant patients some degree of physical seclusion (and associational intimacy with visiting family and friends). Male gynecologists and obstetricians help patients cope with sex-specific modesty norms and sexual abuse concerns by working with female assistants. Some health care providers maintain medical procedures staffing policies sensitive to modesty and harassment concerns. Indeed, mammograms on women are generally performed by female technicians. On the other hand, the radiologists and radiology technicians who deliver prolonged, intimate radiation services to breast cancer patients are likely to be male. Patients may encounter health institutions and providers who are unwilling to honor what they may regard as impractical or discriminatory preferences

for same-sex or same race caregivers, preferences sometimes motivated rightly or wrongly by modesty concerns.

2.3 Bodily Integrity

Another aspect of physical privacy is bodily integrity. Mandatory testing and health evaluation offend bodily integrity by forcing persons to submit their bodies to unwanted touching and visual inspection (Allen 2014). Policy makers and the courts have generally permitted a great deal of nonconsensual urine testing of school children and people in jobs tied to public safety, public service and crime control. Drivers can be subjected to alcohol intoxication screening at road blocks or in hospital emergency rooms after accidents to promote highway safety. The concerns about neuroimaging and lie detection raised earlier in this article under the rubric of secrecy could as easily be raised here in connection with bodily integrity. Nonconsensual uses of imaging and lie-detection to assess honesty or character arguably demeans and disrespects autonomous moral agents and assaults bodily integrity. The philosophical issue here is whether there is some limit to the right of government to sidestep persons' preferences about the handling of their bodies, body fluids and tissue samples. These issues arise in peace and war, and with respect to the living and the dead. Certainly, law-based constraints exist, but so too do principle-based and other moral constraints (Faden et al. 1986). Western cultures respect the integrity of a deceased's body; however advances in transplant medicine mean the newly dead are a garden of healthy organs that could be used to save and extend lives. Organ harvesting with or without consent may be defended on utilitarian moral grounds. Of particular philosophical import is the issue of whether the bodily integrity of a person is violated when organs and/or tissue are harvested prior to brain death or prior to cardiac death. A related philosophical question is whether a legal regime of opting into organ donations or opting out of organ donation better serves the demands of justice and morality. Post-mortem sperm donation raises important ethical questions about bodily integrity. Harvesting the sperm of a deceased man raises concerns about respect for corpses; using sperm to create embryos and ultimately to parent the children of dead men raises concerns about parental autonomy and beneficence toward children.

3. Associational Privacy

Respect for the intimacy of the experiences of suffering, childbirth, recovery and dying is required by sound ethics. People who are in pain or grieving have an interest in including some people and excluding others. People commonly want to reserve sharing the joys of medical experience with friends and family, no less than the agonies. They have what can be thought of as an associational privacy interest in selective intimacy.

Injured, suffering, and dying adults may badly desire intimacy, even sexual intimacy. A patient may wish to exclude strangers or inessential medical personnel at times when the presence of loved ones is welcome. Parents of newborns may regard strangers photographing their babies as violations of family intimacy. A dying man may object to

being photographed by a physician anxious to take photographs of the man's surgical wounds for scientific purposes. If associational privacy is important, a bored visitor strolling the halls of a hospital should not maneuver to watch a randomly selected patient give birth; and if he does, he merits criticism as a morally offensive intruder.

Hospitals and hospital patients have clashed over who should be allowed visitation and a role in decision-making or hands-on care. Some institutions have kept extended family, paramours, gay or lesbian partners and children away from in-patients. On the other hand, children's hospitals commonly encourage parents to spend as much time as possible with sick minors, and may have sleeping sofas near children's beds or sleeping rooms inside the hospital for attentive guardians.

4. Proprietary Privacy

Moral and legal theorists have offered accounts of the relationship between "property" and "privacy", "property rights" and "privacy rights" (May 1988; Radin 1987; Thomson 1975). Philosophers have debated the existence of a property right in the self, both the physical self and the non-physical self (e.g., the mind or soul) (Lakoff & Johnson 1999). One philosopher has argued that we own our selves and owe ourselves a self-love that constrains how we ought to treat our selves and allow others to treat us (Annas 1989).

John Locke famously characterized the relationship between a person and her body as self-ownership. However, other philosophers have held that persons are stewards of their bodies rather than owners (Honore 1961). In medical contexts, under rubrics of privacy, individuals are sometimes ascribed rights of self-ownership and the ownership of parts and products of their bodies (Moore 2005). In this vein, a philosophically interesting invasion of privacy argument was advanced in the landmark California case *Moore v. Regents of the University of California* (1990). Without his knowledge or consent, University of Southern California research physicians developed a commercial cell line from tissue removed from leukemia patient John Moore. Moore and an appellate court argued that in taking his DNA-laden tissue for unrevealed research and development purposes unrelated to Moore's cancer care, UCLA doctors had appropriated Moore's identity in a manner analogous to advertisers using a person's photograph without consent for commercial gain. Moore's privacy claim was novel at the time, but the claims of celebrities and others to control the attributes of their personal identities—likenesses, voices, names, monikers, trademarks, and Social Security numbers—are commonly styled as privacy rights and have been since the early 20th century. John Moore's privacy claim was not successful in court. The California court held that Moore's doctors ought to have obtained his informed consent; but the court was unwilling to commodify human tissue or DNA as private property (Radin 1987). Nor did the court think Moore's injury fit the mold of traditional invasions of privacy recognized in the law. In a related case that did not result in tort litigation in her lifetime, cells taken from Baltimore resident Henrietta Lacks were the basis of an important immortal cell line, HeLa. Lacks died in 1951, but the cell line created using her cervical cancer cells without her knowledge or consent lives on. It has been used in

the treatment and eradication of numerous conditions and illnesses, including polio, without any financial reward to her or her heirs.

But proprietary understandings of privacy continue to find expression in health care and health research contexts. Scholars suggest that individuals have privacy interests in their genes, genomes and bio-banked tissue specimens. These are sources of health information that reflect what individuals and their biological families are like, and what will become of them. Since most people have only one set of DNA (the rare exception is the genetic chimera), a person's DNA is virtually a unique personal identifier. The interest individuals have in controlling the use of their data and specimens can be reconciled with researchers' needs for genotypical and phenotypical data, where principles of informed consent are honored (Presidential Commission 2012).

Infertility medicine is a growing field, one dependent upon gamete donation and cryopreservation of embryos. Individuals have asserted what they describe as "privacy" interests in controlling the fate of gametes, zygotes, and frozen embryos. The privacy interests debated in the context of infertility medicine are twofold: a decisional privacy interest in the decision to bear a child with the help of reproductive technologies, and a proprietary privacy interest in controlling the fate of the building blocks of human life and the earliest beginnings of human life, created as a consequence of one's intentions or the use of one's genetic materials. While many courts have rejected viewing frozen embryos as property, they have struggled over how to allocate rights over embryos in cases of separation, divorce, death, moves and changes of heart.

In an entirely different vein, government regulators and the general public characterize identity theft as a "privacy" problem (Allen 2011). In recent years identify theft has become a privacy problem in the delivery of health care. Because of the high price of health care, medical identity theft—receiving medical care using others' personal data for billing purposes—has become a serious problem. Consumers must worry both about the confidentiality of their medical records and physician encounters, and about the possibility that someone will appropriate their personal identifiers and then use them to defraud health care providers and insurers.

5. Decisional Privacy

In medical contexts, "privacy" is commonly used to denote autonomy, liberty or choice in health-related decision-making (Allen 2014; DeCew 1997; Feinberg 1983). A patient's active participation in health-related decisions and control of his or her body, without the interference of government or unauthorized persons is a decisional variant of privacy. Women are often ascribed a "privacy right" to use medically prescribed birth control and to elect medically safe abortions. Men and women are ascribed a "privacy right" to utilize *in vitro* fertilization, surrogate gestators, and other reproductive technologies. Men and women with terminal illnesses or in vegetative comas are ascribed a "privacy right" to refuse life-sustaining nutrition, respirators, and medical care (Beauchamp 2000).

5.1 Birth Control

Birth control and abortion are common practices the world over. They were once criminalized on moral and medical grounds, but are generally available today. Laws categorically criminalizing contraception and abortion, were struck down in the U.S., Canada, most of Europe, Japan and Taiwan by the final third of the 20th century.

Feminist philosophers have widely debated the significance of the use of the concepts of privacy and a "right to privacy" to win women the capacity to control their fertility (Rössler 2004; Boling 1996). The concept of "privacy" played a role in confining women to traditional roles of daughter, wife and mother under the authority of male heads of households. While Catherine MacKinnon argued that ascriptions of rights of privacy are merely palliative distractions from a more basic quest for gender equality, other feminists have argued that privacy rights play a proper role in achieving reproductive autonomy and pave the road to greater education and employment equality (Allen 2000; MacKinnon 1984).

Official Roman Catholic doctrine opposes all non-natural birth control, birth control devices and all intentional abortions (Pope Paul VI, 1968, *Humanae Vitae*). Some regard human sexuality as having an essentially reproductive purpose and artificial birth control as unethically unnatural. One argument is that human life begins "at the moment of conception" when a sperm fertilizes an egg. Therefore, forms of birth control that may prevent the development of a fertilized egg to grow into a baby—such as "emergency contraceptive pills" or "menstrual extraction" following unplanned sex or rape—are considered "abortion", even if no pregnancy has been confirmed. Thomas Aquinas taught that the fetus lacks a soul until forty to sixty days after conception (Finnis 1998: 186). Those who oppose abortion on personal moral or religious grounds, sometimes also oppose public law and public policies that permit abortion.

5.2 Abortion

Philosophers differ on the question of the morality of abortion (Jonsen 1998: 294ff). Advocates of abortion freedom maintain that government should not take sides in what is irreducibly a moral debate, and that individuals should be free to make up their own minds about the moral status of the unborn (Richards 1986). Judith Thomson employed the concept of a right to control the use of one's own body in a famous defense of abortion rights (Thomson 1971). Some philosophers have denied that fetuses are moral persons, stressing that they are not self-conscious subjects of experience. Those who oppose abortion freedom argue that it should not be left to private choice because the unborn are equal members of the moral community, along with newborn infants. Membership in the moral community is conferred by human status or potential personhood, these philosophers argue. Religious ethicists sometimes characterize the unborn as having souls. Some moralists maintain that women's decisional privacy must yield if science establishes that a totally unique human life comes into being immediately at fertilization of an ovum. Peter Singer has argued that science proves

that unique human lives do not begin at conception. Instead, fertilization begins a process of initially pluripotent cell development that may result in several human lives, due, e.g., to twinning and other divisions, or in no human life, due, e.g., to defects that result in spontaneous abortion. Philosophers Margaret Little and Rosalind Hursthouse contributed nuance to the ethics of abortion debate by arguing that while autonomy and privacy concerns are important, *sui generis* considerations of obligation and virtue are ethically relevant to decisions about terminating a pregnancy (Little 1999; Hursthouse 1991).

The trend in public policy, dating back to the 1970s in the U.S. and most of Europe, seems to be moral compromise (McDonagh 1996; Sher 1981). The law tends to permit women to obtain abortions freely in the first trimester and then to limit access to second and third trimester abortions. Philosophical differences in how societies think about abortion ethics are reflected in the four major models of abortion regulation found around the world. The models of abortion regulation are (1) the model of prohibition; (2) the model of permission; (3) the model of prescription; and (4) the model of privacy.

In countries characterized by the model of prohibition, most or all abortions are prohibited by criminal laws. In the West, the Republic of Ireland has been an example of the model of prohibition. In countries characterized by the model of permission, early abortions are readily available to women who meet legislated government eligibility criteria and adhere to official procedures. Germany and Japan are examples. In countries characterized by the model of prescription, abortions were not only permitted, but encouraged or required to avoid government penalties. While liberalization may be in progress, China has been the signature contemporary example of the troubling model of prescription, apparently prompted by concerns about over-population and limited resources. Finally, in countries characterized by the model of privacy, abortions are freely available to women who wish to obtain them, without having to meet eligibility criteria or adhere to detailed government procedures designed to limit access. Canada is an example of the model of privacy. While the U.S. under *Roe v. Wade* (1973) used to be a nation in which the model of privacy prevailed, it has taken on some of the features of a model of permission regime since 1989 when the U.S. Supreme Court announced it would begin allowing restrictions. The Court has upheld restrictions that include mandatory waiting periods and bans on specific second and third semester abortion (so-called “partial birth”) techniques.

5.3 Conscience Clauses

In most countries, the public relies on licensed physicians and hospitals for medical care. The medicines physicians recommend are available only from professionally trained, licensed pharmacists. In the U.S., state and federal laws have been enacted to relieve health care providers of the obligation to perform medical services that offend their philosophical, moral, or religious beliefs. Some policy-makers have argued that health care practitioners should be free to decline to provide services for which they

are professionally trained if doing so genuinely violates personal conscience (Dresser 2005). Defenders of what have been called "conscience clauses" and "refusal laws" see themselves as defending the "privacy" of pharmacists and health care providers, privacy akin to liberty of thought and freedom of religion (White 1999). But opponents of such laws see themselves as the true defenders of privacy, standing up for the "right to privacy". They stress that the call for refusal laws has been tied to larger "pro life" strategies to limit access to contraceptives, medical abortifacients and surgical abortions. They say pharmacists who decline to dispense medication are placing their personal values and autonomy above the values and autonomy of patients. Furthermore, pharmacists, like physicians and nurses, enjoy the benefits of regulation and have chosen their professions voluntarily. Private reproductive choices can be exercised only if sufficient numbers of health care professionals are willing to perform lawful services.

Should health care workers be required to dispense medications and perform procedures that violate their personal scruples? Most bioethicists agree that in the context of emergency medicine, conscientious refusal has no place. A physician should not refuse to terminate an ectopic (tubal) pregnancy threatening the life of the mother, for example. There is significant disagreement, however, about whether morally-based refusal is warranted by retail pharmacists. Whether pharmacists can ethically refuse may depend upon the proximity of other pharmacists willing to serve in their places. Ethicists also disagree about whether physicians may use their scruples as rationales for refusing to answer medical questions or refer patients to abortion providers. A further, related, question is whether physicians in countries where abortion is safe and legal may ethically follow their public or private employers' orders to refrain from providing information about abortion services to patients.

5.4 Assisted Reproductive Technology and Enhancements

Some legal commentators and philosophers have argued that infertile men and women have a right to procreative privacy, and a right to use technology to bear children. Assisted reproductive technology services ("ART") include medicines to balance hormones, regulate ovulation, and stimulate the production of viable eggs; and surgery to unblock Fallopian tubes or undo the damage of endometriosis, miscarriages, ectopic pregnancies and pelvic inflammatory disease. Reproductive services also include sperm and egg harvesting and donation, *in vitro* fertilization, zygote and embryo transplant, reproductive organ transplant, cryopreservation ("freezing") of pre-embryos, and surrogate pregnancies.

It may be argued that the ability to freely choose ART, like the ability to freely choose sterilization, abortion and birth control, is called for by the right to privacy. But ART use raises moral concerns. One concern is the false hopes ART creates in a world in which the technology is expensive and the success rate low. The availability of affordable

treatments can cause conflict within families. Women report feeling pressured by their families to undergo repeated painful attempts to get pregnant. It may argued that adoption is a more satisfying, affordable and socially commendable option for becoming a parent. The use of reproductive technology has led to bioethical concerns about the handling of the earliest beginnings of human life. Ethical concerns surround exposing otherwise healthy women to the uncertain health risks of repeated rounds of fertility drugs and high-risk multiple pregnancies with twins and triplets. In a few tragic cases children created using ART have been unwanted, raising questions of responsibility and the just role of family law. What should happen if the people who contract with a surrogate mother to carry a child for them using donated egg and sperm change their minds after a child is conceived? Should the mind-changers be deemed the parents? Should the gestator be deemed the parent; the gamete donors? Should parentage be assigned by a judge based on the best interest of the child?

The realm of reproductive technology is surprisingly *laissez faire* in the U.S., more regulated in the United Kingdom. Some U.S. constitutional lawyers argue that the right to bear and beget children enshrined by the Supreme Court in Fourteenth Amendment jurisprudence is a right to bear and beget by virtually any consensual means necessary. There is a right to reproduce, they argue, and a right to use other people and social resources to help one reproduce. Some have even argued that the right to procreative privacy is a reason for government or employers to pay for fertility services. In Israel, Germany and Taiwan, government subsidizes ART for infertile couples. Great Britain has enacted a special statute and created a special governing body to deal with policy and ethical questions raised by the growing popularity of artificial reproductive technologies. The Human Fertilization and Embryology Act 1990 created the HFEA, an agency charged to license and monitor IVF, donor insemination, human embryo research, and the storage of gametes and embryos.

It is now possible to select the sex of one's offspring. Some bioethicists have argued that a "right to privacy" countermands government placing bans on sex selection. Supporters of sex selection sometimes argue that choosing a child's sex is a future parent's moral and legal right. Some methods of sex selection include: (1) Amniocentesis testing to determine sex, followed by abortion if the fetus has the undesired sex; (2) Sperm sorting to produce X rich or Y rich batches of sperm, followed by *in vitro* fertilization or insemination to increase chances of having a child of the desired sex; (3) preimplantation genetic diagnosis ("PGD") to determine the sex of a pre-embryo, followed by implantation of one or more pre-embryos of the desired sex. Amniocentesis and PGD were techniques developed originally to determine whether a fetus or embryo was affected by a genetic disorder such as Down's syndrome or cystic fibrosis. In some jurisdictions abortion or PGD solely for sex-selection other than to avoid sex-linked disorders is illegal.

Adults who want children often prefer children of a particular sex, or a "balance" of male and female children, perhaps born in a particular order. Medically-assisted high-tech sex selection raises large ethical issues. PGD involves creating human embryos,

some of which will not be used. Freezing, destroying and giving away human embryos can seem inconsistent with respect for human dignity. Sex selection is arguably a kind of gender discrimination and could heighten problems of pernicious gender discrimination. Sex selection plays into gender stereotypes and could someday throw off the societal, even global balance of males and females. Sex-selection is controversial as a first step on a slippery slop toward "designer babies".

Men and women in developed countries are "designing" their babies (Parens and Knowles 2003). In the context of fertility medicine, patient's select donated egg and sperm based on the race, IQ, SAT scores, and detailed physical profiles of the donors. The capacity to select the traits of offspring is likely to expand in the coming years. It has been argued that a "right to privacy" countermands government placing bans on trait selection through genetic selection and manipulation. If women and their partners have a right to reproductive autonomy, it arguably follows that they have a right to use technologies that enable them to choose the precise traits of their children. Yet using technology to achieve "perfect" or "superior" humans may be unethical, even if using technology to screen out tragic abnormalities and diseases representing extremes of suffering is not (Presidential Commission 2015b).

Michael Sandel has argued that the quest for genetic enhancements and other god-like mastery over the human body reflects a failure to appreciate fully the "giftedness" of life and the ethical value of "humility, responsibility, and solidarity" (Sandel 2007: 12 and 86). Ronald Green has cautioned against a *status quo* bias that leads us to the irrational conclusion that human beings should remain as they are (Green 2008: 9). John Harris has moved several steps beyond Ronald Green in building a case against preserving the status quo. Offering what he calls "the ethical case for making people better", Harris has argued that society ought to leap on opportunities to create "healthier, longer lived, and altogether 'better' individuals" (Harris 2007). In the future, the notion of decisional privacy may play a major role in building a case for allowing individuals and families to use or refuse genetic, pharmaceutical and other forms of enhancements.

The issue of biological enhancement is not limited to the context of prenatal intervention. Concepts of health privacy may be brought to bear on questions surrounding the ethics of electing to utilize medical procedures or drugs to improve the motor and cognitive capacities of people seeking to be "normal" or "superior". The privacy-as-autonomy argument for allowing largely unfettered choice has been less controversial where persons and clinicians aim to bring someone who is suffering from disease or disability to within normal ranges, than where the aim is to enable someone to surpass normal levels. Thus, prescribing or taking Ritalin to combat ADD/HD may meet with moral approval as a matter of medical privacy, while prescribing or taking Ritalin to achieve a higher SAT score does not (Presidential Commission 2015b).

5.5 Medically Unhealthy Life-Styles

Should the state enact health and safety rules designed to save people from poor private choices such as eating sugary, high fat foods, smoking and refusing to wear

motorcycle helmets? Are individuals entitled to unfettered enjoyment of drinking, using addictive drugs and a medication-free existence? The answer John Stuart Mill gave to such questions in his famous essay *On Liberty*(1869) was "yes" to the extent that these are self-regarding behaviors that do not harm others. Mill defended liberal tolerance of intoxicants and narcotic drugs on the ground that liberty nets society benefits that are lost when government tells us what to do. A libertarian perspective condemns the "nanny state" that fails to treat citizens like conscientious adults (Harsanyi 2007: 41).

A robust regard for liberty prompts adopting an extreme libertarian perspective on the law. Yet

[t]he notion of radical individualism focuses on individual health behavior and ignores the social preconditions of that behavior. (McGee 1999: 211)

What, on the surface, appear to be inviolate personal choices may be straightforward products of social forces as diverse as "media, advertising, movies, literature and folklore" (McGee 1999: 212). Debates over managed care have stressed that individuals' unhealthy choices have externalities, including higher health care costs for fellow citizens. Unhealthy lifestyles can impose substantial costs on others. Smokers impose the costs of illnesses caused by exposure to second-hand smoke. Unhealthy diets and the lack of exercise can contribute to reduced worker productivity and increase health care spending. Obesity in pregnancy can adversely impact the health of developing fetuses and infants. Unhealthy lifestyles divert societal resources from other areas of public need, such as education (McGee 1999).

5.6 The Right to Refuse Care

Whether persons with mental conditions are morally required to take medications that make them better able to live normal lives could be styled as a question of the limits of private choice. Some mental health patients are not competent to make their own treatment decisions, but the vast majority are competent most of the time. Some patients are offered medications by their physicians to curb distinctly anti-social impulses such as oppositionality, verbal aggression and violence. It could be argued that these patients have an ethical obligation to medicate themselves, as advised. Competent patients with cognitive and emotional problems (such as moderate depression or mild hallucinations) that affect mainly themselves may plausibly argue that the benefits of psychotropic medications are not outweighed by the risks of lethargy, sexual dysfunction, tremor, speech problems and organ damage. Questions of political philosophy are implicated in debates over the extent to which authorities may compel medication use by death row inmates, defendants awaiting trial, prisoners and in-patients in state hospitals.

The flowering of bioethics as an academic discipline and branch of philosophy was fed by religious, moral and ethical concerns raised by high profile legal cases about the right to die (Beauchamp 2000). These cases seemed to place the power to "play God"—make life and death decisions—in the hands of patients, families and physicians. The

field was influenced, for example, by the famous Karen Quinlan decision (*In the Matter of Quinlan*, 1976). This case transported the federal constitutional ideal of the right to decisional privacy into state law, and characterized the right of a comatose woman's family to refuse life-saving treatment on her behalf as a "right to privacy" (Jonsen 1998). After the Quinlan decision, hospitals began setting up ethics committees to help doctors, patients and families exercise decisional privacy rights in a lawful and responsible manner. In 1986, the U.S. Supreme Court recognized in the case of Nancy Cruzan a right of patients to refuse medical care such as artificial respiration and tube feeding, where the wishes of the patient to die could be established by clear and convincing evidence.

Moral philosophers have sought a greater role for ethics in shaping interpretations of constitutional law in life and death cases. On December 6, 1996, six prominent U.S. moral philosophers submitted an unprecedented brief to the U.S. Supreme Court in two cases, *Washington v. Glucksberg* (1997) and *Vacco v. Quill* (1997). The philosopher's were on the losing side. The U.S. Supreme Court refused to strike down laws banning assisted suicide, instead upholding state laws in New York and Washington that criminalized physician-assisted suicide. The Court argued that states have an interest in protecting life, protecting the poor and the disabled, and promoting physicians' ethical integrity. Patient's rights groups had argued that laws banning physician assisted suicide violated the privacy and equality rights of people with terminal illnesses.

According to what came to be known as "The Philosophers' Brief", signed by Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson in 1997 in connection with the United States Supreme Court case, Washington v. Glucksberg, 521 U.S. 702 (1997),

A person's interest in following his own convictions at the end of life is so central a part of the more general right to make 'intimate and personal choices' for himself that a failure to protect that particular interest would undermine the general right altogether. Death is, for each of us, among the most significant events of life. (Dworkin et al. 1997 [2007] pp.548-561)

The Brief went on to argue that there is little moral difference between allowing an authorized physician to administer a life-ending injection on behalf of a terminally ill patient and allowing an authorized physician to turn off the respirator or remove the feeding tube of a person in a vegetative coma.

The 2007 Theresa Schiavo case raised the philosophically important question of when it is ethical to exercise privacy rights. A Florida court allowed spouse Michael Schiavo to terminate life support on wife Terri's behalf, after the court found that Terri's autonomous choice would have been to refuse life-sustaining care if she were hopelessly comatose. Since the age of twenty-five, Terri had subsisted in a "persistent vegetative coma". Autopsy established that Terri had massive and irreversible brain damage, as her husband believed. Terri's parents had doubted the diagnosis of hopeless coma and wanted their daughter alive. Assuming Michael Schiavo was justified in

ignoring the pleas of strangers who wanted him to keep his wife alive, it is less clear that he was justified in turning down the pleas of his wife's own parents, who urged Schiavo to waive his wife's "privacy" and offered to assume complete responsibility for her care. What are the obligations of kin to honor the care and kinship wishes of fellow family members? What weight do privacy arguments on behalf of an incompetent spouse have in the face of parental claims?

6. Conclusion

Privacy is a broad concept. Philosophers have identified several forms of privacy. Respect for recognized forms of privacy —informational (Section 1), physical (Section 2), associational (Section 3), proprietary (Section 4) and decisional (Section 5)—is an ideal of biomedical ethics for the conduct of clinical research and administrative practices relating to physical and behavioral health. Yet there is ample disagreement about the scope of the ideal. There is wide philosophical consensus about the importance of medical confidentiality, modesty and bodily integrity in all health settings; but substantial philosophical disagreement about the limits of personal autonomy or individual choice in fields relating to human reproduction and genetics. As electronic data management technologies, mobile health care apps, public health surveillance and brain imaging technologies expand, the range and complexity of important privacy questions in medicine will also expand.

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APPENDIX 5: THE SCOPE OF ARTICLE 21

The interpretation of "Life"

- Minimum subsistence allowance during suspension *(State of Maharashtra v Chandrabhan (1983) 3 SCC 387)*
- To not be subjected to bonded labour *(Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161)*
- To not be subjected to unfair conditions of labour (*PUCL v. Union of India (1982) 3 SCC 235*)
- An environment free from smoke and pollution *(Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520)*
- A reasonable residence *(Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520)*
- Good health; chronic exposure to polluted air is violative of the right to life *(M.C Mehta v. Union of India (1999) 6 SCC 9)*
- Move freely and mingle with fellow beings which is violated if CBI is directed to investigate an offence without a prima facie case *(Common Cause, A Registered Society v. Union of India (1996) 6 SCC 667)*
- Food, water, decent environment, education, medical care and shelter. *(Chameli Singh v State of UP (1996) 6 SCC 667)*
- A prisoner's right to the bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading, writing *(Francis Coralie Mullin v. Union Territory Delhi, Administrator (1981) 1 SCC 608)*
- Clean air, water and soil.*(M.C. Mehta v Kamal Nath (2000) 6 SCC 2013)*
- Self-preservation *(Surjit Singh v State of Punjab (1996) 2 SCC 336)*
- Reputation (*State of Bihar v Lal Krishna Advani (2003) 8 SCC 361)*
- Sleep undisturbed *(Ramlila Maidan Incident, re (2012) 5 SCC 1)*
- Potable Water and a duty on the State to provide clean drinking water *(Narmada Bachao Andolan (2000) 10 SCC 664; A.P. Polln Control Board (2001) 2 SCC 62; State of*

Orissa v. Govt of India (2009) 5 SCC 492; M.K Balakrishnan (1) and (2) (2009) 5 SCC 507 and 511)

- Every child's right to a full development *(Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520)*
- Women to be treated with decency and proper dignity *(State of Punjab v Baldev Singh (1996) 6 SCC 172)*
- Livelihood *(Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545)*
- Tradition, culture and heritage and protection of that heritage in its full measure (*Ram Sharan Autyanuprasi v. Union of India (1989) Supp. (1) SCC 251*)
- Education (*Mohini Jain v. State of Karnataka (1992) 3 SCC 666*; *Unnikrishnan,J.P v State of Andhra Pradesh (1993) 1 SCC 645)*
- Payment of minimum wages to workers (*PUCL v Union of India (1983) SCR (3) 327*)
- Right against Sexual harassment at the workplace (*Visakha v. State of Rajasthan (1997) 6 SCC 241*)
- Social security *(Calcutta Electricity Supply Corporation (India) Ltd. v. Subhash Chandra Bose 1991 SCR Supl. (2) 267)*
- Health *(State of Punjab v. Mohinder Singh Chawla (1997) 2 SCC 83)*
- Medical care *(Parmananda Katara v. Union of India(1989) 4 SCC 286)*
- Environment free of noise pollution (*Noise Pollution (v), in re (2005) 5 SCC 733)*
- Right to know and be informed (*Essar Oil Ltd. v. Halar Utkarsh Samiti (2004) 2 SCC 392)*
- Early end of criminal proceedings through a speedy trial *(Mansukhlal Vithaldas Chauhan v. State of Gujarat (1997) 7 SCC 622)*
- Access to roads by resident of hilly areas *(State of Himachal Pradesh v. Umed Ram Sharma (1986) 2 SCC 68)*

The scope of "Personal Liberty"

- Right against the invasion of one's home and personal security *(Kharak Singh v State of Uttar Pradesh (1964) 1 SCR 332)*

- Right to go abroad *(Satwant Singh Sawhney v. Asst. Passport Officer 1967 (3) SCR 525)*
- Right to socialize with one's family and friends *(Hussainara Khatoon v. Home Secy, State of Bihar (1980) 1 SCC 81 and 93)*
- Right against solitary confinement *(Sunil Batra v Delhi Admn (1978) 4 SCC 494)*
- Right against bar fetters *(Charles Sobraj v Supdt, Central Jail, New Delhi (1978) 4 SCC 104)*
- Right to legal aid (*Madhav Hayawadanrao Hoskot v. State of Maharashtra (1978) 3 SCC 544)*
- Right to speedy trial *(Hussainara Khatoon v. Home Secy, State of Bihar (1980) 1 SCC 81 and 93)*
- Right against handcuffing at the first instance *(Prem Shankar Shukla v Delhi Admn (1980) 3 SCC 526)*
- Right against delayed execution *(Vatheeswaran, T.V. v State of T.N. (1983) 2 SCC 68)*
- Right against custodial violence *(Sheela Barse v. State of Maharashtra (1983) 2 SCC 96)*
- Right against public hanging *(Attorney General of India v. Lachma Devi (1989) Supp. (1) SCC 264)*
- Right against illegal detention (*Joginder Kumar v. State of Uttar Pradesh 1994 SCC (4) 260)*
- Right to shelter *(Shantistar Builders v. Totame Narayan Khimalal (1990) 1 SCC 520)*
- Right to health and medical aid of workers *(Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42)*
- Social Justice and Economic Empowerment *(Ashok Kumar Gupta v. State of Uttar Pradesh (1997) 5 SCC 201)*
- Reproductive rights and choice regarding sterilization *(Devika Biswas v. Union of India (2016) 10 SCC 726)*

APPENDIX 6: THE INDIAN CONTEXT OF PRIVACY

No.	Case Name and Citation	Paras	Context
1	Gobind v. State of M.P. (1975) 2 SCC 148 [3 Jj.]	13,15,28	Domiciliary
2	Malak Singh v. State of P&H (1981) 1 SCC 420 [2 Jj.]	5	Surveillance
3	Unni Krishnan, J.P. v. State of A.P., (1993) 1 SCC 645 [5 Jj.]	30	Not on Privacy directly
4	R. Rajagopal v. State of T.N. (1994) 6 SCC 632	9	Publicity of private life by publication
5	PUCL v. UoI (1997) 1 SCC 301 [2 Jj.]	12	Phone Tapping
6	Mr. 'X' v. Hospital 'Z' (1998) 8 SCC 296 [2 Jj.]	21	Medical secrecy
7	PUCL v. UoI (2003) 4 SCC 399 [3 Jj.]	43	Disclosure of antecedents by Politicians
8	Sharda v. Dharmpal (2003) 4 SCC 493 [3 Jj.]	54-60	Subjecting a person to Medical Test
9	Kapila Hingorani v. State of Bihar (2003) 6 SCC 1 [2 Jj.]	57	Not on Privacy directly
10	PUCL v. UoI (2004) 9 SCC 580 [2 Jj.]	37	POTA- Compelling to give information regarding terrorist
11	District Registrar and Collector v. Canara Bank (2005) 1 SCC 496 [2 Jj.]	36-38	Inspection and seizure of Bank documents
12	Directorate of Revenue v. Mohd. Nisar Holia (2008) 2 SCC 370 [2 Jj.]	15	Search and Seizure
13	Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat (2008) 5 SCC 33 [2 Jj.]	27	Closure of slaughterhouses during Jain festival
14	State of Maharashtra v. Bharat Shanti Lal Shah (2008) 13 SCC 5 [3 Jj.]	57	Phone tapping
15	Bhavesh Jayanti Lakhani v. State of Maharashtra	102-105	Surveillance- Extradition

	(2009) 9 SCC 551 [2 Jj.]		
16	Bhabani Prasad Jena v. Orissa State Commission for Women (2010) 8 SCC 633 [2 Jj.]	18	DNA testing- Paternity test
17	Ramlila Maidan Incident, In re: (2012) 5 SCC 1 [2 Jj.]	310-313	Right to sleep disturbed- Privacy during sleep
18	Suresh Kumar Kaushal v. Naaz Foundation (2014) 1 SCC 1 [2 Jj.]	70	Homosexuality and dignity
19	Talappalam Service Coop. Bank v. State of Kerala (2013) 16 SCC 82 [2jj]	57	Right to Information
20	Sahara India Real estate Corp. Ltd. v. SEBI (2012) 10 SCC 603 [5 Jj]	3	Publication of information in newspaper

APPENDIX 7: PRIVACY PROTECTED BY STATUTE

1. *Information Technology Act, 2000*

Section	Provision
S.30	**Duties of Certifying Authorities.-** Every Certifying Authority shall … (c) adhere to security procedures to ensure that the secrecy and privacy of the Electronic Signature are assured.
S.43	**Penalty and Compensation for damage to computer, computer system, etc..-** If any person without permission of the owner or any other person who is in-charge of a computer, computer system or computer network - (a) accesses or secures access to such computer, computer system or computer network or computer resource (b) downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium; … (g) provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under, … he shall be liable to pay damages by way of compensation to the person so affected. …
S. 43A	**Compensation for failure to protect data. –** Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected.
S. 66E	**Punishment for violation of privacy.-** Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both. …
S. 72	**Penalty for breach of confidentiality and privacy.** Save as otherwise provided in this Act or any other law for the time being in

	force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book. register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.
S. 72A	**Punishment for Disclosure of information in breach of lawful contract**.- Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both.

2. *The Indian Post Office Act, 1898*

S.53	**Penalty for opening, detaining or delaying postal articles.-** Whoever, being an officer of the Post Office, contrary to this duty, opens, or causes or suffers to be opened, any postal article in course of transmission by post, or willfully details or delays, or causes or suffers to be detained or delayed, any such postal article, shall be punishable with imprisonment for a term which may extend to two years, or with fine or both. Provided that nothing in this Section shall extend to the opening, detaining or delaying of any postal article under the authority of this Act or in obedience to the order in writing of the Central Government or the direction of a competent Court.
S. 67	**Penalty for detaining mails or opening mail bag**.- Whoever, except under the authority of this Act [or of any other Act for the time being in force] or in obedience to the order in writing of the Central Government or the direction of a competent Court, detains the mail or any postal article in course of transmission by post, or on any pretence opens a mail bag in course of transmission by post, shall be punishable with fine which may extend to two hundred rupees : Provided that nothing in this section shall prevent the detention of an officer of the post office carrying the mails or any postal article in course of transmission by post, on a charge of having committed an offence declared to be cognizable by the Code of Criminal Procedure, 1898 (5 of 1898), or any other law for the time being in force.

3. *Right to Information Act, 2005*

S. 8	**Exemption from disclosure of information.** (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,— … (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; … (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.
S. 11	**Third party information.—** (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information: Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

4. *Indian Telegraph Act, 1885*

S. 24	**Unlawfully attempting to learning the contents of messages** If any person does any of the acts mentioned in section 23 with the

	intention of unlawfully learning the contents of any message, or of committing any offence punishable under this Act, he may (in addition to the fine with which he is punishable under section 23) be punished with imprisonment for a term which may extend to one year.
S. 25	**Intentionally damaging or tampering with telegraphs** If any person, intending to prevent or obstruct the transmission or delivery of any message, or to intercept or to acquaint himself with the contents of any message, or to commit mischief, damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof, he shall be punished with imprisonment for a term which may extend to three years, or with fine or with both.

5. The Aadhaar Act, 2016

S. 28	**Security and confidentiality of information.** (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.
S. 29	**Restriction on sharing information.** (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.
S. 30	**Biometric information deemed to be sensitive personal information.** The biometric information collected and stored in electronic form, in accordance with this Act and regulations made thereunder, shall be deemed to be "electronic record" and "sensitive personal data or information", and the provisions contained in the Information Technology Act, 2000 and the rules made thereunder shall apply to such information, in addition to, and to the extent not in derogation of the provisions of this Act.
S. 37	**Penalty for disclosing identity information.** Whoever, intentionally discloses, transmits, copies or otherwise disseminates any identity information collected in the course of enrolment or authentication to any person not authorised under this Act or regulations made thereunder or in contravention of any agreement or arrangement entered into pursuant to the provisions of this Act, shall be punishable with imprisonment for a term which may extend to three years or with a fine which may extend to ten thousand rupees or, in the case of a company, with a fine which may extend to one lakh rupees or with both.
S. 38	**Penalty for unauthorised access to the Central Identities Data Repository** Whoever, not being authorised by the Authority, intentionally,— (a) accesses or secures access to the Central Identities Data Repository; (b) downloads, copies or extracts any data from the Central Identities Data Repository or stored in any removable storage medium; … (g) reveals any information in contravention of sub-section (5) of section 28, or shares, uses or displays information in contravention of section 29 or

	assists any person in any of the aforementioned acts; … shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to a fine which shall not be less than ten lakh rupees. …
S. 40	**Penalty for unauthorised use by requesting entity.** Whoever, being a requesting entity, uses the identity information of an individual in contravention of sub-section (3) of section 8, shall be punishable with imprisonment which may extend to three years or with a fine which may extend to ten thousand rupees or, in the case of a company, with a fine which may extend to one lakh rupees or with both.
S. 41	**Penalty for noncompliance with intimation requirements.** Whoever, being an enrolling agency or a requesting entity, fails to comply with the requirements of sub-section (2) of section 3 or sub-section (3) of section 8, shall be punishable with imprisonment which may extend to one year or with a fine which may extend to ten thousand rupees or, in the case of a company, with a fine which may extend to one lakh rupees or with both.

6. The Evidence Act, 1972

S. 122	**Communications during marriage.** No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.
S. 126	**Professional communications.** No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure-- (1) any such communication made in furtherance of any illegal purpose: (2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his

	client. Explanation.--The obligation stated in this section continues after the employment has ceased.
S. 129	**Confidential communications with legal advisers.-** No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.
S. 131	**Production of documents which another person, having possession, could refuse to produce.-** No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

7. The Indian Penal Code, 1860

S. 354C	**Voyeurism** Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine. … Explanation 2.— Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.
S.354D	**Stalking** 1. Any man who— i. follows a woman and contacts, or attempts. to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or ii. monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking: Provided that such conduct shall not amount to stalking if the man who pursued it proves that— i. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking bad been entrusted with the responsibility

	of prevention and detection of crime by the State; or ii. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or iii. in the particular circumstances such conduct was reasonable and justified. 2. Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

8. The Code of Criminal Procedure, 1973

S. 327	**Court to be open.** (1)The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. (2) Notwithstanding anything contained in sub-section (1), he inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court. (3)Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.

9. The Protection of Children from Sexual Offences Act, 2012

S. 23	**Procedure for media:** (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy. (2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child: Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its

	opinion such disclosure is in the interest of the child. … (4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.
S. 33	**Procedure and powers of Special Court** : … (7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial: Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child. Explanation.—For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

10. The State Bank of India Act, 1955

S. 44	**Obligation as to fidelity and secrecy:** (1) The State Bank shall observe, except as otherwise required by law, the practices and usages customary among bankers, and, in particular, it shall not divulge any information relating to or to the affairs of its constituents except in circumstances in which it is, in accordance with the law or practice and usage customary among bankers, necessary or appropriate for the State Bank to divulge such information. (2) Every director, member of a Local Board or of a Local Committee, auditor, adviser, officer or other employee of the State Bank shall, before entering upon his duties, make a declaration of fidelity and secrecy as in the form set out in the Second Schedule. [Similar provisions- SBI (Acquisition and Transfer of Undertakings) 1980 – Section 13, Credit Information Companies Act 2005 -section 29, and The Public Financial Institutions Act, 1983 -section 3.]

11. Payment and Settlement Systems Act , 2007

S. 22	**Duty to keep documents in the payment system confidential** (1)A system provider shall not disclose to any other person the existence or contents of any document or part thereof or other information given to him by a system participant, except where such disclosure is required under the provisions of this Act or the disclosure is made with the express or implied consent of the system participant concerned or where such disclosure is in obedience to the orders passed by a court of competent jurisdiction or a statutory authority n exercise of the powers conferred by a statute. (2) The provisions of the Bankers' Book Evidence Act, 1891 shall apply in

	relation to the information or 18 of 1991 documents, or other books in whatever form maintained by the system provider.

12. The Census Act, 1948

S.11	**Penalties.—** (1) … (b) any census-officer who intentionally puts any offensive or improper question or knowingly makes any false return or, without the previous sanction of the Central Government or the State Government, discloses any information which he has received by means of, or for the purposes of, a census return, or (c) any sorter, compiler or other member of the census staff who removes, secrets, damages or destroys any census document or deals with any census document in a manner likely to falsify or impair the tabulations of census results, or … shall be punishable with fine which may extend to one thousand rupees and in case of a conviction under part 4(a), (b) or (c) shall also be punishable with imprisonment which may extend to three years. (2) Whoever abets any offence under sub-section (1) shall be punishable with fine which may extend to one thousand rupees.
S. 15	**Records of census not open to inspection of admissible in evidence.—** No person shall have a right to inspect any book, register or record made by a census-officer in the discharge of his duty as such, or any schedule delivered under section 10 and notwithstanding anything to the contrary in the Indian Evidence Act, 1872 (1 of 1872), no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding whatsoever or in any criminal proceeding other than a prosecution under this Act or any other law for any act or omission which constitutes an offence under this Act.

13. The Family Courts Act, 1984

S. 11	**Proceedings to be held in camera.-** In every suit or proceedings to which the Act applies, the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires.

APPENDIX 8: RELEVANT PARAS OF OLGA TELLIS

Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545

27. We will first deal with the preliminary objection raised by Mr K.K. Singhvi, who appears on behalf of the Bombay Municipal Corporation, that the petitioners are estopped from contending that their huts cannot be demolished by reason of the fundamental rights claimed by them. It appears that a Writ Petition No. 986 of 1981, was filed on the original side of the Bombay High Court by and on behalf of the pavement dwellers claiming reliefs similar to those claimed in the instant batch of writ petitions. A learned Single Judge granted an ad-interim injunction restraining the respondents from demolishing the huts and from evicting the pavement dwellers. When the petition came up for hearing on July 27, 1981, counsel for the petitioners made a statement in answer to a query from the court, that no fundamental right could be claimed to put up dwellings on footpaths or public roads. Upon this statement, respondents agreed not to demolish until October 15, 1981, huts which were constructed on the pavements or public roads prior to July 23, 1981. On August 4, 1981, a written undertaking was given by the petitioners agreeing, inter alia, to vacate the huts on or before October 15, 1981 and not to obstruct the public authorities from demolishing them. Counsel appearing for the State of Maharashtra responded to the petitioners' undertaking by giving an undertaking on behalf of the State Government that, until October 15, 1981, no pavement dweller will be removed out of the city against his wish. On the basis of these undertakings, the learned Judge disposed of the writ petition without passing any further orders. The contention of the Bombay Municipal Corporation is that since the pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981, they are estopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Article 21 of the Constitution.

28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any

more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well-founded is another matter. But, the argument has to be examined despite the concession.

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In *Basheshar Nath v. CIT* [AIR 1959 SC 149 : 1959 Supp (1) SCR 528 : (1959) 35 ITR 190] a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

30. We must, therefore, reject the preliminary objection and proceed to consider the validity of the petitioners' contentions on merits.

APPENDIX 9: RIGHT TO PRIVACY – US SUPREME COURT

S. NO.	CASE	SUBJECT-MATTER
1	Wolf v. Colorado (1949)	Search and seizure
2	NAACP v. Alabama (1958)	Association
3	Mapp v. Ohio (1961)	Search and seizure
4	Griswold v. Connecticut (1965)	Choice to use contraceptives
5	Loving v. Virginia (1967)	Interracial marriage
6	Katz v. United States (1967)	Telephonic conversations
7	Stanley v. Georgia (1969)	Possession of obscene material
8	Eisenstadt v. Baird (1972)	Choice to use contraceptives
9	Roe v. Wade (1973)	Choice to abort
10	South Dakota v. Opperman (1976)	Vehicle search
11	Planned Parenthood v. Casey (1992)	Choice to abort
12	Kyllo v. United States (2001)	Thermal-imaging
13	Lawrence v. Texas (2003)	Sodomy
14	NASA v. Nelson (2011)	Informational privacy
15	United States v. Jones (2012)	Vehicle tracking
16	Riley v. California (2014)	Search of contents of cellphone
17	Obergefell v. Hodges (2015)	Same-sex marriage

Search and seizure – Wolf v. Colorado (1949): The court observed that "the security of one's privacy against arbitrary intrusion by the police" was "at the core of the Fourth Amendment" and hence implicit in "the concept of ordered liberty". Despite this, however, the Court held (after balancing this right with societal interests of crime prevention) that the Fourteenth Amendment does not prohibit evidence obtained through illegal search and seizure from being admitted.

Association – NAACP v. Alabama (1958): An organization working for the welfare of 'Negroes' (as the judgment puts it) set up an office in Alabama without complying with the statutory requirements. During legal proceedings initiated by the State, the Court ordered the organization to produce its membership lists. Upon the organization's failure to comply,

a contempt order was passed by the Court. The organization came to the Supreme Court to have that order set quashed.

The NAACP was able to establish that previously, its members had faced "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" when their identities were revealed. The SCOTUS recognized and affirmed a right to "privacy in one's associations". It held that there was a "vital relationship between freedom to associate and privacy in one's associations…. …Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Search and seizure – Mapp v. Ohio (1961): The Appellant was convicted of possessing obscene material that was seized through an unlawful search. On the one hand, the Court held that the principles in Wolf (supra) had been watered down by later decisions. On the other hand, it used "Wolf's constitutional documentation of the right to privacy free from unreasonable state intrusion" to conclude that evidence obtained through unlawful search and seizure is inadmissible in federal and state courts.

Choice to use contraceptives – Griswold v. Connecticut (1965): The challenged statute outlawed the use of contraceptives by any person. The SCOTUS held that specific guarantees in the Bill of Rights have penumbras, "formed by emanations from those guarantees that help give them life and substance." E.g., the right to association is a right penumbral to the guarantee in the first amendment – without the right to association, first amendment rights would be "less secure".

Similarly, the Court noted that the Constitution creates various 'zones of privacy' through its various amendments. E.g. the first amendment creates the right to associational privacy, the fourth amendment creates the right against unlawful search and seizure, the fifth amendment creates the right against self-incrimination, etc. Thus, it declared the statute unconstitutional as contravening many of these zones of privacy. Without further explaining which zones were violated, the court highlighted the importance of the right to privacy in one's marriage by calling it "a right of privacy older than the Bill of Rights - older than our political parties, older than our school system." The police could not be allowed to search "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," as per the majority.

Interracial marriage – Loving v. Virginia (1967): The statute prohibited certain marriages solely on the basis of racial classification. This was held to be in violation of the Due Process clause of the Fourteenth Amendment. "The freedom to marry", as per the Court, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." This judgment was read in later decisions of the SCOTUS as recognizing a right to privacy in marriage-related choices.

Telephonic conversations – Katz v. United States (1967): A listening and recording device was placed by the FBI outside a telephone booth from where the accused made

phone calls disclosing his illegal activities. The SCOTUS held that such intrusion into one's private conversations amounted to "search and seizure", even though no physical space was intruded into. Thus, the Fourth Amendment was violated.

Importantly, the Court held that the Fourth Amendment did not recognize a "general 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."

Possession of obscene material – Stanley v. Georgia (1969): The statute under challenge was a Georgia statute that made mere private possession of obscene material an offence. The appellant had been convicted under it by the courts below. The court distinguished previous cases (Roth, Alberts) on the ground that they dealt with dissemination of obscene material.

> *"This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 U. S. 507, 333 U. S. 510 (1948), is fundamental to our free society. Moreover, in the context of this case -- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home -- that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.*
>
> *…These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home.*
>
> *…If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."*

Choice to use contraceptives – Eisenstadt v. Baird (1972): Appellant was convicted for giving a woman a contraceptive foam. The Court extended the principle in Griswold (supra) to unmarried couples to invalidate the conviction, and (famously) held that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

Choice to abort – Roe v. Wade (1973): In the abortion case, the Court held that even though there was no explicit right to privacy in the Constitution, "in a line of decisions", the Supreme Court had recognized "a guarantee of certain areas or zones of privacy". In the same breath, it qualified the statement by saying that only such personal rights would be deemed a part of the right to privacy which were "fundamental" and "implicit in the

concept of personal liberty". The Court later went on to hold that the right to privacy was broad enough to include the woman's right to make a decision regarding termination of her pregnancy.

Notably, as per Justice Stewart (concurring), who draws support from Katz, there is "no constitutional right of privacy, as such" in the U.S. Constitution.

Vehicle search – South Dakota v. Opperman (1976): The respondent's car was impounded for multiple traffic violations and subsequently searched. The SCOTUS (Burger, CJ speaking on behalf of 5 judges) held that the expectation of privacy in case of a vehicle plying on a public road was diminished. It was "significantly less than that relating to one's home or office", because of two reasons. The first reason is the "obviously public nature of automobile travel". The second is the fact that vehicles are routinely subjected to inspections.

Choice to abort – Planned Parenthood v. Casey (1992): The statute under challenge imposed certain conditions on the termination of pregnancy (including in the first trimester), one of which was spousal consent. The Court took support from the decision in Eisenstadt (supra) on privacy. Since women "do not lose their constitutionally protected liberty when they marry," the court held, "[t]he Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the …family."

Thermal-imaging – Kyllo v. United States (2001): The appellant was growing marijuana in his house. An officer put a thermal-imaging device outside the house (in a vehicle) to map the interiors of the house. "The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex." The Court (Scalia, J. with 5 others) held that this amounts to a 'search' within the meaning of the Fourth Amendment. The Government would have to show that the search was reasonable. To hold otherwise, as per the Court, would be to reduce the importance of the right to privacy guaranteed under the Constitution.

Sodomy – Lawrence v. Texas (2003): The Act under challenge criminalized same-sex sexual conduct. Since the petitioners were adults, the Court held, they were entitled to respect for their private lives. Under the Due Process Clause, through the right to liberty, they had "full right to engage in their conduct without intervention of the government."

Informational privacy – NASA v. Nelson (2011): The Court was called upon to decide whether mandatory background checks of employees (conducted by NASA) violated the right to informational privacy. The majority (Alito, J. for himself and 6 others), however, did not decide that question. "We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in Whalen and Nixon." It upheld the checks as a reasonable intrusion into the right, if any existed. However, Scalia, J. (joined by Thomas, J.) in a concurring opinion, held that no such right existed in the U.S. Constitution.

Vehicle tracking – United States v. Jones (2012): A GPS device was affixed to the respondent's jeep. All 9 judges held (through different opinions) that this constituted a 'search' within the meaning of the Fourth Amendment.

Search of contents of cellphone – Riley v. California (2014): In one case, a police officer arrested a man for being a suspected gang member, and went through his phone for evidence (photographs) proving said membership, as also a crime recently committed by the gang. In the other case, a police officer went through the phone contacts of an arrested man who was suspected as dealing in cocaine. They found a contact called 'my house'. They then traced that phone number to an apartment, got a search warrant for the said apartment and seized cocaine.

In a 1973 case, the SCOTUS had laid down that searches 'incident' to arrest were reasonable intrusions into the Fourth Amendment. [United States v. Robinson, 414 U. S. 218.] In that case, the police had arrested Robinson for driving with a revoked license. Upon searching him, the officer found heroin on his person. In a subsequent case [Arizona v. Gant, 556 U. S. 332], the Court held that a warrantless search of a vehicle was permitted where it was "reasonable to believe that evidence of the crime of arrest might be found in the vehicle".

The Court in Riley had to decide whether a warrantless search of mobile phones fell within these exceptions. It distinguished both the above cases on facts. In Riley, the respondents' main contention was that a warrant requirement would frustrate the aim of evidence collection (the argument hinged on remote-wiping and encryption). The Court (through **CJ Roberts, speaking for 8 judges**) held:

> "*The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." Maryland v. King…. To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." Ibid. One such example, of course, is Chimel. Chimel refused to "characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor.'" …Because a search of the arrestee's entire house was a substantial invasion beyond the arrest itself, the Court concluded that a warrant was required.*"

Specifically on cell phones, the Court observed that the immense storage capacity of these devices had implications on privacy:

> "*The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone* ***collects in one place many distinct types of information****—an address, a note, a prescription, a bank statement, a video— that reveal much more in combination than any isolated record. Second, a cell phone's capacity* ***allows even just one type of information to convey far more than previously possible****. The sum of an individual's private life can be reconstructed through a thousand*

photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, ***the data on a phone can date back to the purchase of the phone, or even earlier****. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.*

…The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.

…In 1926, Learned Hand observed (in an opinion later quoted in Chimel) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." United States v. Kirschenblatt, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form — unless the phone is."

The Court also expressed concerns about cloud computing servers accessible through cell phones. In conclusion, the Court made the following observation:

"*We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.*

…Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," Boyd, supra, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant."

Same-sex Marriage – Obergefell v. Hodges (2015): Drawing support from Lawrence (supra), the Court held that the right to marry was "a fundamental right inherent in the liberty of the person". It invalidated the impugned statute which prohibited same-sex marriages.