REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 494 OF 2012

JUSTICE K.S. PUTTASWAMY (RETD.),
AND ANOTHER …PETITIONERS

VS.

UNION OF INDIA AND OTHERS …RESPONDENTS

WITH

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

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

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

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

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

CONTEMPT PETITION (CIVIL) NO.144 OF 2014 IN W.P. (C) NO.494/2012

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

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

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

W.P.(C) NO.37 OF 2015

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

CONTEMPT PETITION (C) NO.674 OF 2015 IN W.P. (C) NO.829 OF 2013

T.P. (CIVIL) NO. 921/2015

CONTEMPT PETITION (C) NO.470 OF 2015 IN W.P.(C) NO.494 OF 2012

CONTEMPT PETITION (C) NO.444 OF 2016 IN W.P. (C) NO.494 OF 2012

CONTEMPT PETITION (C) NO.608 OF 2016 IN W.P. (C) NO.494 OF 2012

W.P.(C) NO. 797 OF 2016

CONTEMPT PETITION (C) NO.844 OF 2017 IN W.P. (C) NO.494 OF 2012

AND

W.P. (CIVIL) NO. 000372 OF 2017

J U D G M E N T

SANJAY KISHAN KAUL, J

1. I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman, J, and Dr. D.Y. Chandrachud, J. The conclusion is the same, answering the reference that privacy is not just a common law right, but a fundamental right falling in Part III of the

Constitution of India. I agree with this conclusion as privacy is a primal, natural right which is inherent to an individual. However, I am tempted to set out my perspective on the issue of privacy as a right, which to my mind, is an important core of any individual existence.

2. A human being, from an individual existence, evolved into a social animal. Society thus envisaged a collective living beyond the individual as a unit to what came to be known as the family. This, in turn, imposed duties and obligations towards the society. The right to *"do as you please"* became circumscribed by norms commonly acceptable to the larger social group. In time, the acceptable norms evolved into formal legal principles.

3. "The right to be", though not extinguished for an individual, as the society evolved, became hedged in by the complexity of the norms. There has been a growing concern of the impact of technology which breaches this "right to be", or privacy – by whatever name we may call it.

4. The importance of privacy may vary from person to person dependent on his/her approach to society and his concern for being left

alone or not. That some people do not attach importance to their privacy cannot be the basis for denying recognition to the right to privacy as a basic human right.

5. It is not India alone, but the world that recognises the right of privacy as a basic human right. The Universal Declaration of Human Rights to which India is a signatory, recognises privacy as an international human right.

6. The importance of this right to privacy cannot be diluted and the significance of this is that the legal conundrum was debated and is to be settled in the present reference by a nine-Judges Constitution Bench.

7. This reference has arisen from the challenge to what is called the 'Aadhar Card Scheme'. On account of earlier judicial pronouncements, there was a cleavage of opinions and to reconcile this divergence of views, it became necessary for the reference to be made to a nine-Judges Bench.

8. It is nobody's case that privacy is not a valuable right, but the moot point is whether it is only a common law right or achieves the status of a fundamental right under the *Grundnorm* – the Indian

Constitution. We have been ably assisted by various senior counsels both for and against the proposition as to whether privacy is a Constitutional right or not.

PRIVACY

9. In the words of Lord Action:

> "the sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by mortal power[1]."

10. Privacy is an inherent right. It is thus not given, but already exists. It is about respecting an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so.

11. The right to privacy may have different aspects starting from 'the right to be let alone' in the famous article by Samuel Warren and Louis D. Brandeis[2]. One such aspect is an individual's right to control dissemination of his personal information. There is nothing wrong in individuals limiting access and their ability to shield from unwanted access. This aspect of the right to privacy has assumed particular

[1]The History of Freedom and Other Essays (1907), p 587
[2] The Right to Privacy 4 HLR 193

significance in this information age and in view of technological improvements. A person-hood would be a protection of one's personality, individuality and dignity.[3] However, no right is unbridled and so is it with privacy. We live in a society/ community. Hence, restrictions arise from the interests of the community, state and from those of others. Thus, it would be subject to certain restrictions which I will revert to later.

PRIVACY & TECHNOLOGY

12. We are in an information age. With the growth and development of technology, more information is now easily available. The information explosion has manifold advantages but also some disadvantages. The access to information, which an individual may not want to give, needs the protection of privacy.

The right to privacy is claimed *qua* the State and non-State actors. Recognition and enforcement of claims qua non-state actors may require legislative intervention by the State.

[3] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

A. Privacy Concerns Against The State

13. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilizing technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened public safety concerns. One such technique being adopted by States is 'profiling'. The European Union Regulation of 2016[4] on data privacy defines 'Profiling' as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences,

[4] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

interests, reliability, behaviour, location or movements[5]. Such profiling can result in discrimination based on religion, ethnicity and caste. However, 'profiling' can also be used to further public interest and for the benefit of national security.

14. The security environment, not only in our country, but throughout the world makes the safety of persons and the State a matter to be balanced against this right to privacy**.**

B. <u>Privacy Concerns Against Non-State Actors</u>

15. The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before.

16. Further, in this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences**.** Data is generated not just by active sharing of information, but also passively, with every click on the 'world

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

wide web'. We are stated to be creating an equal amount of information every other day, as humanity created from the beginning of recorded history to the year 2003 – enabled by the 'world wide web'.[6]

17. Recently, it was pointed out that "'Uber', the world's largest taxi company, owns no vehicles. 'Facebook', the world's most popular media owner, creates no content. 'Alibaba', the most valuable retailer, has no inventory. And 'Airbnb', the world's largest accommodation provider, owns no real estate. Something interesting is happening."[7] 'Uber' knows our whereabouts and the places we frequent. 'Facebook' at the least, knows who we are friends with. 'Alibaba' knows our shopping habits**.** **'**Airbnb' knows where we are travelling to**.** Social networks providers, search engines, e-mail service providers, messaging applications are all further examples of non-state actors that have extensive knowledge of our movements, financial transactions, conversations – both personal and professional, health, mental state, interest, travel locations, fares and shopping habits**.** As we move towards becoming a digital economy

[6]Michael L. Rustad, SannaKulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, 28 Harv. J.L. & Tech. 349

[7]https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/ Tom Goodwin 'The Battle is for Customer Interface'

and increase our reliance on internet based services, we are creating deeper and deeper digital footprints – passively and actively.

18. These digital footprints and extensive data can be analyzed computationally to reveal patterns, trends, and associations, especially relating to human behavior and interactions and hence, is valuable information. This is the age of 'big data'. The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially. A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising. Of course, 'big data' can also be used to further public interest. There may be cases where collection and processing of big data is legitimate and proportionate, despite being invasive of privacy otherwise.

19. Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision making processes and shaping behaviour. It can be

used as a tool to exercise control over us like the 'big brother' State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.

20. Thus, there is an unprecedented need for regulation regarding the extent to which such information can be stored, processed and used by non-state actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated.[8]

21. The concept of 'invasion of privacy' is not the early conventional thought process of 'poking ones nose in another person's affairs'. It is not so simplistic. In today's world, privacy is a limit on the government's power as well as the power of private sector entities.[9]

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[8]Kadhim Shubber, Blackberry gives Indian Government ability to intercept messages published by Wired on 11 July, 2013 http://www.wired.co.uk/article/blackberry-india

[9] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

22. George Orwell created a fictional State in '*Nineteen Eighty-Four*.' Today, it can be a reality. The technological development today can enable not only the state, but also big corporations and private entities to be the 'big brother'.

The Constitution of India - A Living Document

23. The Constitutional jurisprudence of all democracies in the world, in some way or the other, refer to 'the brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day', 'the heaven of freedom' , etc. The spirit is justice for all, being the cherished value.

24. This spirit displays many qualities, and has myriad ways of expressing herself – at times she was liberty, at times dignity. She was equality, she was fraternity, reasonableness and fairness. She was in Athens during the formative years of the *demoscratos* and she manifested herself in England as the Magna Carta. Her presence was felt in France during the Revolution, in America when it was being founded and in South Africa during the times of Mandela.

25. In our country, she inspired our founding fathers – The Sovereign, Socialist, Secular Democratic Republic of India was founded on her very spirit.

26. During the times of the Constituent Assembly, the great intellectuals of the day sought to give this brooding spirit a form, and sought to invoke her in a manner that they felt could be understood, applied and interpreted – they drafted the Indian Constitution.

27. In it they poured her essence, and gave to her a grand throne in Part III of the Indian Constitution.

28. The document that they created had her everlasting blessings, every part of the Constitution resonates with the spirit of Justice and what it stands for: *'peaceful, harmonious and orderly social living'*. The Constitution stands as a codified representation of the great spirit of Justice itself. It is because it represents that *Supreme Goodness* that it has been conferred the status of the *Grundnorm*, that it is the Supreme Legal Document in the country.

29. The Constitution was not drafted for a specific time period or for a certain generation, it was drafted to stand firm, for eternity. It sought to

create a Montesquian framework that would endear in both war time and in peace time and in Ambedkar's famous words, *"if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."*[10]

30. It has already outlived its makers, and will continue to outlive our generation, because it contains within its core, a set of undefinable values and ideals that are eternal in nature. It is because it houses these values so cherished by mankind that it lives for eternity, as a *Divine Chiranjeevi.*

31. The Constitution, importantly, was also drafted for the purpose of assisting and at all times supporting this 'peaceful, harmonious and orderly social living'. The Constitution thus lives for the people. Its deepest wishes are that civil society flourishes and there is a peaceful social order. Any change in the sentiments of the people are recognised by it. It seeks to incorporate within its fold all possible civil rights which existed in the past, and those rights which may appear on the horizon of the future. It endears. The Constitution was never intended to serve as a means to stifle the protection of the valuable rights of its citizens. Its aim and purpose was completely the opposite.

[10] Dhananjay Keer, Dr.Ambedkar: Life and Mission, Bombay: Popular Prakashan, 1971 [1954], p.410.)

32. The founders of the Constitution, were aware of the fact that the Constitution would need alteration to keep up with the mores and trends of the age. This was precisely the reason that an unrestricted amending power was sought to be incorporated in the text of the Constitution in Part 20 under Article 368. The very incorporation of such a plenary power in a separate part altogether is *prima facie* proof that the Constitution, even during the times of its making was intended to be a timeless document, eternal in nature, organic and living.

33. Therefore, the *theory of original intent* itself supports the stand that the original intention of the makers of the Constitutional was to ensure that it does not get weighed down by the originalist interpretations/remain static/fossilised, but changes and evolves to suit the felt need of the times. The original intention theory itself contemplates a Constitution which is organic in nature.

34. The then Chief Justice of India, Patanjali Sastri, in the State of West Bengal vs. Anwar Ali Sarkar[11] observed as follows:

> "**90.** I find it impossible to read these portions of the Constitution without regard to the background out of which

[11] AIR 1952 SCR 284

> they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs."

35. How the Constitution should be read and interpreted is best found in the words of Khanna,J., in Kesavananda Bharati v. State of Kerala[12] as follows:

> **"1437.** …. A Constitution is essentially different from pleadings filed in Court of litigating parties. Pleadings contain claim and counter-claim of private parties engaged in litigation, while a Constitution provides for the framework of the different organs of the State viz. the executive, the legislature and the judiciary. A Constitution also reflects the hopes and aspirations of a people. Besides laying down the norms for the functioning of different organs a Constitution encompasses within itself the broad indications as to how the nation is to march forward in times to come. A Constitution cannot be regarded as a mere legal document to be read as a will or an agreement nor is Constitution like a plaint or written statement filed in a suit between two litigants. A Constitution must of necessity be the vehicle of the life of a nation. It has also to be borne in mind that a Constitution is not a gate but a

[12] (1973) 4 SCC 225

road. Beneath the drafting of a Constitution is the awareness that things do not stand still but move on, that life of a progressive nation, as of an individual, is not static and stagnant but dynamic and dashful. A Constitution must therefore contain ample provision for experiment and trial in the task of administration.

A Constitution, it needs to be emphasised, is not a document for fastidious dialectics but the means of ordering the life of a people. ***It had (sic) its roots in the past, its continuity is reflected in the present and it is intended for the unknown future.*** The words of Holmes while dealing with the U.S. Constitution have equal relevance for our Constitution. Said the great Judge:

"… the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." [See *Gompers* v. *United States*, 233 U.S. 604, 610 (1914)].

It is necessary to keep in view Marshall's great premises that "It is a Constitution we are expounding". To quote the words of Felix Frankfurter in his tribute to Holmes:

"Whether the Constitution is treated primarily as a text for interpretation or as an instrument of Government may make all the difference in the word. The fate of cases, and thereby of legislation, will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in a civilized society." (See *Mr Justice Holmes* edited by Felix Frankfurter, p. 58). (Emphasis supplied)

36. In the same judgment, K.K. Mathew, J., observed :

> **1563** ... That the Constitution is a framework of great governmental powers to be exercised for great public ends in the future, is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power. No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth. Human societies keep changing; needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it, may burst forthwith an intensity that exacts more than reasonable satisfaction. [See Felix Frankfurter, of Law and Men, p 35] As Wilson said, a living Constitution must be Darwinian in structure and practice. [See Constitutional Government in The United States, p 25] The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep pulsation for change within. "A Constitution is an experiment as all life is an experiment." [See Justice Holmes in Abrams v United States, 250 US 616]…"

37. In the context of the necessity of the doctrine of flexibility while dealing with the Constitution, it was observed in Union of India vs. Naveen Jindal[13] :

> "**39**. Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time.

[13] (2004) 2 SCC 510

> **40**. Interpretation of the Constitution is a difficult task. While doing so, the Constitutional courts are not only required to take into consideration their own experience over the time, the international treaties and covenants but also keeping the doctrine of flexibility in mind. This Court times without number has extended the scope and extent of the provisions of the fundamental rights, having regard to several factors including the intent and purport of the Constitution-makers as reflected in Parts IV and IV-A of the Constitution of India**."**

38. The document itself, though inked in a parched paper of timeless value, never grows old. Its ideals and values forever stay young and energetic, forever changing with the times. It represents the pulse and soul of the nation and like a phoenix, grows and evolves, but at the same time remains young and malleable.

39. The notions of goodness, fairness, equality and dignity can never be satisfactorily defined, they can only be experienced. They are felt. They were let abstract for the reason that these rights, by their very nature, are not static. They can never be certainly defined or applied, for they change not only with time, but also with situations. The same concept can be differently understood, applied and interpreted and therein lies their beauty and their importance. This multiplicity of interpretation and application is the very core which allows them to be

differently understood and applied in changing social and cultural situations.

40. Therefore, these core values, these core principles, are all various facets of the spirit that pervades our Constitution and they apply and read differently in various scenarios. *They manifest themselves differently in different ages, situations and conditions.* Though being rooted in ancient Constitutional principles, they find mention and applicability as different rights and social privileges. They appear differently, based on the factual circumstance. Privacy, for example is nothing but a form of dignity, which itself is a subset of liberty.

41. Thus, from the one great tree, there are branches, and from these branches there are sub-branches and leaves. Every one of these leaves are rights, all tracing back to the tree of justice. They are all equally important and of equal need in the great social order. They together form part of that '*great brooding spirit*'. Denial of one of them is the denial of the whole, for these rights, in manner of speaking, fertilise and nurture each other.

42. What is beautiful in this biological, organic growth is this: While the tree appears to be great and magnificent, apparently incapable of further growth, there are always new branches appearing, new leaves and buds growing. These new rights, are the rights of future generations that evolve over the passage of time to suit and facilitate the civility of posterity. They are equally part of this tree of rights and equally trace their origins to those natural rights which we are all born with. These leaves, sprout and grow with the passage of time, just as certain rights may get weeded out due to natural evolution.

43. At this juncture of time, we are incapable and it is nigh impossible to anticipate and foresee what these new buds may be. There can be no certainty in making this prediction. However, what remains certain is that there will indeed be a continual growth of the great tree that we call the Constitution. *This beautiful aspect of the document is what makes it organic, dynamic, young and everlasting. And it is important that the tree grows further, for the Republic finds a shade under its branches.*

44. The challenges to protect privacy have increased manifold. The observations made in the context of the need for law to change, by

Bhagwati, J., as he then was, in National Textile Workers Union Vs. P.R. Ramakrishnan [14] would equally apply to the requirements of interpretation of the Constitution in the present context:

> "We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind."

45. It is wrong to consider that the concept of the supervening spirit of justice manifesting in different forms to cure the evils of a new age is unknown to Indian history. Lord Shri Krishna declared in Chapter 4 Text 8 of The Bhagavad Gita thus:

"परित्राणायसाधूनां विनाशायचदुष्कृताम्।
धर्मसंस्थापनार्थाय सम्भवामि युगे युगे ॥"

[14] (1983) 1 SCC 228

46. *The meaning of this profound statement, when viewed after a thousand generations is this:* That each age and each generation brings with it the challenges and tribulations of the times. But that Supreme spirit of Justice manifests itself in different eras, in different continents and in different social situations, *as different values* to ensure that there always exists the protection and preservation of certain eternally cherished rights and ideals. It is a reflection of this divine 'Brooding spirit of the law', 'the collective conscience', 'the intelligence of a future day' that has found mention in the ideals enshrined in *inter- alia*, Article 14 and 21, which together serve as the heart stones of the Constitution. The spirit that finds enshrinement in these articles manifests and reincarnates itself in ways and forms that protect the needs of the society in various ages, as the values of liberty, equality, fraternity, dignity, and various other Constitutional values, Constitutional principles. It always grows stronger and covers within its sweep the great needs of the times. This spirit can neither remain dormant nor static and can never be allowed to fossilise.

47. An issue like privacy could never have been anticipated to acquire such a level of importance when the Constitution was being contemplated.

Yet, today, the times we live in necessitate that it be recognised not only as a valuable right, but as a right Fundamental in Constitutional jurisprudence.

48. There are sure to be times in the future, similar to our experience today, perhaps as close as 10 years from today or as far off as a 100 years, when we will debate and deliberate whether a certain right is fundamental or not. At that time it must be understood that the Constitution was always meant to be an accommodative and all-encompassing document, framed to cover in its fold all those rights that are most deeply cherished and required for a 'peaceful, harmonious and orderly social living.

49. The Constitution and its all-encompassing spirit forever grows, but never ages.

Privacy is essential to liberty and dignity

50. Rohinton F. Nariman, J., and Dr. D.Y. Chandrachud J., have emphasized the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them and seek to refer to some legal observations in this regard:

In Robertson and Nicol on Media Law[15] it was observed:

> "Individuals have a psychological need to preserve an intrusion-free zone for their personality and family and suffer anguish and stress when that zone is violated. Democratic societies must protect privacy as part of their facilitation of individual freedom, and offer some legal support for the individual choice as to what aspects of intimate personal life the citizen is prepared to share with others. This freedom in other words springs from the same source as freedom of expression: a liberty that enhances individual life in a democratic community."

51. Lord Nicholls and Lord Hoffmann in their opinion in *Naomi Campbell*'s case[16] recognized the importance of the protection of privacy.

Lord Hoffman opined as under:

> "**50**. *What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state - I have particularly in mind the position of the media, to which I shall return in a moment - but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the*

[15] Geoffrey Robertson, QC and Andrew Nicol, QC, Media Law fifth edition p. 265

[16] Campbell V. MGN Ltd.2004 UKHL 22

publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.

51. The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. …. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

Lord Nicholls opined as under:

"12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in R v Dymont [1988] 2 SCR 417, 426."

52. Privacy is also the key to freedom of thought. A person has a right to think. The thoughts are sometimes translated into speech but confined to the person to whom it is made. For example, one may want to criticize someone but not share the criticism with the world.

Privacy – Right To Control Information

53. I had earlier adverted to an aspect of privacy – the right to control dissemination of personal information. The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business". On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candor in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which

becomes impossible, if important decisions are made in secret without our awareness or participation.[17]

54. Dr. D.Y. Chandrachud, J., notes that recognizing a zone of privacy is but an acknowledgement that each individual must be entitled to chart and pursue the course of development of their personality. Rohinton F. Nariman,J., recognizes informational privacy which recognizes that an individual may have control over the dissemination of material which is personal to him. Recognized thus, from the right to privacy in this modern age emanate certain other rights such as the right of individuals to exclusively commercially exploit their identity and personal information, to control the information that is available about them on the 'world wide web' and to disseminate certain personal information for limited purposes alone.

55. Samuel Warren and Louis Brandeis in 1890 expressed the belief that an individual should control the degree and type of private – personal information that is made public :

[17] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

> *"The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.... In every such case the individual is entitled to decide whether that which is his shall be given to the public."*

This formulation of the right to privacy has particular relevance in today's information and digital age.

56. An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments[18].

57. There is no justification for making all truthful information available to the public. The public does not have an interest in knowing

[18] Daniel Solove, '10 Reasons Why Privacy Matters' published on January 20, 2014 https://www.teachprivacy.com/10-reasons-privacy-matters/

all information that is true. Which celebrity has had sexual relationships with whom might be of interest to the public but has no element of public interest and may therefore be a breach of privacy.[19] Thus, truthful information that breaches privacy may also require protection.

58. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.[20]

59. Aside from the economic justifications for such a right, it is also justified as protecting individual autonomy and personal dignity. The right protects an individual's free, personal conception of the 'self.' The right of publicity implicates a person's interest in autonomous self-

[19] The UK Courts granted in super-injunctions to protect privacy of certain celebrities by tabloids which meant that not only could the private information not be published but the very fact of existence of that case & injunction could also not be published.

[20] The Second Circuit's decision in Haelan Laboratories v. Topps Chewing Gum. 202 F.2d 866 (2d Cir. 1953) penned by Judge Jerome Frank defined the right to publicity as "*the right to grant the exclusive privilege of publishing his picture"*.

definition, which prevents others from interfering with the meanings and values that the public associates with her.[21]

60. Prosser categorized the invasion of privacy into four separate torts[22]:

1) Unreasonable intrusion upon the seclusion of another;
2) Appropriation of another's name or likeness;
3) Unreasonable publicity given to the other's private life; and
4) Publicity that unreasonably places the other in a false light before the public

From the second tort, the U.S. has adopted a right to publicity.[23]

61. In the poetic words of Felicia Lamport mentioned in the book "The Assault on Privacy[24]" :

"DEPRIVACY

Although we feel unknown, ignored
As unrecorded blanks,
Take heart! Our vital selves are stored
In giant data banks,

Our childhoods and maturities,
Efficiently compiled,
Our Stocks and insecurities,
All permanently filed,

[21]Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 67 U. PITT. L. REV. 225, 282 (2005).
[22]William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960)
[23] the scope of the right to publicity varies across States in the U.S.
[24] Arthur R. Miller, The University of Michigan Press

Our tastes and our proclivities,
In gross and in particular,
Our incomes, our activities
Both extra-and curricular.

And such will be our happy state
Until the day we die
When we'll be snatched up by the great
Computer in the Sky"

INFORMATIONAL PRIVACY

62. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right.The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the *nth* extent for all and sundry to know.

63. A high school teacher was fired after posting on her Facebook page that she was "so not looking forward to another [school] year" since that the school district's residents were "arrogant and snobby". A flight attended was fired for posting suggestive photos of herself in the

company's uniform.[25] In the pre-digital era, such incidents would have never occurred. People could then make mistakes and embarrass themselves, with the comfort that the information will be typically forgotten over time.

64. The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The foot prints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle[26].

65. The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is

[25] Patricia Sánchez Abril, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 69 (2012).

[26] Ravi Antani, THE RESISTANCE OF MEMORY : COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES ?

privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

66. Children around the world create perpetual digital footprints on social network websites on a 24/7 basis as they learn their 'ABCs': Apple, Bluetooth, and Chat followed by Download, E-Mail, Facebook, Google, Hotmail, and Instagram.[27] They should not be subjected to the consequences of their childish mistakes and naivety, their entire life. Privacy of children will require special protection not just in the context of the virtual world, but also the real world.

67. People change and an individual should be able to determine the path of his life and not be stuck only on a path of which he/she treaded initially. An individual should have the capacity to change his/her beliefs and evolve as a person. Individuals should not live in fear that the views they expressed will forever be associated with them and thus refrain from expressing themselves.

[27]Michael L. Rustad, Sanna Kulevska, Reconceptualizing the right to be forgotten to enable transatlantic data flow, 28 Harv. J.L. & Tech. 349

68. Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser of history, this right, as a part of the larger right of privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

69. Thus, The European Union Regulation of 2016[28] has recognized what has been termed as 'the right to be forgotten'. This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal data/ information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/ data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the

[28] Supra

performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy.

Data Regulation

70. I agree with Dr. D.Y. Chandrachud, J., that formulation of data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of privacy concerns and legitimate State interests, including public benefit arising from scientific and historical research based on data collected and processed. The European Union Regulation of 2016[29] of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data may provide useful guidance in this regard. The State must ensure that

[29] Supra

information is not used without the consent of users and that it is used for the purpose and to the extent it was disclosed. Thus, for e.g. , if the posting on social media websites is meant only for a certain audience, which is possible as per tools available, then it cannot be said that all and sundry in public have a right to somehow access that information and make use of it.

Test: Principle of Proportionality and Legitimacy

71. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

" (i) The action must be sanctioned by law;

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference."

The Restrictions

72. The right to privacy as already observed is not absolute. The right to privacy as falling in part III of the Constitution may, depending on its variable facts, vest in one part or the other, and would thus be subject to the restrictions of exercise of that particular fundamental right. National security would thus be an obvious restriction, so would the provisos to different fundamental rights, dependent on where the right to privacy would arise. The Public interest element would be another aspect.

73. It would be useful to turn to The European Union Regulation of 2016[30] . Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:

(a) Other fundamental rights: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.

(b) Legitimate national security interest

(c) Public interest including scientific or historical research purposes or statistical purposes

[30] Supra

(d) Criminal Offences: the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;

(e) The unidentifiable data: the information does not relate to identifiedor identifiable natural person but remains anonymous. The European Union Regulation of 2016[31] refers to 'pseudonymisation' which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

(f) The tax etc: the regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected.

Report of Group of Experts on Privacy

74. It is not as if the aspect of privacy has not met with concerns. The Planning Commission of India constituted the Group of Experts on Privacy

[31] Supra

under the Chairmanship of Justice A.P. Shah, which submitted a report on 16 October, 2012. The five salient features, in his own words, are as follows:

> "1. **Technological Neutrality and Interoperability with International Standards**: The Group agreed that any proposed framework for privacy legislation must be technologically neutral and interoperable with international standards. Specifically the Privacy Act should not make any reference to specific technologies and must be generic enough such that the principles and enforcement mechanisms remain adaptable to changes in society, the marketplace, technology, and the government. To do this it is important to closely harmonise the right to privacy with multiple international regimes, create trust and facilitate co-operation between national and international stakeholders and provide equal and adequate levels of protection to data processed inside India as well as outside it. In doing so, the framework should recognise that data has economic value, and that global data flows generate value for the individual as data creator, and for businesses that collect and process such data. Thus, one of the focuses of the framework should be on inspiring the trust of global clients and their end users, without compromising the interests of domestic customers in enhancing their privacy protection.
>
> 2. **Multi-Dimensional Privacy:** This report recognises the right to privacy in its multiple dimensions. A framework on the right to privacy in India must include privacy-related concerns around data protection on the internet and challenges emerging therefrom, appropriate protection from unauthorised interception, audio and video surveillance, use of personal identifiers, bodily privacy including DNA as well as physical privacy, which are crucial in establishing a national ethos for privacy protection,

though the specific forms such protection will take must remain flexible to address new and emerging concerns.

3. **Horizontal Applicability:** The Group agreed that any proposed privacy legislation must apply both to the government as well as to the private sector. Given that the international trend is towards a set of unified norms governing both the private and public sector, and both sectors process large amounts of data in India, it is imperative to bring both within the purview of the proposed legislation.

4. **Conformity with Privacy Principles:** This report recommends nine fundamental Privacy Principles to form the bedrock of the proposed Privacy Act in India. These principles, drawn from best practices internationally, and adapted suitably to an Indian context, are intended to provide the baseline level of privacy protection to all individual data subjects. The fundamental philosophy underlining the principles is the need to hold the data controller accountable for the collection, processing and use to which the data is put thereby ensuring that the privacy of the data subject is guaranteed.

5. **Co-Regulatory Enforcement Regime:** This report recommends the establishment of the office of the Privacy Commissioner, both at the central and regional levels. The Privacy Commissioners shall be the primary authority for enforcement of the provisions of the Act. However, rather than prescribe a pure top-down approach to enforcement, this report recommends a system of co-regulation, with equal emphasis on Self-Regulating Organisations (SROs) being vested with the responsibility of autonomously ensuring compliance with the Act, subject to regular oversight by the Privacy Commissioners. The SROs, apart from possessing industry-specific knowledge, will also be better placed to create awareness about the right to privacy and explaining the sensitivities of privacy protection both within industry as well as to the public in respective

> sectors. This recommendation of a co-regulatory regime will not derogate from the powers of courts which will be available as a forum of last resort in case of persistent and unresolved violations of the Privacy Act."

75. The enactment of a law on the subject is still awaited. This was preceded by the Privacy Bill of the year of 2005 but there appears to have been little progress. It was only in the course of the hearing that we were presented with an office memorandum of the Ministry of Electronics and Information Technology dated 31.7.2017, through which a Committee of Experts had been constituted to deliberate on a data protection framework for India, under the Chairmanship of Mr. Justice B.N. Srikrishna, former Judge of the Supreme Court of India, in order to identify key data protection issues in India and recommend methods of addressing them. So there is hope !

76. The aforesaid aspect has been referred to for purposes that the concerns about privacy have been left unattended for quite some time and thus an infringement of the right of privacy cannot be left to be formulated by the legislature. It is a primal natural right which is only being recognized as a fundamental right falling in part III of the Constitution of India.

CONCLUSION

77. The right of privacy is a fundamental right. It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

78. It was rightly expressed on behalf of the petitioners that the technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by the State and non-State actors. It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity.

79. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most

important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right.

80. There are two aspects of the opinion of Dr. D.Y. Chandrachud,J., one of which is common to the opinion of Rohinton F. Nariman,J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation.[32] In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, *inter alia*, observed that the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find

[32] (2014) 1 SCC 1

favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section *ultra virus* of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. Ones sexual orientation is undoubtedly an attribute of privacy. The observations made in Mosley vs. News Group Papers Ltd. [33], in a broader concept may be usefully referred to:

[33] (2008) EWHS 1777 (QB)

> "130… It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.
>
> 131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years."

81. It is not necessary to delve into this issue further, other than in the context of privacy as that would be an issue to be debated before the appropriate Bench, the matter having been referred to a larger Bench.

82. The second aspect is the discussion in respect of the majority judgment in the case of ADM Jabalpur vs. Shivkant Shukla[34] in both the opinions. In I.R. Coelho Vs. The State of Tamil Nadu[35] it was observed that the ADM Jabalpur case has been impliedly overruled and that the supervening event was the 44th Amendment to the Constitution, amending Article 359 of the Constitution. I fully agree with the view expressly overruling the ADM Jabalpur case which was an aberration in the constitutional jurisprudence of our country and the desirability of burying the majority opinion ten fathom deep, with no chance of resurrection.

83. Let the right of privacy, an inherent right, be unequivocally a fundamental right embedded in part-III of the Constitution of India, but subject to the restrictions specified, relatable to that part. This is the call of today. The old order changeth yielding place to new.

……..J.
(SANJAY KISHAN KAUL)

New Delhi
August 24 , 2017.

[34] (1976) 2 SCC 521
[35] (2007*)* 2 SCC 1