WRIT PETITION (CIVIL) NO. 829 OF 2013

TRANSFER PETITION (CIVIL) NO. 921 OF 2015

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

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

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

WRIT PETITION (CIVIL) NO. 797 OF 2016

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

WRIT PETITION (CIVIL) NO. 342 OF 2017

WRIT PETITION (CIVIL) NO. 372 OF 2017

J U D G M E N T

Chelameswar, J.

1. I have had the advantage of reading the opinion of my learned brothers Justice Nariman and Justice Chandrachud. Both of them in depth dealt with various questions that are required to be examined by this Bench, to answer the reference. The factual background in which these questions arise and the history of the

instant litigation is set out in the judgments of my learned brothers. There is no need to repeat. Having regard to the importance of the matter, I am unable to desist recording few of my views regarding the various questions which were debated in this matter.

2. The following three questions, in my opinion, constitute the crux of the enquiry;

(i) Is there any Fundamental Right to Privacy under the Constitution of India?

(ii) If it exists, where is it located?

(iii) What are the contours of such Right?

3. These questions arose because Union of India and some of the respondents took a stand that, in view of two larger bench judgments of this Court[1], no fundamental right of privacy is guaranteed under the Constitution.

4. Therefore, at the outset, it is necessary to examine whether it is the *ratio decidendi* of *M.P. Sharma* and *Kharak Singh* that under our Constitution there is no Fundamental Right of Privacy; and if that be indeed the *ratio* of either of the two rulings whether they were rightly decided? The issue which fell for the consideration of

[1] ***M.P. Sharma & Others v. Satish Chandra & Others***, AIR 1954 SC 300 and ***Kharak Singh*** *v.* ***State of U.P. & Others,*** AIR 1963 SC 1295, (both decisions of Constitution Bench of *Eight* and *Six* Judges respectively).

this Court in *M.P. Sharma* was – whether seizure of documents from the custody of a person accused of an offence would amount to "testimonial compulsion" prohibited under Article 20(3) of our Constitution?

5. The rule against the "testimonial compulsion" is contained in Article 20(3)[2] of our Constitution. The expression "testimonial compulsion" is not found in that provision. The mandate contained in Article 20(3) came to be described as the rule against testimonial compulsion. The rule against self-incrimination owes its origin to the revulsion against the inquisitorial methods adopted by the Star Chamber of England[3] and the same was incorporated in the Fifth Amendment of the American Constitution.[4]

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[2] "Article 20(3) of the Constitution of India: "No person accused of any offence shall be compelled to be a witness against himself."

[3] "In English law, this principle of protection against self-incrimination had a historical origin. It resulted from a feeling of revulsion against the inquisitorial methods adopted and the barbarous sentences imposed, by the Court of Star Chamber, in the exercise of its criminal jurisdiction. This came to a head in the case of *John Lilburn*, 3 State Trials 1315, which brought about the abolition of the Star Chamber and the firm recognition of the principle that the accused should not be put on oath and that no evidence should be taken from him. This principle, in course of time, developed into its logical extensions, by way of privilege of witnesses against self-incrimination, when called for giving oral testimony or for production of documents. A change was introduced by the Criminal Evidence Act of 1898 by making an accused a competent witness on his own behalf, if he applied for it. But so far as the oral testimony of witnesses and the production of documents are concerned, the protection against self-incrimination continued as before. (See Phipson on Evidence, 9th Edition, pages 215 and 474).

These principles, as they were before the statutory change in 1898, were carried into the American legal system and became part of its common law. (See Wigmore on Evidence, Vol.VIII, pages 301 to 303). This was later on incorporated into their Constitution by virtue of the Fifth Amendment thereof."

[4] "Amendment V of the American Constitution: "No person ……..shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law …"

6. Does the rule against "testimonial compulsion", entrenched as a fundamental right under our Constitution create a right of privacy? - is a question not examined in *M.P. Sharma*. It was argued in *M.P. Sharma* "that a search to obtain documents for investigation into an offence is a compulsory procuring of incriminatory evidence from the accused himself and is, therefore, hit by Article 20(3) ..." by necessary implication flowing from "certain canons of liberal construction". Originally the rule was invoked only against oral evidence. But the judgment in *Boyd v. United States*[5], extended the rule even to documents procured during the course of a constitutionally impermissible search[6].

This Court refused to read the principle enunciated in *Boyd* into Article 20(3) on the ground: "we have nothing in our Constitution corresponding to the Fourth Amendment".

This Court held that the power of search and seizure is "an overriding power of the State for the protection of social security". It further held that such power (1) "is necessarily regulated by law"; and (2) Since the Constitution makers have not made any provision "analogous to the

[5] 116 US 616

[6] A search in violation of the safeguards provided under the Fourth Amendment – "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"

American Fourth Amendment", such a requirement could not be read into Article 20(3).

It was in the said context that this Court referred to the right of privacy:

> "A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a **fundamental right to privacy, analogous to the American Fourth Amendment**, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

7. I see no warrant for a conclusion (which is absolute) that their lordships held that there is no right of privacy under our Constitution. All that, in my opinion, their Lordships meant to say was that contents of the U.S. Fourth Amendment cannot be imported into our Constitution, while interpreting Article 20(3). That is the boundary of *M.P. Singh's ratio*. Such a conclusion, in my opinion, requires a further examination in an appropriate case since it is now too well settled that the text of the Constitution is only the primary source for understanding the Constitution and the silences of the Constitution are also to be ascertained to understand the Constitution. Even according to the American Supreme Court, the Fourth Amendment is not the

sole repository of the right to privacy[7]. Therefore, values other than those informing the Fourth Amendment can ground a right of privacy if such values are a part of the Indian Constitutional framework, and *M.P. Sharma* does not contemplate this possibility nor was there an occasion, therefore as the case was concerned with Article 20(3). Especially so as the *Gopalan* era compartmentalization ruled the roost during the time of the *M.P. Sharma* ruling and there was no *Maneka Gandhi* interpretation of Part III as a cohesive and fused code as is presently.

Whether the right of privacy is implied in any other fundamental right guaranteed under Articles 21, 14, 19 or 25 etc. was not examined in *M.P Sharma*. The question whether a fundamental right of privacy is implied from these Articles, is therefore, *res integra* and *M.P. Sharma* is no authority on that aspect. I am, therefore, of the opinion that *M.P. Sharma* is not an authority for an absolute proposition that there is no right of privacy under our Constitution; and such is not the *ratio* of that judgment.

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[7] In Griswold *v*. Connecticut, 381 US 479, Douglas, J who delivered the opinion of the Court opined that the I, II, IV, V and IX Amendments creates zones of privacy. Goldberg, J. opined that even the **XIV** Amendment creates a zone of privacy. This undoubtedly grounds a right of privacy *beyond* the IV amendment. Even after Griswold, other cases like Roe v. Wade, 410 U.S. 113 (1973) have made this point amply clear by sourcing a constitutional right of privacy from sources other than the IV amendment.

8. The issue in *Kharak Singh* was the constitutionality of police regulations of UP which *inter alia* provided for 'surveillance' of certain categories of people by various methods, such as, domiciliary visits at night', 'verification of movements and absences' etc. Two judgments (4:2) were delivered. Majority took the view that the impugned regulation insofar as it provided for 'domiciliary visits at night' is unconstitutional whereas the minority opined the impugned regulation is in its entirety unconstitutional.

The Court was invited to examine whether the impugned regulations violated the fundamental rights of *Kharak Singh* guaranteed under Articles 21 and 19(1)(d). In that context, this Court examined the scope of the expression 'personal liberty' guaranteed under Article 21. Majority declared that the expression "personal liberty" occurring under Article 21: "is used in the Article as **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 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."

9. The *Kharak Singh* majority opined that the impugned regulation insofar as it provided for 'domiciliary visits' is plainly

"violative of Article 21". The majority took note of the American decision in *Wolf v. Colorado,* 338 US 25 wherein it was held that State lacks the authority to sanction "incursion into privacy" of citizens. Such a power would run counter to the guarantee of the Fourteenth Amendment[8] and against the "very essence of a scheme of ordered liberty".[9] The majority judgment in *Kharak Singh* noticed that the conclusion recorded in *Wolf v. Colorado* is based on the prohibition contained in the Fourth Amendment of the U.S. Constitution, and a corresponding provision is absent in our Constitution. Nonetheless, their Lordships concluded that the impugned regulation insofar as it sanctioned domiciliary visits is plainly violative of Article 21. For this conclusion, their Lordships relied upon the English Common Law maxim that "every man's house is his castle"[10]. In substance domiciliary visits violate **liberty** guaranteed under Article 21.

The twin conclusions recorded, viz., that Article 21 takes within its sweep various rights other than mere freedom from physical restraint; and domiciliary visits by police violate the right of *Kharak Singh* guaranteed under Article 21, are a great leap from

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[8] Frankfurter, J.
[9] Murphy, J.
[10] See (1604) 5 Coke 91 – ***Semayne's case***

the law declared by this Court in *Gopalan*[11] - much before *R.C. Cooper*[12] and *Maneka Gandhi*[13] cases. The logical inconsistency in the judgment is that while on the one hand their Lordships opined that the maxim "every man's house is his castle" is a part of the liberty under Article 21, concluded on the other, that absence of a provision akin to the U.S. Fourth Amendment would negate the claim to the right of privacy. Both statements are logically inconsistent. In the earlier part of the judgment their Lordships noticed[14] that it is the English Common Law which formed the basis of the U.S. Fourth Amendment and is required to be read into Article 21; but nevertheless declined to read the right of privacy into Article 21. This is the incongruence.

10. Interestingly as observed by Justice Nariman, when it came to the constitutionality of the other provisions impugned in *Kharak Singh,* their Lordships held that such provisions are not violative of Article 21 since there is no right to privacy under our

[11] A.K. Gopalan Vs. State of Madras AIR 1950 SC 27
[12] RC Cooper Vs. Union of India (1970) 1 SCC 248
[13] Maneka Gandhi Vs. Union of India (1978) 1 SCC 248
[14] See F/N 3 (supra)

Constitution[15]. I completely endorse the view of my learned brother Nariman in this regard.

11. I now proceed to examine the salient features of the minority view.

(i) Disagreement with the majority on the conclusion that Article 21 contains those aspects of personal liberty excluding those enumerated under Article 19(1);

(ii) after noticing that *Gopalan* held that the expression "personal liberty" occurring under Article 21 is only the antithesis of physical restraint or coercion, opined that in modern world coercion need not only be physical coercion but can also take the form of psychological coercion;

(iii) "further the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life.";

[15] 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.

(iv) Though "our Constitution does not expressly declare the right to privacy as a fundamental right", "the said right is an essential ingredient of personal liberty".

In substance *Kharak Singh* declared that the expression "personal liberty" in Article 21 takes within its sweep a bundle of rights. Both the majority and minority are *ad idem* on that conclusion. The only point of divergence is that the minority opined that one of the rights in the bundle is the right of privacy. In the opinion of the minority the right to privacy is "an essential ingredient of personal liberty". Whereas the majority opined that "the right of privacy is not a guaranteed right under our Constitution", and therefore the same cannot be read into Article 21.[16]

12. I am of the opinion that the approach adopted by the majority is illogical and against settled principles of interpretation of even an ordinary statute; and wholly unwarranted in the context of constitutional interpretation. If a right is recognised by the express language of a statute, no question of implying such a right from

[16] Kharak Singh v. The State of U.P. & Others, (1962) 1 SCR 332 at page 351
"… 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."

some provision of such statute arises. Implications are logical extensions of stipulations in the express language of the statute and arise only when a statute is silent on certain aspects. Implications are the product of the interpretative process, of silences of a Statute. It is by now well settled that there are implications even in written Constitutions.[17] The scope and amplitude of implications are to be ascertained in the light of the scheme and purpose sought to be achieved by a statute. The purpose of the statute is to be ascertained from the overall scheme of the statute. Constitution is the fundamental law adumbrating the powers and duties of the various organs of the State and rights of the SUBJECTS[18] and limitations thereon, of the State. In my opinion, provisions purportedly conferring power on the State are in fact limitations on the State power to infringe on the liberty of SUBJECTS. In the context of the interpretation of a Constitution

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[17] (1947) 74 CLR 31 – ***The Melbourne Corporation*** *v.* ***The Commonwealth***

“ ... Thus, the purpose of the Constitution, and the scheme by which it is intended to be given effect, necessarily give rise to implications as to the manner in which the Commonwealth and the States respectively may exercise their powers, vis-à-vis each other.”

Also see: ***His Holiness Kesavananda Bharati Sripadagalvaru*** *v.* ***State of Kerala & Another,*** (1973) 4 SCC 225

[18] Citizens and non-citizens who are amenable to the Constitutional authority of the State

the intensity of analysis to ascertain the purpose is required to be more profound.[19]

The implications arising from the scheme of the Constitution are "Constitution's dark matter" and are as important as the express stipulations in its text. The principle laid down by this Court in *Kesvananda*[20], that the basic structure of the Constitution cannot be abrogated is the most outstanding and brilliant exposition of the 'dark matter' and is a part of our Constitution, though there is nothing in the text suggesting that principle. The

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[19] Two categories of Constitutional interpretation - textualist and living constitutionalist approach are well known. The former, as is illustrated by the Gopalan case, focuses on the text at hand i.e. the language of the relevant provision. The text and the intent of the original framers are determinative under the textualist approach. The living constitutionalist approach, while acknowledging the importance of the text, takes into account a variety of factors as aids to interpret the text. Depending on the nature of factor used, academics have added further nuance to the this approach of interpretation (For instance, in his book titled 'Constitutional Interpretation' (which builds on his earlier work titled 'Constitutional Fate'), Philip Bobbitt categorizes the six approaches to interpretation of Constitutions as historical, textual, prudential, doctrinal, structural, and ethical. The latter four approaches treat the text as less determinative than the former two approaches).

This court has progressively adopted a living constitutionalist approach. Varyingly, it has interpreted the Constitutional text by reference to Constitutional values (liberal democratic ideals which form the bedrock on which our text sits); a mix of cultural, social, political and historical ethos which surround our Constitutional text; a structuralist technique typified by looking at the structural divisions of power within the Constitution and interpreting it as an integrated whole etc. This court need not, in the abstract, fit a particular interpretative technique within specific pigeonholes of a living constitutionalist interpretation. Depending on which particular source is most useful and what the matter at hand warrants, the court can resort to variants of a living constitutionalist interpretation. This lack of rigidity allows for an enduring constitution.

The important criticisms against the living constitutionalist approach are that of uncertainty and that it can lead to arbitrary exercise of judicial power. The living constitutionalist approach in my view is preferable despite these criticisms, for two reasons. First, adaptability cannot be equated to lack of discipline in judicial reasoning. Second, it is still the text of the constitution which acquires the requisite interpretative hues and therefore, it is not as if there is violence being perpetrated upon the text if one resorts to the living constitutionalist approach.

[20] *His Holiness Kesavananda Bharati Sripadagalvaru & Others. v. State of Kerala & Another* (1973) 4 SCC 225

necessity of probing seriously and respectfully into the invisible portion of the Constitution cannot be ignored without being disrespectful to the hard earned political freedom and the declared aspirations of the liberty of 'we the people of India'. The text of enumerated fundamental rights is "only the primary source of expressed information" as to what is meant by liberty proclaimed by the preamble of the Constitution.

13. To embrace a rule that the text of the Constitution is the only material to be looked at to understand the purpose and scheme of the Constitution would not only be detrimental to liberties of SUBJECTS but could also render the administration of the State unduly cumbersome. Fortunately, this Court did not adopt such a rule of interpretation barring exceptions like *Gopalan* (supra) and *ADM Jabalpur*[21]. Else, this Court could not have found the freedom of press under Article 19(1)(a) and the other rights[22] which were

[21] ADM Jabalpur Vs. S.S. Shukla AIR 1976 SC 1207

[22] Sakal Papers (P) Ltd. & Others etc. v. Union of India, AIR 1962 SC 305 at page 311
"Para 28. It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. Bearing this principle in mind it would be clear that the right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under clause (2) of Article 19. The first decision of this Court in which this was recognized is *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.. There, this Court held that

held to be flowing from the guarantee under Article 21. *Romesh Thappar*[23] and *Sakal Papers (supra)* are the earliest acknowledgment by this Court of the existence of Constitution's dark matter. The series of cases in which this Court subsequently perceived various rights in the expression 'life' in Article 21 is a resounding confirmation of such acknowledgment.

14. The U.S. VIth Amendment confers a "right to speedy and public trial" to the accused, the right "to be informed of the nature and cause of the accusation", the right to have the "assistance of counsel for his defence" etc. None of those rights are expressed in the text of our Constitution. Nonetheless, this Court declared these rights as implicit in the text of Articles 14 or 21. The VIIIth Amendment[24] of the American Constitution contains stipulations prohibiting excessive bails, fines, cruel and unusual punishments etc. Cruel punishments were not unknown to this country. They were in vogue in the middle ages. Flaying a man alive was one of the

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freedom of speech and expression includes freedom of propagation of ideas and that this freedom is ensured by the freedom of circulation. In that case this Court has also pointed out that freedom of speech and expression are the foundation of all democratic organisations and are essential for the proper functioning of the processes of democracy. ..."

[23] Romesh Thappar Vs. State of Madras AIR 1950 SC 124

[24] "VIII Amendment to the American Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

favoured punishments of some of the Rulers of those days. I only hope that this Court would have no occasion to hear an argument that the Parliament or State legislatures would be constitutionally competent to prescribe cruel punishments like amputation or blinding or flaying alive of convicts merely an account of a prescription akin to the VIIIth Amendment being absent in our Constitution.[25]

15. This Court by an interpretive process read the right to earn a livelihood[26], the right to education[27], the right to speedy trial[28], the right to protect one's reputation[29] and the right to have an environment free of pollution[30] in the expression 'life' under Article 21 of the Indian Constitution.

Similarly, the right to go abroad[31] and the right to speedy trial of criminal cases[32] were read into the expression liberty occurring

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[25] *Mithu Etc. Vs. State of Punjab Etc. Etc.,* AIR 1983 SC 473 - *"If a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21."*

[26] Olga Tellis Vs. Bombay Municipal Corporation (1985) 3 SCC 545
[27] Mohini Jain Vs. State of Karnataka (1992) 3 SCC 666, Unnikrishnan J.P. Vs. State of Andhra Pradesh (1993) 1 SCC 645
[28] Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1997) 7 SCC 622
[29] State of Bihar Vs. Lal Krishna Advani (2003) 8 SCC 361
[30] Shantistar Builders Vs. Narayan Khimalal Totame (1990) 1 SCC 520, M.C. Mehta Vs. Kamal Nath (2000) 6 SCC 2013
[31] Satwant Singh Sawhney Vs. Asst. Passport Officer 1967 (3) SCR 525,
[32] In Re. Hussainara Khatoon & Ors. Vs. Home Secretary, Home Secretary, Bihar (1980) 1 SCC 81

under Article 21. This court found delayed execution of capital punishment violated both the rights of life and 'liberty' guaranteed under Article 21[33] and also perceived reproductive rights and the individual's autonomy regarding sterilization to being inherent in the rights of life and liberty under Art. 21[34].

16. None of the above-mentioned rights are to be found anywhere in the text of the Constitution.

17. To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution would be too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation. Such an approach regarding the rights and liberties of citizens would be an affront to the collective wisdom of our people and the wisdom of the members of the Constituent Assembly. The fact that some of the members opined during the course of debates in that Assembly, that the right of privacy need not find an express mention in the Constitution, would not necessarily lead to the conclusion that they were oblivious to the importance of the right to privacy.

[33] Vatheeswaran, T.V. Vs. State of T.N. (1983) 2 SCC 68
[34] Devika Biswas Vs. Union of India (2016) 10 SCC 726

Constituent Assembly was not a seminar on the right to privacy and its amplitude. A close scrutiny of the debates reveals that the Assembly only considered whether there should be an express provision guaranteeing the right of privacy in the limited context of 'searches' and 'secrecy of correspondence'. Dimensions of the right of privacy are much larger and were not fully examined. The question whether the expression 'liberty' in Article 21 takes within its sweep the various aspects of the right of privacy was also not debated. The submissions before us revolve around these questions. Petitioners assert that the right to privacy is a part of the rights guaranteed under Article 19 and 21 and other Articles.

18. The Constitution of any country reflects the aspirations and goals of the people of that country voiced through the language of the few chosen individuals entrusted with the responsibility of framing its Constitution. Such aspirations and goals depend upon the history of that society. History invariably is a product of various forces emanating from religious, economic and political events[35].

[35] However, various forces which go into the making of history are dynamic. Those who are entrusted with the responsibility of the working of the Constitution must necessarily keep track of the dynamics of such forces. Evolution of science and growth of technology is another major factor in the modern world which is equally a factor to be kept in mind to successfully work the constitution.

The degree of refinement of the Constitution depends upon the wisdom of the people entrusted with the responsibility of framing the Constitution. Constitution is not merely a document signed by 284 members of the Constituent Assembly. It is a politically sacred instrument created by men and women who risked lives and sacrificed their liberties to fight alien rulers and secured freedom for our people, not only of their generation but generations to follow. The Constitution cannot be seen as a document written in ink to replace one legal regime by another. It is a testament created for securing the goals professed in the Preamble[36]. Part-III of the Constitution is incorporated to ensure achievement of the objects contained in the Preamble.[37] 'We the People' of this country are the intended beneficiaries[38] of the Constitution. It must be seen as a document written in the blood of innumerable martyrs of

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[36] ***Kesavananda Bharati (supra)***
"Para 91. … Our Preamble outlines the objectives of the whole constitution. It expresses "what we had thought or dreamt for so long"."

[37] ***In re, The Kerala Education Bill, 1957***, AIR 1958 SC 956
"… To implement and fortify these supreme purposes set forth in the Preamble, Part III of our Constitution has provided for us certain fundamental rights."

[38] ***Bidi Supply Co.*** *v.* ***Union of India & Others,*** AIR 1956 SC 479 at page 487
"Para 23. After all, for whose benefit was the Constitution enacted? What was the point of making all this other about fundamental rights? I am clear that the Constitution is not for the exclusive benefit governments and States; it is not only for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker". It lays down for this land "a rule of law" as understood in the free democracies of the world. It constitutes India into a Sovereign Republic and guarantees in every page rights and freedom to the side by side and consistent with the overriding power of the State to act for the common good of all.

Jalianwala Bagh and the like. Man is not a creature of the State. Life and liberty are not granted by the Constitution. Constitution only stipulates the limitations on the power of the State to interfere with our life and liberty. Law is essential to enjoy the fruits of liberty; it is not the source of liberty and emphatically not the exclusive source.

19. To comprehend whether the right to privacy is a Fundamental Right falling within the sweep of any of the Articles of Part-III, it is necessary to understand what "fundamental right" and the "right of privacy" mean conceptually. Rights arise out of custom, contract or legislation, including a written Constitution. The distinction between an ordinary legislation and an enacted Constitution is that the latter is believed and expected to be a relatively permanent piece of legislation which cannot be abrogated by a simple majority of representatives elected for a limited tenure to legislative bodies created thereby. The Constitution of any country is a document which contains provisions specifying the rules of governance in its different aspects. It defines the powers of the legislature and the procedures for law making, the powers of the executive to administer the State by enforcing the law made by the legislature

and the powers of the judiciary. The underlying belief is that the Constitution of any country contains certain core political values and beliefs of the people of that country which cannot normally be tinkered with lightly, by transient public opinion.

20. The Constitution of India is one such piece of legislation. Comparable are constitutions of United States of America, Canada and Australia to mention only some. All such Constitutions apart from containing provisions for administration of the State, contain provisions specifying or identifying certain rights of citizens and even some of the rights of non-citizens (both the classes of persons could be collectively referred to as SUBJECTS for the sake of convenience). Such rights came to be described as "basic", "primordial", "inalienable" or "fundamental" rights. Such rights are a protective wall against State's power to destroy the liberty of the SUBJECTS.

Irrespective of the nomenclature adopted in different countries, such rights are believed in all democratic countries[39] to

[39] ***Bidi Supply Co.*** *v.* ***Union of India & Others,*** AIR 1956 SC 479
Para 24. I make no apology for turning to older democracies and drawing inspiration from them, for though our law is an amalgam drawn from many sources, its firmest foundations are rooted in the freedoms of other lands where men are free in the democratic sense of the term. England has no fundamental rights as such and its Parliament is supreme but the liberty of the subject is guarded there as jealously as the supremacy of Parliament."

be rights which cannot be abridged or curtailed totally by ordinary legislation and unless it is established that it is so necessary to abridge or curtail those rights in the larger interest of the society. Several Constitutions contain provisions stipulating various attendant conditions which any legislation intending to abridge such (fundamental) rights is required to comply with.

21. Provisions of any written Constitution create rights and obligations, belonging either to individuals or the body politic as such. For example, the rights which are described as fundamental rights in Chapter-III of our Constitution are rights of individuals whereas provisions of dealing with elections to legislative bodies create rights collectively in the body politic mandating periodic elections. They also create rights in favour of individuals to participate in such electoral process either as an elector or to become an elected representative of the people/voters.

22. Though each of the rights created by a Constitution is of great importance for sustenance of a democratic form of Government chosen by us for achieving certain objectives declared in the

Preamble, the framers of our Constitution believed that some of the rights enshrined in the Constitution are more crucial to the pursuit of happiness of the people of India and, therefore, called them fundamental rights. The belief is based on the study of human history and the Constitution of other nations which in turn are products of historical events.

The scheme of our Constitution is that the power of the State is divided along a vertical axis between the Union and the States and along the horizontal axis between the three great branches of governance, the legislative, the executive and the judiciary. Such division of power is believed to be conducive to preserving the liberties of the people of India. The very purpose of creating a written Constitution is to secure justice, liberty and equality to the people of India. Framers of the Constitution believed that certain freedoms are essential to enjoy the fruits of liberty and that the State shall not be permitted to trample upon those freedoms except for achieving certain important and specified objectives in the larger interests of society. Therefore, the authority of the State for making a law inconsistent with fundamental rights, is cabined within constitutionally proclaimed limitations.

23. Provisions akin to the Fundamental Rights guaranteed under our Constitution exist in American Constitution also[40]. They are anterior to our Constitution.

24. The inter-relationship of various fundamental rights guaranteed under Part III of the Constitution and more specifically between Articles 14, 19 and 21 of the Constitution has been a matter of great deal of judicial discourse starting from *A.K. Gopalan*. The march of the law in this regard is recorded by Justices Nariman and Chandrachud in detail.

25. *R.C. Cooper* and *Maneka Gandhi* gave a different orientation to the topic. Justice Bhagwati in *Maneka Gandhi* speaking for the majority opined[41] that in view of the later decision of this Court in

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[40] The first 8 amendments to the Constitution are some of them.

[41] 5. ....It was in *Kharak Singh v. State of U.P. & Ors.* 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.

R.C. Cooper, the minority view (in *Kharak Singh*) must be regarded as correct and the majority view must be held to be overruled. Consequently, it was held that any law which deprives any person of the liberty guaranteed under Article 21 must not only be just, fair and reasonable, but must also satisfy that it does not at the same time violate one or some of the other fundamental rights enumerated under Article 19, by demonstrating that the law is strictly in compliance with one of the corresponding clauses 2 to 6 of Article 19.[42]

26. In *Kharak Singh*, Ayyangar, J. speaking for the majority held that the expression 'personal liberty' used in Article 21 is a "compendious term to include within itself all varieties of rights which"

Cooper v. Union of India(2) the minority view must be regarded as correct and the majority view must be held to have been overruled…….

[42] 6. …..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, in so far 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's case, Shambhu Nath Sarkar's case and Haradhan Saha's case. 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 Mukharjea, J., in A. K. Gopalan's case 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.....

constitute the "personal liberties of a man other than those specified in the several clauses of Article 19(1)." In other words, Article 19(1) deals with particular "species or attributes of personal liberty" mentioned in Article 21. "Article 21 takes in and comprises the residue." Such a construction was not accepted by the minority. The minority opined that both Articles 19 and 21 are independent fundamental rights but they are overlapping.[43]

27. An analysis of *Kharak Singh* reveals that the minority opined that the right to move freely is **an attribute of** personal liberty. Minority only disputed the correctness of the proposition that by enumerating certain freedoms in Article 19(1), the makers of the Constitution excluded those freedoms from the expression liberty in Article 21. The minority opined that both the freedoms enumerated in Article 19(1) and 21 are independent fundamental rights, though there is "overlapping".

The expression 'liberty' is capable of taking within its sweep not only the right to move freely, guaranteed under Article 19(1)(d);

[43] 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 Art. 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping.

but also each one of the other freedoms mentioned under Article 19(1). Personal liberty takes within its sweep not only the right not to be subjected to physical restraints, but also the freedom of thought, belief, emotion and sensation and a variety of other freedoms. The most basic understanding of the expression liberty is the freedom of an individual to do what he pleases. But the idea of liberty is more complex than that. Abraham Lincoln's statement[44] that our nation "was conceived in liberty" is equally relevant in the context of the proclamation contained in our Preamble; and as evocatively expressed in the words of Justice Brandies;

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."
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> – *Whitney v. California*, 274 U.S. 357, 375

28. The question now arises as to what is the purpose the framers of the Constitution sought to achieve by specifically enumerating some of the freedoms which otherwise would form part of the expression 'liberty'. To my mind the answer is that the Constituent

[44] Gettysburg Speech

Assembly thought it fit that some aspects of liberty require a more emphatic declaration so as to restrict the authority of the State to abridge or curtail them. The need for such an emphatic declaration arose from the history of this nation. In my opinion, the purpose sought to be achieved is two-fold. Firstly, to place the expression 'liberty' beyond the argumentative process[45] of ascertaining the meaning of the expression liberty, and secondly, to restrict the authority of the State to abridge those enumerated freedoms only to achieve the purposes indicated in the corresponding clauses (2) to (6) of Article 19.[46] It must be remembered that the authority of the

[45] That was exactly the State's submission in A.K. Gopalan's case which unfortunately found favour with this Court.

[46] (2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

State to deprive any person of the fundamental right of liberty is textually unlimited as the only requirement to enable the State to achieve that result is to make a 'law'. When it comes to deprivation of the freedoms under Article 19(1), the requirement is: (a) that there must not only be a law but such law must be tailored to achieve the purposes indicated in the corresponding sub-Article[47]; and (b) to declare that the various facets of liberty enumerated in Article 19(1) are available only to the citizens of the country but not all SUBJECTS.[48] As it is now clearly held by this Court that the rights guaranteed under Articles 14 and 21 are not confined only to citizens but available even to non-citizens aliens or incorporated bodies even if they are incorporated in India etc.

29. The inter-relationship of Article 19 and 21, if as understood by me, as stated in para 28, the authority of the State to deprive any person of his liberty is circumscribed by certain factors;

(1) It can only be done under the authority of law

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[47] That was exactly the State's submission in A.K. Gopalan's case which unfortunately found favour with this Court.

[48] See *Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and Others* AIR 1955 SC 367, (Paras 34 and 38)
State Trading Corporation of India Ltd. Vs. The Commercial Tax Officer and Others, AIR 1963 SC 1811, Para 20
Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs, Calcutta and Others, AIR 1964 SC 1140, (Para 35)
Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi, AIR 1978 SC 104, (Para 16)
Louis De Raedt Vs. Union of India and Others, (1991) 3 SCC 554, (Para 13)

(2) 'law' in the context means a valid legislation.

(3) If the person whose liberty is sought to be deprived is a citizen and that liberty happens to be one of the freedoms enumerated in Article 19(1), such a law is required to be a reasonable within the parameters stipulated in clauses (2) to (6) of Article 19, relevant to the nature of the entrenched freedom/s, such law seeks to abridge.

(4) If the person whose liberty is sought to be deprived of is a non-citizen or even if a citizen is with respect to any freedom other than those specified in Articles 19(1), the law should be just, fair and reasonable.

30. My endeavour *qua* the aforesaid analysis is only to establish that the expression liberty in Article 21 is wide enough to take in not only the various freedoms enumerated in Article 19(1) but also many others which are not enumerated. I am of the opinion that a better view of the whole scheme of the chapter on fundamental rights is to look at each one of the guaranteed fundamental rights not as a series of isolated points, but as a rational continuum of the legal concept of liberty i.e. freedom from all substantial, arbitrary

encroachments and purposeless restraints sought to be made by the State. Deprivation of liberty could lead to curtailment of one or more of freedoms which a human being possesses, but for interference by the State.

31. Whether it is possible to arrive at a coherent, integrated and structured statement explaining the right of privacy is a question that has been troubling scholars and judges in various jurisdictions for decades.[49] Considerable amount of literature both academic and judicial came into existence. In this regard various taxonomies[50] have been proposed suggesting that there are a number of interests and values into which the right to privacy could be dissected.

32. Claims for protection of privacy interests can arise against the State and its instrumentalities and against non-State entities – such as, individuals acting in their private capacity and bodies corporate or unincorporated associations etc., without any element of State participation. Apart from academic literature, different

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[49] ***Gobind** v. **State of Madhya Pradesh & Another,*** (1975) 2 SCC 148
"Para 23. … The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. …"

[50] For a detailed account of the taxonomy of the constitutional right to privacy in India see, Mariyam Kamil, 'The Structure of the Right to Privacy in India' (MPhil thesis, University of Oxford, 2015).

claims based on different asserted privacy interests have also found judicial support. Cases arose in various jurisdictions in the context of privacy interests based on (i) Common Law; (ii) statutory recognition; and (iii) constitutionally protected claims of the right of privacy.

33. I am of the opinion that for answering the present reference, this Court is only concerned with the question whether SUBJECTS who are amenable to the laws of this country have a Fundamental Right of Privacy against the State[51]. The text of the Constitution is silent in this regard. Therefore, it is required to examine whether such a right is implied in any one or more of the Fundamental Rights in the text of the Constitution.

34. To answer the above question, it is necessary to understand conceptually identify the nature of the right to privacy.

35. My learned brothers have discussed various earlier decisions of this Court and of the Courts of other countries, dealing with the claims of the Right of Privacy. International Treaties and Conventions have been referred to to establish the existence and

[51] It is a settled principle of law that some of the Fundamental Rights like 14 and 29 are guaranteed even to non-citizens

recognition of the right to privacy in the various parts of the world, and have opined that they are to be read into our Constitution in order to conclude that there exists a Fundamental Right to privacy under our Constitution. While Justice Nariman opined –

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

Justice Chandrachud held :

> "(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;"

36. One of the earliest cases where the constitutionality of State's action allegedly infringing the right of privacy fell for the consideration of the US Supreme Court is *Griswold et al v. Connecticut*, 381 US 479. The Supreme Court of the United States sustained a claim of a privacy interest on the theory that the Constitution itself creates certain zones of privacy - 'repose' and

'intimate decision.[52] Building on this framework, Bostwick[53] suggested that there are in fact, three aspects of privacy – "repose", "sanctuary" and "intimate decision". "Repose" refers to freedom from unwarranted stimuli, "sanctuary" to protection against intrusive observation, and "intimate decision" to autonomy with respect to the most personal life choices. Whether any other facet of the right of privacy exists cannot be divined now. In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy. The ever growing possibilities of technological and psychological intrusions by the State into the liberty of SUBJECTS must leave some doubt in this context. Definitional uncertainty is no reason to not recognize the existence of the right of privacy. For the purpose of this case, it is sufficient to go by the understanding that the right to privacy consists of three facets i.e. repose, sanctuary and intimate decision. Each of these facets is so essential for the liberty of human beings that I see no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution.

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[52] *Griswold v Connecticut* 381 US 479 (1965) 487.

[53] Gary Bostwick, 'A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision' (1976) 64 California Law Review 1447.

37. History abounds with examples of attempts by governments to shape the minds of SUBJECTS. In other words, conditioning the thought process by prescribing what to read or not to read; what forms of art alone are required to be appreciated leading to the conditioning of beliefs; interfering with the choice of people regarding the kind of literature, music or art which an individual would prefer to enjoy.[54] Such conditioning is sought to be achieved by screening the source of information or prescribing penalties for making choices which governments do not approve.[55] Insofar as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres around competing claims of the right to propagate religion. Constitution of India protects the liberty of all SUBJECTS guaranteeing[56] the freedom of

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[54] *Stanley Vs. Georgia*, 394 U.S. 557 (1969) - that the mere private possession of obscene matter cannot constitutionally be made a crime….
……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.

[55] (1986) 3 SCC 615, Bijoe Emmanuel & Ors vs State Of Kerala & Others

[56] 25. Freedom of conscience and free profession, practice and propagation of religion.-
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
Explanation I.- The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

conscience and right to freely profess, practice and propagate religion. While the right to freely "profess, practice and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty. There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief etc. which form part of the liberty under Article 21.

38. Concerns of privacy arise when the State seeks to intrude into the body of SUBJECTS.[57] Corporeal punishments were not unknown to India, their abolition is of a recent vintage. Forced feeding of certain persons by the State raises concerns of privacy. An individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which fall within the zone of the right of privacy. I am conscious of the fact that the issue is pending before this Court. But in various other jurisdictions, there

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Explanation II.- In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.\

[57] *Skinner Vs. Oklahoma,* 316 U.S. 535 (1942) - There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority – even those who have been guilty of what the majority defines as crimes - *Jackson, J.*

is a huge debate on those issues though it is still a grey area.[58] A woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.

Similarly, the freedom to choose either to work or not and the freedom to choose the nature of the work are areas of private decision making process. The right to travel freely within the country or go abroad is an area falling within the right of privacy. The text of our Constitution recognised the freedom to travel throughout the country under Article 19(1)(d). This Court has already recognised that such a right takes within its sweep the right to travel abroad.[59] A person's freedom to choose the place of his residence once again is a part of his right of privacy[60] recognised by the Constitution of India under Article 19(1)(e) though the pre-dominant purpose of enumerating the above mentioned two freedoms in Article 19(1) is to disable both the federal and State Governments from creating barriers which are incompatible with the federal nature of our country and its Constitution. The choice

[58] For the legal debate in this area in US, *See* Chapter 15.11 of the American Constitutional Law by Laurence H. Tribe – 2nd Edition.

[59] Maneka Gandhi Vs. Union of India, (1978) 1 SCC 248

[60] *Williams Vs. Fears, 179 U.S. 270 (1900)* – Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty,…….

of appearance and apparel are also aspects of the right of privacy. The freedom of certain groups of SUBJECTS to determine their appearance and apparel (such as keeping long hair and wearing a turban) are protected not as a part of the right of privacy but as a part of their religious belief. Such a freedom need not necessarily be based on religious beliefs falling under Article 25. Informational traces are also an area which is the subject matter of huge debate in various jurisdictions falling within the realm of the right of privacy, such data is as personal as that of the choice of appearance and apparel. Telephone tappings and internet hacking by State, of personal data is another area which falls within the realm of privacy. The instant reference arises out of such an attempt by the Union of India to collect bio-metric data regarding all the residents of this country.

The above-mentioned are some of the areas where some interest of privacy exists. The examples given above indicate to some extent the nature and scope of the right of privacy.

40. I do not think that anybody in this country would like to have the officers of the State intruding into their homes or private property at will or soldiers quartered in their houses without their

consent. I do not think that anybody would like to be told by the State as to what they should eat or how they should dress or whom they should be associated with either in their personal, social or political life. Freedom of social and political association is guaranteed to citizens under Article 19(1)(c). Personal association is still a doubtful area.[61] The decision making process regarding the freedom of association, freedoms of travel and residence are purely private and fall within the realm of the right of privacy. It is one of the most intimate decisions.

All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be

[61] The High Court of AP held that Article 19(1)(c) would take within its sweep the matrimonial association in *T. Sareetha Vs. T. Venkata Subbaiah*, AIR 1983 AP 356. However, this case was later overruled by this Court in *Saroj Rani Vs. Sudarshan Kumar Chadha*, AIR 1984 SC 1562

defended. It is part of liberty within the meaning of that expression in Article 21.

41. I am in complete agreement with the conclusions recorded by my learned brothers in this regard.

42. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case to case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right of privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

43. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry[62]; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of 'compelling state interest'. The last of these four options is the highest standard of scrutiny[63] that a court can adopt. It is from this menu that a standard of review for limiting the right of privacy needs to be chosen.

44. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions under Article 19, then the standard of review would be as expressly provided under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Art. 21 is bleak. Without discounting that possibility, it needs to be noted that Art. 21 is the bedrock of

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[62]A challenge under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555, is very simply the lack of any reasoning.

[63]A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in Constitutional law that is Footnote Four in United States v. Carolene Products, 304 U.S. 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.

the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult if not impossible to imagine that any standard of limitation, other than the one under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

45. The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto.[64] *Gobind* resorted to the compelling state interest standard in addition to the Article 21 reasonableness enquiry. From the United States where the terminology of 'compelling state interest' originated, a strict standard of scrutiny comprises two things- a 'compelling state interest' and a requirement of 'narrow tailoring' (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, compelling state interest does not have definite contours in the US. Hence, it is critical that this standard be adopted with some *clarity as to when and in what types of privacy claims* it is to be used. Only in privacy claims which deserve

[64] District Registrar & Collector, Hyderabad v Canara Bank AIR 2005 SC 186; State of Maharashtra v Bharat Shanti Lal Shah (2008) 13 SCC 5.

the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right of privacy is to be found.

.....J.
(J. CHELAMESWAR)

New Delhi
August 24, 2017.