

INFORMAL METHOD AS A MEANS OF JUDICIAL INTERPRETATION: WITH REFERENCE TO EVOLUTION OF PRIVACY AS A FUNDAMENTAL RIGHT

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ABSTRACT

In any country, the Judiciary plays an important role of interpreting and applying the law and adjudicating upon controversies between one citizen and another and between a citizen and the state.

India, a country with a written constitution, courts have the additional function of safeguarding the supremacy of the constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework.

The **Supreme Court of India** is the highest judicial forum and has been called upon to safeguard civil and minority rights and play the role of “guardian of the social revolution”.

The inclusion of a chapter of Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society. In India, the judiciary (particularly the Supreme Court) also has the significant function of protecting and enforcing the Fundamental Rights of the people.

Judicial interpretation is a process of slow and gradual metamorphosis of constitutional principles, and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. In this process, the Supreme Court plays a dominant role, for its their function to interpret the Constitution. In the informal method of Judicial Interpretation, the constitutional text does not change, but its interpretation undergoes a change and this provision is made with a view to overcome the difficulties which may encounter in future working of the Constitution.

Sensing the need of the hour, the Supreme Court was willing to adopt the advancement of the society in order to protect the privacy of the individuals. As soon as the question of privacy came up to the Supreme Court, the opinion of the court dwelled in favour of recognising

privacy as intrinsic to life and personal liberty under Article-21 of the Constitution.

PHRASES:

Supreme Court, Judicial Interpretation, Legislature. Personal Liberty, Privacy.

INTRODUCTION TO THEME

In any country, the Judiciary plays an important role of interpreting and applying the law and adjudicating upon controversies between one citizen and another and between a citizen and the state. It is the function of the courts to maintain rule of law in the country and to assure that the government runs according to law.

India, a country with a written constitution, courts have the additional function of safeguarding the supremacy of the constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework.

India has one of the oldest legal systems in the world. India's jurisprudence and law can be traced back into the centuries, forming a living tradition which has grown and evolved with the lives of its diverse people. The fountain source of law in India is the Constitution which, in turn, gives due recognition to statutes, case law and customary law consistent with its dispensations.

On the 28th of January, 1950, two days after India became a Sovereign Democratic Republic, the Supreme Court came into being.

The **Supreme Court of India** is the highest judicial forum and final court of appeal under the **Constitution of India**, the highest constitutional court, with the power of constitutional review.

The supreme court is the third strongest pillar of our constitution. The supreme court is called the **Guardian of the Constitution** as it protects the fundamental rights of citizens from being getting violated by any organ of the government. Moreover, it upholds the constitution and empower to declare a law null and void if it is found to be inconsistent with the constitution.

The constitution of India under Article 124 to 147 in Part-V deals with the organization and its powers. The Supreme court is assigned a very significant role in the democratic political system, it's the guarantor of the fundamental rights of the citizen, any amendments can be brought in the constitution in the light of Supreme Court and the Supreme Court has been conferred the power to make any law null and void if it violates the fundamental rights. The supreme court is the final interpreter of the constitution. Thus, correctly referred to as the 'Guardian of the Constitution.

Truly, the Supreme Court has been called upon to safeguard civil and minority rights and play the role of "guardian of the social revolution".¹ It is the great tribunal which has to draw the line between individual liberty and social control.²

INTRODUCTION TO SUB-THEME: **FUNDAMENTAL RIGHTS**

Part-III of the Constitution contains a long list of fundamental rights and has very well been described as the Magna Carta of India.³

The inclusion of a chapter of Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society. The aim of having a declaration of fundamental rights is that certain elementary rights, such as right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majority in Legislature of the country should not have a free hand in interfering with these fundamental rights.⁴

In India, the judiciary (particularly the Supreme Court) also has the significant function of protecting and enforcing the Fundamental Rights of the people guaranteed to them by the Constitution.

¹ G. Austin- The Indian Constitution Cornerstone of Nation, p. 169

² Sri Alladi Krishnaswamy Aiyer, Member of Drafting Committee.

³ V.G. Ram Chandran- Fundamental Rights and Constitutional Remedies., Vol. 1 (1964), p. 1.

⁴ A.K. Gopalan v. State of Madras, AIR 1950 SC 27

Justice Untwalia has compared the Judiciary to “a watching tower above all the big structures of the other limbs of the State” from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme.⁵

INFORMAL METHOD AS A MEANS OF JUDICIAL INTERPRETATION

In the informal method of Judicial Interpretation, the constitutional text does not change, but its interpretation undergoes a change.⁶ The words in the constitution having one meaning in one context maybe given somewhat different meaning in another context.

“While the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.”⁷

Judicial interpretation is a process of slow and gradual metamorphosis of constitutional principles, and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. In this process, the Supreme Court plays a dominant role, for its their function to interpret the Constitution.

The process is slow for its develop from case to case over a length of time and it may take long for a view to crystallize. The Court’s interpret the constitution only when the question is raised before them and it is also somewhat haphazard because the courts do not take the initiative themselves and the course of such interpretation depends on the nature of cases and constitutional controversies which are presented to the courts for adjudication.

Though the process of judicial interpretation goes on in every constitution to a greater or lesser extent, yet it assumes a crucial importance in a country like India in which the formal method of constitutional amendment is very tardy and difficult.

In democratic countries, the judiciary is given a place of great significance. The courts perform a vital role of propounding and putting forward the provisions of the Constitution. The courts act as the supreme interpreter, protector and guardian of the supremacy of the Constitution. The judiciary has to perform an important role in the interpretation and enforcement of human rights inscribed in the fundamental law of the country.

⁵ Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328

⁶ Constitutional Interpretation, Wheare, Modern Constitutions, 146-147 (1964)

⁷ Justices Black and Frankfurter, Conflict in the Court, 57.

The Supreme Court of India by holding that it can reconsider its decisions from time to time has kept the way open for adjustments in constitutional interpretation so as to adopt the Indian Constitution to new situations. The Supreme Court has on several occasions changed its views about the significance and meaning of several constitutional provisions.

Even though, due to the Indian Constitution being very detailed, and its language being rather specific, and not general, opportunities available to mould the Constitution by the judicial interpretation process are somewhat limited, yet, there have been several outstanding judicial decisions which have had a deep impact on constitutional development.

Since 1978, the interpretative process has entered a very dynamic phase because of judicial creativity. In *Maneka Gandhi's Case*,⁸ the Supreme Court has held that the provisions of Part-III should be given widest possible interpretation.

Delivering the judgment, Bhagwati, J., said, "the correct way of interpreting the provisions of Part-III is that attempt of the court should be to expand the reach and ambit of fundamental rights rather than to attenuate their meaning and content."

It is important to note that the constitution itself super-scribes the general principles of interpretation through **Article 367(1)**, which states that unless the context otherwise requires, the General Clauses Act, 1897 shall apply for the interpretation of this constitution as it applies for the interpretation of an act of the legislature. Courts have held in cases such as **Jugmendar Das vs State**,⁹ that not only the general definitions provided in the General Clauses Act, but also the general rules of construction given therein are also applicable to the constitution.

Having said the above, the fact remains that Constitution is a special act. This imposes an important obligation on the interpreters of the constitution to interpret its provisions such that the spirit of the constitution is not maligned.

In **Keshvananda Bharati vs State of Kerala**,¹⁰ the Supreme Court identified the basic structure of the constitution that reflects its true spirit and held that nothing that hurts the basic structure of the constitution, is constitutional. The Supreme Court also delivered that one should give the freedom to the legislature to enact laws, within the framework of the constitution, that ensure that the blessings of liberty be shared with all.

Provisions of the constitution are fairly static and not very easy to change but the laws enacted by the legislature reflect the current state of people and are very dynamic. To ensure that the

⁸ AIR 1978 SC 597

⁹ AIR 1951 SC 703

¹⁰ AIR 1973 SC 1461

new laws are in accordance with the basic structure of the constitution, the constitution must be interpreted in a liberal and broad manner giving effect to all its parts and the presumption must be that no conflict or repugnancy was ever intended by the framers of the Constitution. Applying the same logic, the provisions relating to fundamental rights have been interpreted broadly and liberally in favor of the subject. Similarly, various legislative entries mentioned in the Union, State, and Concurrent list have been construed liberally and widely.

NECESSITY FOR JUDICIAL INTERPRETATION

Times are not static. Times keep on changing and therefore, the life of a nation too is never static but always is dynamic, living and organic; its social, political and economic conditions tends to change continuously. Social mores and ideals change from time to time creating new problems and altering the complexation of old ones. It is, therefore, quite possible that a constitution drafted in one era, and in a particular context, be found inadequate in another era and another context. The ideas upon which a constitution is based in one generation may be spurned as old fashioned in the next generation.

It thus becomes essential to have some mechanism, or a process, with the help of which the constitution may be adapted and construed from time to time in accordance with contemporary national needs.

The provision of judicial interpretation of the Constitution is made with a view to overcome the difficulties which may encounter in future working of the Constitution. No generation has a monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of government according to their requirements.

If no provisions were made for the Judicial Interpretation of the Constitution, the people would have recourse to extra constitutional method like revolution to change the Constitution.

The framers of the Indian Constitution were ambitious to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. Thus, it can be regarded as a living document. The constitution is also an organic instrument.

“One can therefore, safely say that the Indian Federation will not suffer from the faults of rigidity of legalism. Its distinguishing feature is that it is a flexible federation.”¹¹

¹¹ Dr. Ambedkar, - CAD Vol. IX, p. 1569.

EVOLUTION OF PRIVACY AS A FUNDAMENTAL RIGHT

It has been urged that the framers of the Constitution rejected the notion of privacy being a fundamental right. Hence it has been submitted that it would be outside the realm of constitutional adjudication for the Court to declare a fundamental right to privacy.

However, it is pertinent to note that the 21st century is an era of digitalisation and this very development must be borne in mind considering any interpretation to the laws of the country. Society, in this era, is developing well in accordance with the technological advancements. The use of internet, primarily, the social media, has again touched the topic of privacy of the individuals. It becomes hard to digest that where people are too prone to the invasion of their privacy, Part-III of the Indian Constitution does not even recognise right to privacy as a fundamental right.

Sensing the need of the hour, the Supreme Court too was willing to adopt this advancement of the society in order to protect the privacy of the individuals. As soon as the question of privacy came up to the Supreme Court, the opinion of the court dwelled in favour of recognising privacy as intrinsic to life and personal liberty under Article-21 of the Indian Constitution.

On 24th August'2017 in **Justice KS Puttaswamy (Retd.) & Anr. v. Union of India & Ors**,¹² the Supreme Court of India unanimously by virtue of 9:0 upheld privacy as a fundamental right, thus making it clear that anyone can challenge the actions of the State or other entities of the State against the infringement of this right.

The Privacy bench unanimously found that privacy was a right emanating from Article 21 of the Constitution, which guarantees right to life and personal liberty.

The unanimous judgment by the Supreme Court of India in Justice Puttaswamy Case is a resounding victory for privacy. A new sun arose in the scope and extent of right to personal liberty in India. The judgment marks a watershed moment in the constitutional history of India ringing endorsement of the right to privacy as a fundamental right.

¹² Writ Petition (Civil) No. 494 of 2012.

The one-page order signed by all nine judges declares:

The right to privacy is guaranteed as an inherent right under life and personal liberty under Article 21 and as a part of the other freedoms guaranteed by Part III of the Constitution.

The right to privacy in India has developed through a series of decisions over the past 60 years.

Privacy judgment reconciles those different interpretations to unequivocally declare that it is a fundamental right. The judgment also concludes that privacy is a necessary condition for the meaningful exercise of other guaranteed freedoms.

The judgment extends to 547 pages, in which the judges state the reasons behind the one-page order and includes opinions from six judges, creating a legal framework for privacy protections in India. The opinions cover a wide range of questions in elucidating that privacy is a fundamental inalienable right, intrinsic to human dignity and liberty.

Moreover, the provisions of the Constitution must also be read and interpreted in a manner which would enhance their adherence with international human rights instruments which have been ratified by India.

MAIN ISSUES BEFORE THE COURT

The Court was addressed on various aspects of privacy including:

- i. Whether there is a constitutionally protected right to privacy;
- ii. If there is a constitutionally protected right, whether this has the character of an independent fundamental right or whether it arises from within the existing guarantees of protected rights such as life and personal liberty;
- iii. The doctrinal foundations of claim to privacy;
- iv. The content of privacy;
- v. What are the contours of such Right?
- vi. The nature of the regulatory power of the State.

ORIGIN OF CONCEPT OF PRIVACY

The basic primary question that whether privacy is a right protected under Part-III of our Constitution requires an understanding of what privacy means. For it is when we understand what entitlements privacy safeguards, that we can determine whether the Constitution protects privacy. The contents of privacy need to be analysed, not by providing an exhaustive enunciation or catalogue of what it includes but by indicating its broad contours.

The Greek philosopher **Aristotle** spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*). This dichotomy may provide an early recognition of “a confidential zone on behalf of the citizen”.¹³ Aristotle’s distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand, activities in the private realm are more appropriately reserved for “private reflection, familial relations and self-determination.”¹⁴

At a certain level, the evolution of the doctrine of privacy has followed the public – private distinction. **William Blackstone** in his **Commentaries on the Laws of England** (1765) spoke about this distinction while dividing wrongs into private wrongs and public wrongs. Private wrongs are an infringement merely of particular rights concerning individuals and are in the nature of civil injuries. Public wrongs constitute a breach of general and public rights affecting the whole community and according to him, are called crimes and misdemeanors.

Austin in his **Lectures on Jurisprudence** (1869) spoke of the distinction between the public and the private realms: *jus publicum* and *jus privatum*. The distinction between the public and private realms has its limitations. If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from that which she expects in the sanctity of the home. Yet if dignity is the underlying feature, the basis of recognizing the right to privacy is not denuded in public spaces. The extent of permissible state regulation may, however, differ based on the legitimate concerns of governmental authority.

In their seminal article, Warren and Brandeis observed that: “The principle which protects personal writings and all other personal productions, not against theft and physical

¹³ Michael C. James, “A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe”, *Connecticut Journal of International Law* (Spring 2014), Vol. 29, Issue 2, at page 261

¹⁴ *Ibid*, at page 262

appropriation, but against publication in any form, is in reality not the principle of private property, but that of **an inviolate personality**.”¹⁵ BLACK’S LAW DICTIONARY (Bryan Garner, ed.) 3783 (2004)

‘Privacy’ is “The condition or state of being free from public attention to intrusion into or interference with one’s acts or decisions”.¹⁶ The right to be in this condition has been described as ‘the right to be let alone’.¹⁷ What seems to be essential to privacy is the power to seclude oneself and keep others from intruding it in any way. These intrusions may be physical or visual, and may take any of several forms including peeping over one’s shoulder to eavesdropping directly or through instruments, devices or technological aids.

The right “to be let alone” thus represented a manifestation of “an inviolate personality”, a core of freedom and liberty from which the human being had to be free from intrusion. The technology which provided a justification for the need to preserve the privacy of the individual was the development of photography. The right to be let alone was not so much an incident of property as a reflection of the inviolable nature of the human personality.

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**.¹⁸ 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’.¹⁹

Building on this framework, **Bostwick**²⁰ suggested that there are in fact, three aspects of privacy – “repose”, “sanctuary” and “intimate decision”. “Repose” is known to be as freedom from unwarranted stimuli, “sanctuary” refers to protection against intrusive observation, and “intimate decision” means to autonomy with respect to the most personal life choices. Whether any other facet of the right of privacy exists cannot be divined now.

EVOLUTION OF THE DOCTRINE OF PRIVACY IN INDIAN CONTEXT

¹⁵ Warren and Brandeis, “The Right to Privacy”, *Harvard Law Review* (1890), Vol.4, No. 5, at page 205

¹⁶ Black Law’s Dictionary (Bryan Garner, ed.) 3783 (2004)

¹⁷ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)

¹⁸ 381 US 479

¹⁹ *Griswold v. Connecticut* 381 US 479 (1965) 487

²⁰ Review 1447. Gary Bostwick, ‘A Taxonomy of Privacy: Response, Sanctuary, and Intimate Decision’ (1976) 64 California Law

The Constituent Assembly after having a brief discussion on this issue decided not to put Right to Privacy under Part-III of the Indian Constitution.

Over the years, inconsistency from two early judgments (the first: **M.P. Sharma v. Satish Chandra, District Magistrate, Delhi**²¹ was rendered by a Bench of eight judges and the second, in **Kharak Singh v. State of Uttar Pradesh**²² was rendered by a Bench of six judges) created a divergence of opinion on whether the right to privacy is a fundamental right.

In M.P Sharma case, the bench held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right of privacy. They argued that the Constitution of India does not prescribe any language similar to the Fourth Amendment of the US Constitution, and therefore, interrogated the existence of a secured right to privacy. The decision in **M P Sharma** did not decide whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, Article 21 which provides for right to life and personal liberty. Hence the decision cannot be construed to specifically exclude the protection of privacy under the framework of protected guarantees including those in Articles 19 or 21. The absence of an express constitutional guarantee of privacy still begged the question that whether privacy is an element of liberty and, as an integral part of human dignity, is comprehended within the protection of life as well.

The judgment in the **Kharak Singh case** is worth pointing out because while invalidating Regulation 236(b) of the Police Regulations which provided for nightly domiciliary visits, the majority construed this to be an unauthorized intrusion into a person's home and a violation of **ordered liberty**. The majority decision placed reliance on the privacy doctrine enunciated by Justice Frankfurter, speaking for the US Supreme Court in **Wolf v Colorado** (the extract from **Wolf** cited in the majority judgment specifically adverts to 'privacy' twice) while arriving at this conclusion. Placing reliance on this doctrine to discredit domiciliary visits, the majority in **Kharak Singh** proceeded to repel the challenge to other clauses of Regulation 236 on the ground that the right of privacy is not guaranteed under the Constitution and hence Article 21 had no application.

²¹ AIR 1954 SC 300

²² AIR 1963bSC 1295

However, over the next few years, the interpretation and scope of privacy as a right expanded, and was accepted as being constitutional in certain subsequent judgments as discussed below.

In **R. Rajagopal v. State of T.N.**,²³ popularly known as “**Auto Shankar Case**” the Supreme Court has expressly held that the “right to privacy”, or the right to be let alone is guaranteed by Article-21 of the Indian Constitution. It can be inferred that a citizen thus has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among the matters.

In **Govind v. State of M.P.**,²⁴ the Supreme Court undertook a more elaborate appraisal of the right to privacy. The Court accepted a limited Fundamental Right to privacy “as an emanation” from Articles- 19 (a), (d), and 21.

After taking note of the above mentioned cases, the Supreme Court observed in **People’s Union for Civil Liberties v. Union of India**,²⁵ that:

“we have, therefore, no hesitation in holding that right to privacy is a part of the right to ‘life’ and ‘personal liberty’ enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed except according to the procedure established by law.”

The Supreme Court’s decision in **Suchita Srivastava v. Chandigarh Administration**²⁶ dwells on the statutory right of a woman under the Medical Termination of Pregnancy Act, 1971 to decide whether or not to consent to a termination of pregnancy and to have that right respected where she does not consent to termination. The statutory recognition of the right is relatable to the constitutional right to make reproductive choices which has been held to be an ingredient of personal liberty under Article 21. The Court deduced the existence of such a right from a woman’s right to privacy, dignity and bodily integrity.

In **Ram Jethmalani v. Union of India**,²⁷ a Bench of two judges was dealing with a public interest litigation concerned with unaccounted monies and seeking the appointment of a Special

²³ (1994) 6 SCC 632

²⁴ (1975) 2 SCC 148; 1975 SCC (Cri) 468

²⁵ AIR 1991 SC 207, 211

²⁶ AIR (2009) 9 SCC 1

²⁷ (2011) 8 SCC 1

Investigating Team to follow and investigate the money trail. The Court held that the revelation of details the bank accounts of individuals without the establishment of a *prima facie* ground of wrongdoing would be a violation of right to privacy.

In **Selvi v. State of Karnataka**,²⁸ the Court went into an in-depth analysis of the right in the context of lie detector tests used to detect alleged criminals. A number of judgments of this Court were examined and this Court, recognizing the difference between privacy in a physical sense and the privacy of one's mental processes, held that both received constitutional protection.

The right to privacy has been traced in the decisions which have been rendered over more than four decades to the guarantee of life and personal liberty under Article -21 and the freedoms set out in Article -19.

All this leads to a discussion on what exactly is the fundamental right of privacy – where does it fit in Chapter III of the Constitution, and what are the parameters of its constitutional protection.

THE POSITION OF PRIVACY AS A FUNDAMENTAL RIGHT

In the year 2012, Justice K.S. Puttaswamy (Retired) filed a petition in the Supreme Court challenging the constitutionality of Aadhaar on the grounds that it violates the right to privacy of the people emanating from Article 21 of the Indian Constitution. During the hearings, the Central government opposed the categorization of privacy as a fundamental right. The government's opposition to the right relied on two early decisions i.e. **MP Sharma v. Satish Chandra**²⁹ in 1954, and **Kharak Singh v. State of Uttar Pradesh**³⁰ in which it was held that privacy was not a fundamental right.

A 3-Judge Bench of this Court was dealing with a scheme propounded by the Government of India popularly known as the Aadhar card scheme. Under the Aadhar scheme, the Government of India collects and compiles both demographic and biometric data of the residents of this country to be used for various purposes. One of the grounds of attack on the said scheme is that

²⁸ (2010) 7 SCC 263

²⁹ AIR 1954 SC 300

³⁰ AIR 1963 SC 1295

the very collection of such data is violative of the “Right to Privacy”.

The matter was then heard by a Bench of 5 learned Judges on July 18, 2017, and was thereafter referred to 9 learned Judges in view of the fact that the judgment in **M.P. Sharma and others v. Satish Chandra, District Magistrate, Delhi, and others**,³¹ was by a Bench of 8 learned Judges of this Court.

The constitutional validity of the Aadhaar scheme was challenged before the Supreme Court. This issue was before a 5-judge bench of the Court (“**Aadhaar Bench**”). One of the key issues is whether the norms for compilation of the demographic biometric data by the government violates the right to privacy. To come to a conclusion in this case, the Supreme Court had to first clarify that whether there is a constitutionally mandated fundamental right to privacy. Due to conflicting judgments of the SC in the past, the Aadhaar Bench referred this question before a 9-judge bench of the SC (“**Privacy Bench**”) to finally determine whether there existed a fundamental right to privacy.

Sensing this need for the reconciliation of the divergent opinions on the right to privacy, the Court referred this mechanical clarification on constitutionality of the right to a larger bench. The bench was set up not to look into the constitutional validity of Aadhaar, but to consider a much larger and significant question that whether the right to privacy is a fundamental right and can be traced in the rights to life and personal liberty under Article-21.

POSITION AFTER THE PRIVACY JUDGMENT 2017

The Privacy Bench unanimously held that the right to privacy is fundamental right protected under Article 21 of the Indian Constitution. The judges have delivered 6 judgments: Justice Chandrachud has delivered on behalf of himself, and on behalf of Chief Justice JS Khehar, Justices Agrawal and Abdul Nazeer which is also referred to as **Lead Judgment**. Whereas separate judgments were written by Justices Nariman, Sapre, Chelameshwar, Bobde, and Kaul stating their own findings, conclusions and observations.

A consolidated judgment holds that:

³¹ 1954 SCR 1077

1. The right to privacy is guaranteed under Article 21 as an intrinsic part of the right to life and personal liberty and as a part of the freedoms guaranteed by Part III of the Constitution; and
2. The earlier judgments of the SC in Kharak Singh and MP Sharma are overruled to the extent they held otherwise,

The Lead Judgment starts by acknowledging that

- i. Privacy allows each individual / person to be left alone in a core which is inviolable;
- ii. this autonomy is further conditioned by their relationships with the society;
- iii. those relationships pose questions to free choice and autonomy. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual; and
- iv. privacy is required to be analyzed in an interconnected world and the SC has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.³²

In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relating to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognizes that an individual may have control over the dissemination of material that is personal to him. Unauthorized use of such information may, therefore, lead to infringement of this right; and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

PRIVACY AS A FUNDAMENTAL RIGHT

The concept of right to privacy as a fundamental right in India has developed through a series of decisions over the past 60 years. Over the years, inconsistency from two early judgments

³² Justice KS Puttaswamy (Retd.) & Anr. v. Union of India & Ors

created a divergence of opinion on whether the right to privacy is a fundamental right. The privacy judgment reconciles the different interpretations to unequivocally declare that it is. Moreover, constitutional provisions must be read and interpreted in a manner which would enhance their conformity with international human rights instruments ratified by India. The judgment incurs that privacy is a necessary condition for the meaningful exercise of other guaranteed freedoms under the Constitution.

The inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India.

The “right to privacy of any individual” inheres in every human being by birth and is essentially a natural right. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguish with human being.

It is an act of ‘interpretation’ and not an act of ‘introduction’. Meaning thereby, this Judgment does not create a new fundamental right as right to privacy but only clarifies the status of the right to privacy as fundamental right under the Constitution. It traced its recognition in the right to life and personal liberty under Article 21 of the Constitution of India (“**Constitution**”), but found that it was also embedded in certain other rights, such as Article 19.³³

The judgment clarifies that a constitutional right to privacy can be defined in both negative and positive aspects, i.e.:

- a. To protect the individual from unwanted intrusion into their private life, including political affiliation, sexuality, religion and other similar aspects. (the negative freedom)
- b. To oblige the state to adopt suitable measures to protect an individual’s privacy, by removing obstacles to it (the positive freedom)

The SC’s ruling is established deeply and firmly, *inter alia*, in the below mentioned reasoning:

1. Privacy as an inalienable right:

Privacy is a natural right, inherent to a human being. It is therefore emanating from pre-constitutional era which exists from time immemorial and vests in humans by virtue of the fact that they are human. The right has been preserved recognized and protected by

³³ Article 19 of Constitution of India: Protection of certain rights regarding freedom of speech etc.

the Constitution, not framed or created by it. Privacy is not bestowed upon an individual by the state, nor capable of being taken away or curtailed by the State. It is thus inviolable and unassailable.

2. **Relationship with Dignity:**

It was argued by the State that the recognition of privacy would require a Constitutional amendment, and could not be added just by interpreting the Constitution. The judgment has recognized that privacy was intrinsic to other liberties guaranteed as fundamental rights under the Constitution. Privacy is an element essential to human dignity, and ensures that a human being can lead a life of dignity by, inter alia, exercising a right to make imperative choices for himself, to express oneself, dissent, etc. Dignity was, consequently, an innate and inherent aspect of the right to life and liberty enshrined under Article 21 of the Constitution, as 'life' was not limited to mere existence, but was made dignified living because of the attendant freedom of dignity. It was only possible when life could be lived with full dignity and worth that liberty could be of any substance.

3. **Commitment to International Obligations:**

The recognition of privacy as fundamental constitutional value was a part of India's commitment⁵ to safeguard human rights under international law under the International Covenant of Civil and Political Rights ("ICCPR") which found reference in domestic law under the Protection of Human Rights Act, 1993. A right to privacy is recognized by the ICCPR³⁴. A right to privacy is also specifically recognized by the Universal Declaration of Human Rights.³⁵

The judgment has held that constitutional provisions had to be read and interpreted in a manner such that they were in conformity with international commitments made by India.

RIGHTY TO PRIVACY: WHETHER ABSOLUTE OR CURTAILED?

It goes without saying that no legal right can be absolute. Every right has limitations. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case

³⁴ Article 17 of the ICCPR states: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation 2. Everyone has the right to the protection of the law against such interference or attacks.

³⁵ Article 12, Universal Declaration of Human Rights

to case basis depending upon the nature of the privacy interest claimed. To test the infractions of fundamental rights, there exists different standards. 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 to outline the manner in which such a right to privacy can be curtailed.

The Lead Judgement notes the tests for the reasonable restrictions on the right to privacy.³⁶ It prescribes that a law which encroaches upon the right to privacy will have to “*withstand the touchstone of permissible restrictions on fundamental rights*”. Any infringement of privacy must be by a law which should be “*just, fair and reasonable*”.

The three-fold requirement for such infringement to right to privacy would be: “*(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*”³⁷

Justice Chelameshwar has held that aside from meeting the ‘just, fair and reasonable’ requirement under Article 21, there should be a necessity for ‘compelling state interest’ for those privacy claims which deserve the ‘strictest scrutiny.’³⁸

Justice Bobde held that any infringement of the fundamental right to Privacy must pass the same standard required for the infringement of personal liberty, i.e. In terms of the judgement in the case of *Maneka Gandhi v. Union of India*³⁹, such law must be “*just, fair and reasonable, and not fanciful, arbitrary or oppressive.*”⁴⁰

Justice Nariman held that statutory restrictions on privacy would prevail if it is found that the ‘social or public interest and the reasonableness of the restrictions outweighs the particular aspect of privacy claimed.’⁴¹

Justice Sapre says that the right to privacy is subject to reasonable restrictions “in view of the

³⁶ Para 3 (H) of the conclusion

³⁷ ibid

³⁸ paragraph 45 of Justice Chelameshwar's judgment

³⁹ 1978 SCR (2) 621

⁴⁰ paragraph 45 of Bobde's judgment

⁴¹ paragraph 60 of Nariman's judgement

social, moral and evoking public interest that the state is entitled to impose by law.”⁴²

Justice Kaul has held that that right to privacy would be subject to reasonable restrictions on the grounds of national security, public interest and the grounds enumerated in the provisos to Article 19 of the Constitution.⁴³

Thus, State can be permitted and justified to infringe the right to privacy, provided the following conditions are satisfied:

- i. the infringement should be by legislation.
- ii. the legislation should be in public interest.
- iii. the legislation should be reasonable and have nexus with the public interest.
- iv. the State would be entitled to adopt that measure which would most efficiently achieve the objective without being excessive.
- v. if apart from Article 21, the legislation infringes any other specified Fundamental Right then it must stand the test in relation to that specified Fundamental Right.
- vi. Presumption of validity would attach to the legislations.

INTERPRETATION IN THE CONTEMPORARY ERA

The inevitable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution and is intrinsic to life and personal liberty.

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 embedded across the various articles under Part III and, *mutatis mutandis*, takes the form of whichever of their enjoyment its violation curtails.

Privacy is a constitutionally protected right emerging primarily from the guarantee of right and liberty in Article 21 of the Indian Constitution. It includes the preservation of personal intimacies, sanctity of family life, marriage, procreation, the homo and sexual orientation. It also connotes the right to be left alone and safeguards individual autonomy and recognizes one's ability to control vital aspects of his or her life.

⁴² paragraph 26 of Justice Sapre's judgment

⁴³ paragraph 72 of Justice Kaul's judgment

Privacy is not an absolute right, but any invasion must be based on legality, need and proportionality, government must put in place a robust regime for data protection. It must bring about a balance between individual interest and legitimate state concern.

Furthermore, in the current scenario, several pieces of legislations such as Aadhaar Act under which the personal information is collected by the central and state governments will have to pass the test of reasonableness laid down by the Supreme Court to curtail the right to privacy.

Such State actions that deal with privacy and personal information will be tested on the reasonable restriction principles i.e. there is a need for an existence of a Law; this Law should not be against the principle of Rule of Law and Natural Justice. Moreover, the infringement of the right by such Law should have a nexus in achieving a legitimate state aim.

The lead judgment calls for the government to create a data protection regime to protect the privacy of the individual. Moreover, the judgment recommends a robust regime which balances legitimate concerns of the state as well as individual interests.

Justice Chandrachud notes, "Formulation of a regime for data protection is a complex exercise that needs to be undertaken by the state after a careful balancing of requirements of privacy coupled with other values which the protection of data subserves together with the legitimate concerns of the state." For example, the court observes, "government could mine data to ensure resources reached intended beneficiaries." However, the bench restrains itself from providing guidance on the issues, confining its opinion to the clarification of the constitutionality of the right to privacy.

The judgment will also have aftermaths for a number of contemporary issues which are already pending before the supreme court. In particular, two proceedings—on Aadhaar and on WhatsApp-Facebook data sharing—will be test grounds for the application and contours of the right to privacy in India.

As for now, it is certain that the right to privacy has been unequivocally articulated by the Supreme Court. There is much reason to celebrate this long-due victory for privacy rights in India. But it is only the first step, as the real test of the strength of the right will in how it is understood and applied in subsequent challenges.

CONCLUSION: A WAY FORWARD

In the last seventy years, the Supreme Court has interpreted our Constitution in accordance with the socio, economic and political conditions of the Indian Society, felt need of, We, the People of this Country and the Country in general in comparison to the conditions prevailing in other Countries.

Over the last few decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble.

The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society.

The focal point of the Constitution is its citizen because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are embedded in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

The Constitution has evolved over time, as judicial interpretation, led to the recognition of specific interests and entitlements. These have been included within the freedoms and liberties guaranteed by the Constitution. Article 21 has been interpreted by this Court to mean that life does not mean merely a physical existence. It includes all those faculties by which life is enjoyed. The ambit of 'the procedure established by law' has been interpreted to mean that the procedure must be fair, just and reasonable. The coalescence of Articles 14, 19 and 21 has brought into being a jurisprudence which recognises the inter-relationship between rights. That is how the requirements of fairness and non-discrimination animate both the substantive and procedural aspects of Article-21. These constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies requiring an expansive reading of liberties and freedoms to preserve human rights under the rule of law. India's brush with a regime of the deprivation of life and personal liberty in the recent past is a grim reminder of how tenuous liberty can be, if the judiciary is not vigilant.

The interpretation of the Constitution cannot be frozen by its original understanding. The

Constitution has continuously developed and evolved over the years and must continuously evolve to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency, which may arise in the future.

This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past. Hence, as Judges interpreting the Constitution today, the Court must leave open the path for succeeding generations to meet the challenges to privacy that may be unknown today.

