

# JUDGEMENTS





# Right to Privacy Judgement

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

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 ON 24TH AUGUST 2017

IMAGE CREDIT: URMI KENIA



### **Justice DY Chandrachud [For CJ] Khehar, Justices RK Agrawal, Abdul Nazeer]**

1) The judgment in *M P Sharma* holds essentially that in the absence of a provision similar to the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20 (3) of the Indian Constitution. The judgment does not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. *M P Sharma* is overruled to the extent to which it indicates to the contrary.

2) *Kharak Singh* has correctly held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. *Kharak Singh* also correctly laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in *Kharak Singh* which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy is not a guaranteed right under our Constitution, is not reflective of the correct position. Similarly, *Kharak Singh's* reliance upon the decision of the majority in *Gopalan* is not reflective of the correct position in view of the decisions in *Cooper* and in *Maneka*. *Kharak Singh* to the extent that it holds that the right to privacy is not protected under the Indian Constitution is overruled. PART T

3(A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(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;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

(C) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of:

- (i) legality, which postulates the existence of law;
- (ii) need, defined in terms of a legitimate state aim; and
- (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and

Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

4. Decisions rendered by this Court subsequent to Kharak Singh, upholding the right to privacy would be read subject to the above principles.

5. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

### **Justice Chelameswar**

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.

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.

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

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.

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<sup>63</sup> 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.

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 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.

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.<sup>64</sup> 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 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.

### **Justice Bobde**

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

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

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

### **Justice RF Nariman**

It is clear that the international covenants and declarations to which India was a party, namely, the 1948 Declaration and the 1966 Covenant both spoke of the right to life and liberty as being "inalienable". Given the fact that this has to be read as being part of Article 21 by virtue of the judgments referred to *supra*, it is clear that Article 21 would, therefore, not be the sole repository of these human rights but only reflect the fact that they were "inalienable"; that they inhere in every human being by virtue of the person being a human being;

Secondly, developments after this judgment have also made it clear that the majority judgments are no longer good law and that Khanna, J.'s dissent is the correct version of the law. Section 2(1)(d) of the Protection of Human Rights Act, 1993 recognises that the right to life, liberty, equality and dignity referable to international covenants and enforceable by Courts in India are "human rights". We are of the view that the aforesaid statement made by the learned author reflects the correct position in constitutional law. We, therefore, expressly overrule the majority judgments in ADM Jabalpur.

Before parting with this subject, we may only indicate that the majority opinion was done away with by the Constitution's 44<sup>th</sup> Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being.

## Conclusion

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.

Before parting with this subject, we may only indicate that the majority opinion was done away with by the Constitution's 44<sup>th</sup> Amendment two years after the judgment was delivered. By that Amendment, Article 359 was amended to state that where a proclamation of emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of rights conferred by Part III of the Constitution may remain suspended for the period during which such proclamation is in force, excepting Articles 20 and 21. On this score also, it is clear that the right of privacy is an inalienable human right which inheres in every person by virtue of the fact that he or she is a human being.

### **Justice AM Sapre**

I, therefore, do not find any difficulty in tracing the “right to privacy” emanating from the two expressions of the Preamble namely, “liberty of thought, expression, belief, faith and worship” and “Fraternity assuring the dignity of the individual” and also emanating from Article 19 (1)(a) which gives to every citizen “a freedom of speech and expression” and further emanating from Article 19(1)(d) which gives to every citizen “a right to move freely throughout the territory of India” and lastly, emanating from the expression “personal liberty” under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition.

In view of foregoing discussion, my answer to question No. 2 is that “right to privacy” is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, 21 which the State is entitled to impose on the basis of social, moral

and compelling public interest in accordance with law.

Similarly, I also hold that the “right to privacy” has multiple facets, and, therefore, the same has to go through a process of case-to-case development as and when any citizen raises his grievance complaining of infringement of his alleged right in accordance with law.

My esteemed learned brothers, Justice J. Chelameswar, Justice S.A. Bobde, Justice Rohinton Fali Nariman and Dr. Justice D.Y. Chandrachud have extensively dealt with question No. 1 in the context of Indian and American Case law on the subject succinctly. They have also dealt with in detail the various submissions of the learned senior counsel appearing for all the parties.

I entirely agree with their reasoning and the conclusion on question No. 1 and hence do not wish to add anything to what they have said in their respective scholarly opinions.

Some learned senior counsel appearing for the petitioners, however, argued that the law laid down by this Court in some earlier decided cases though not referred for consideration be also overruled while answering the questions referred to this Bench whereas some senior counsel also made attempts to attack the legality and correctness of Aadhar Scheme in their submissions.

These submissions, in my view, cannot be entertained in this case. It is for the reason that firstly, this Bench is constituted to answer only specific questions; secondly, the submissions pressed in service are not referred to this Bench and lastly, it is a settled principle of law that the reference Court cannot travel beyond the reference made and is confined to answer only those questions that are referred. (See – Naresh Shridhar Mirajkar and Ors. vs. State of Maharashtra and Anr. (1966) 3 SCR 744 at page 753).

Suffice it to say that as and when any of these questions arise in any case, the appropriate Bench will examine such questions on its merits in accordance with law.



## Justice S K Kaul

In *I.R. Coelho Vs. The State of Tamil Nadu* it was observed that the *ADM Jabalpur* case has been impliedly overruled and that the supervening event was the 44<sup>th</sup> 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.

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.