RIGHT TO PRIVACY AND JUDICIAL TRENDS IN INDIA

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Abstract

The Supreme Court has recently held in Justice Puttaswamy v. Union of India, delivered on 24th August, 2017 that right to privacy is a fundamental right under the Constitution of India, but like all other fundamental rights it is not absolute. This ruling apart from setting a new benchmark for Indian democracy and clearing all ambiguity on privacy has set the stage for the introduction of a new privacy law by the Government. Delivering the unanimous verdict of the nine judge bench on the penultimate day of his tenure, Chief Justice J.S. Kehar said: "Privacy is intrinsic to the right to life and personal liberty under Article 21 of the Constitution and an inherent part of fundamental freedom under part III of the Constitution". Any encroachment to privacy will have to subscribe to the "touchstone of permissible restrictions" the bench said. Consequently, invasion of privacy will have to be justified against the standard of a fair, just and reasonable procedure. The paper will try to analyse the following questions: 1) What was the position of right to privacy before this landmark judgment? 2) What are the specific facets of privacy that have been referred to by the court? 3) What is the impact of declaring privacy as a fundamental right? 4) What are the reasonable restrictions on the fundamental right to privacy that have been recognised by the court? The conclusion will deal with the impact Puttaswamy will have upon legal and constitutional landscape for years to come and how it will impact the interplay between privacy and free speech.

Keywords: *Privacy, Fundamental Rights, Constitution, Article 21, Supreme Court*

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INTRODUCTION

The quest for privacy is inherent in human behaviour. It is a natural need of man to establish individual boundaries and to restrict the entry of others into that area. There are few moments in the life of everyone where he does not want interference of others and desires to be alone[1]. The autonomy is an essential element for the development of one's personality. These areas may, in relation to a person, be the family, marriage, sex or other matters which require closed chamber treatment. In such areas an individual requires to be at liberty to do as he likes. An intrusion on privacy threatens liberty. For the happiness of a man it becomes necessary to protect intrusion in one's secret, which is basic to a free society and more particularly in a democratic world[2].

There are no express words in the Constitution of India about the right to privacy and it is not to be found in any other statutes, though interest similar to that were protected both under the civil law, i.e., under the Indian Penal Code or the Indian Evidence Act, and under the Indian Constitution. Different names were given to it at different times, viz., privileged communications, withholding of documents, domestic affairs, matrimonial rights, etc[3].

In 2012, Justice K.S. Puttaswamy (retired) filed a petition in the Supreme Court of India challenging the constitutionality of Aadhar on the grounds that it violates the right to privacy. During the hearings, the Central government opposed the classification of privacy as a fundamental right. The government's opposition to the right relied on two earlier decisions- *M.P. Sharma* v. *Satish Chandra* in 1954, and *Kharak Singh* v. *State of Uttar Pradesh* in 1962- which had held that right to privacy was not a fundamental right.

In M.P. Sharma, the bench held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right to privacy. They argued that the Indian Constitution does not include any language similar to the Fourth Amendment of the US Constitution, and therefore, questioned the existence of a protected right to privacy. The Supreme Court made clear that M.P.Sharma did not decide other questions, such as "whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty under Article 21."

[1] Justice Polok Basu : "Law Relating To Protection of Human Rights" Modern Law Publications , First Edition 2002 p503
[2] Wolf V. Colorado, (1948) 338 US 25, refereed in AIR 1991 Journal Section 113 at p. 113
[3] See AIR 1991 Journal Section 113 at p 116

In Kharak Singh, the decision invalidated a Police Regulation that provided for nightly domiciliary visits, calling them an "unauthorised into a person's home and a violation of ordered liberty". However, it also upheld other clauses of the Regulation on the ground that right to privacy was not guaranteed under the Constitution, and hence Article 21 of the Indian Constitution (the right to life and personal liberty) had no application. Justice Subbarao's dissenting opinion clarified that, although the right to privacy was not expressly recognised as a fundamental right, it as an essential ingredient of personal liberty under Article 21.

The Supreme Court has recently held in *Justice Puttaswamy* v. *Union of India*, delivered on 24th August, 2017 that right to privacy is a fundamental right under the Constitution of India, but like all other fundamental rights it is not absolute. This ruling apart from setting a new benchmark for Indian democracy and clearing all ambiguity on privacy has set the stage for the introduction of a new privacy law by the Government.

Delivering the unanimous verdict of the nine judge bench on the penultimate day of his tenure, Chief justice J.S. Kehar said: *"Privacy is intrinsic to the right to life and personal liberty under Article 21 of the Constitution and an inherent part of fundamental freedom under part III of the Constitution".*

Any encroachment to privacy will have to subscribe to the "touchstone of permissible restrictions" the bench said. Consequently, invasion of privacy will have to be justified against the standard of a fair, just and reasonable procedure.

Reading out the common conclusion, arrived at by the nine – judge bench, Chief justice of India J.S. Khehar said the court had overruled its own eight –judge bench and six-judge bench judgements of M.P.Sharma and Kharak Singh cases delivered in 1954 and 1961, respectively , that privacy is not protected under the Constitution.

POSITION OF RIGHT TO PRIVACY BEFORE PUTTASWAMY

Right to privacy is not enumerated as a fundamental right in our Constitution but has been culled out of the provisions of Article 21 of the Constitution and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy.

For the first time , as early as 1963, in Kharak Singh[4], a question was raised whether the right to

[4] *Kharak Singh* v. *State of U.P.* AIR 1963 SC 1295

privacy could be implied from the existing fundamental rights such as Article 19(1)(d), 19(1)(e) and 21. The majority of the judges participating in the decision said of the right to privacy that our Constitution does not in terms confer like constitutional guarantee[5]. On the other hand, the minority opinion (Subba Rao, J) was in favour of inferring the right to privacy from the expression 'personal liberty' in Article 21[6].

In *Govind* v. *State of Madhya Pradesh*[7], the Supreme Court undertook a more elaborate appraisal of the right to privacy. In Govind, the Court considered the constitutional validity of a resolution which provided for surveillance by way of several measures indicated in the said regulation. The Court upheld the validity of the regulation by ruling that Article 21 was not violated as the regulation in question was "procedure established by law" in terms of Article 21. The right to privacy is not however, absolute; reasonable restrictions can be placed thereon in public interest under Article 19(5).

Again in *R. Rajgopal* v. *State of Tamil Nadu*[8], the Supreme Court has asserted that in recent times the right to privacy has acquired constitutional status; it is" implicit in the right to life and liberty guaranteed to the citizens" by Article 21. It is" a right to be let alone". A citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education mong other matters.

In *Peoples Union for Civil Liberties* v. *Union of India*[9], the Supreme Court observed:

"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 the given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established law.'

In *State of Maharashtra* v. *Madhukar Narayan Mardikar*[10], the Supreme Court protected the right to privacy of a prostitute. The Court held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.

POSTION OF RIGHT TO PRIVACY AFTER PUTTASWAMY

[5] *Ibid* at 1302
[6] *Ibid* at 1306
[7] AIR 1975 SC 1378
[8] AIR 1995 SC 264
[9] AIR 1991, SC 207, 211
[10] AIR 1999 SC 495

The privacy bench unanimously held that the right to privacy is a fundamental right protected under the Constitution. A Consolidated order holds that:

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

- The earlier judgements of the Supreme Court in Kharak Singh and M.P.Sharma to the extent they held otherwise are overruled.

The judgements in total run into 547 pages. The judgement trace the history of Indian Constitution, development of jurisprudence with respect to fundamental rights through various Supreme Court cases; examine scholastic articles, foreign jurisprudence and case laws and course of international treaties.

The judgement has not created a new right to privacy as a fundamental right but has clarified the status of right to privacy as a fundamental right under the Constitution. It traced its recognition in in the right to life and personal liberty under Article 21 of the Constitution of India but found that it was footed in some other rights, such as Article 19.

The judgements clarify that a constitutional right to privacy can be defined in both negative and positive terms, i. e.

- To protect the individual from unwarranted intrusion into their private life, including sexuality, religion, political affiliation etc. (negative freedom)

- To oblige the State to adopt suitable measures to protect an individual's privacy, by removing obstacles to it.(positive freedom)

The Supreme Court's ruling is rooted, inter alia, in the following reasoning:

1. Privacy as an inalienable right : Privacy is a natural right, inherent to a human being. It I thus a pre-Constitutional right which vests in humans by virtue of the fact that are human. The right has been preserved and recognised by the Constitution, not created by it. Privacy is not bestowed upon an individual by the State, nor capable of being taken away by it.

2. Relationship with Dignity: It was argued by the State that the recognition of privacy

would require a Constitutional Amendment, and could not be 'interpreted' into the Constitution. The judgement has recognised that privacy was intrinsic to other liberties guaranteed as fundamental rights under the Constitution. Privacy is an element of human dignity by and ensure that a human being can live a life of dignity by, among other things, exercising a right to make essential choices, to express oneself, dissent etc,. Dignity was consequently, an intrinsic part 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 worth living because of the attendant freedom of dignity. It was only when life could be lived with dignity 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 commitment to safeguard human rights under international law under the International Covenant on Civil and Political Rights [ICCPR] which found reference in domestic law under the Protection of Human Rights Act 1993. The ICCPR recognises a right to privacy. The judgement 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.

SPECIFIC FACETS OF PRIVACY THAT HAVE BEEN REFERRED TO BY THE COURT

The submission of the government was that the Supreme Court cannot recognize a juristic concept that is so vague and uncertain that it fails to withstand constitutional scrutiny. The judgement rejected this argument. In the simplest form, the judgement recognizes 'the right to be let alone'. Justice Nariman categorises the right having three aspects: personal privacy, informational privacy and the privacy of choice.

The Supreme Court has traced the history of recognition of various facets of privacy by calling various scholastic writings, Indian and foreign judgements and provides description of privacy rights. However, the lead judgement concludes,

"The 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 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 to concerns which were not present seven decades ago and

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 intrinsic features."

Justice Bobde, has stated that the scope and ambit of constitutional protection of privacy can only be revealed on a case by case basis.

In this context the lead judgement relies on an article that represents privacy through a diagrammatic structure that identifies nine types of privacy[11]:

- Bodily privacy: Privacy of the physical body against violations and restraints of bodily movements
- Special Privacy: Privacy of a space, such as family life and intimate relations
- Communicational Privacy: Right against access to communication, or control over it
- Proprietary Privacy: Right to use property as a means to shield facts or information
- Intellectual Privacy: Privacy of thought, mind, opinions and beliefs
- Decisional Privacy: The ability to make intimate decisions
- Associational Privacy: Privacy of choice of who to interact with
- Behavioural Privacy: The ability to control the extent of access even while conducting publically visible activities
- Informational Privacy: An interest in preventing information about the self from being dissemination and controlling the extent of access to the information.

However, it is important to examine each judgement to have an illustrative list of rights enumerated by the Supreme Court so that while framing any law or taking any action, the government has enough guidance on whether such law or action is likely to violate the right to privacy.

IMPACT OF PUTTASWAMY

[11] Paragraph 141, Part L of the Lead Judgement

The operative part of the order of the Court in Puttaswamy lays down the unanimous verdict of the nine judges, which is unquestionably the law of the land now. This operative part of the order lays down four simple propositions of law:

Proposition 1: The decision in M.P. Sharma which holds that the right to privacy is not protected by the Constitution stands overruled.

The Supreme Court in M.P. Sharma (8judges) and in Kharak Singh (6judges) has held that there was no fundamental right to privacy under the Indian Constitution, and all subsequent judgements to the contrary had been decided by smaller benches. In Puttaswamy four out of the six opinions examined the issue in detail and entirely accepted the petitioner's arguments. On M.P. Sharma, Justice Nariman (para 7), Bobde (para5), and Chandrachurd (para26) all agreed that M.P. Sharma only held that the American Fourth Amendment, which was limited to protecting the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures " was not and never have been , exhaustive of the concept of privacy, even in the United States. Consequently, even if M.P. Sharma was correct in find an analogue to the Fourth Amendment in Article 20(3) of the Indian Constitution, that was no warrant for holding that there was no fundamental right to privacy- a much broader and more compendious concept. In the words of Justice Bobde, " M.P. Sharma is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution n an independent footing or not, but because it wrongly took the United States Fourth Amendment- which in itself is no more than a limited protection against unlawful surveillance- to be a comprehensive constitutional guarantee of privacy in that jurisdiction."

Proposition 2: The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled.

In Kharak Singh, the Supreme Court, had considered the constitutionality of various forms of police surveillance upon an "history- sheeter". It had held reporting requirements, travel restrictions, shadowing and so on (by arguing, in part, that there was no fundamental right to privacy) but had struck down nightly domiciliary visits as a violation of "ordered liberty".

The Court's rejection of Kharak Singh was based on two prongs. First, t held that the judgement was internally contradictory, because the Court could not have struck down domiciliary visits on any other ground but that of privacy; indeed, in doing so, the Court had itself quoted American judgements affirming a right to privacy. As Justice Nariman noted, "If the passage in the

judgement dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the ajority judgement contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent."(paragraph 42)

Justices Bobde (para6), Chelameshwar (para9) and Chandrachud (para27) agreed that there existed a" logical inconsistency" with Kharak Singh in that the Court could not have struck down one facet of police surveillance without invoking the right to privacy. Furthermore, the Justices also agreed that in any event, Kharak Singh's finding that there was no right to privacy under Article 21 of The Constitution was based on a narrow reading of the phrase "personal liberty" which in turn was a relic of the judgement in A.K. Gopalan. In A.K. Gopalan, the Supreme Court had adopted what Justice Chandrachud called the "silos" approach to part III of the Constitution holding that each separate clause dealt with a separate right, and each clause was hermitically sealed from all other clauses. On this reading, "personal liberty" under Article 21contained only what remained after subtracting the various freedoms guaranteed under Article 19(1). The "silos" approach has however, been comprehensively rejected by the Supreme Court in R.C. Cooper, and, in fact in Maneka Gandhi, the majority judgement in Kharak Singh had been held to be overruled in view of this development . Consequently, as Justice Chandrachud observed,

"The jurisprudential foundation which held the field sixty three years ago on M.P. Sharma, and fifty five years ago in Kharak Singh, has given way now to what is a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that state action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III." (para24).

Proposition 3: The right to privacy is protected as an intrinsic part of the right to life and personal liberty under article21 and as a part of freedoms guaranteed by Part III of the Constitution.

At the bar, privacy was argued to be latent with liberty, autonomy, and human dignity, apart from being foundational towards ensuring that the freedom of speech , expression, association, and religion, remained meaningful. All these arguments figure, in different ways, in each of the six opinions.

Justice Chelameswar, for example, grounded his opinion in the concept of liberty. Defining 'privacy' as comprising of three aspects- "repose", "sanctuary" and "intimate decision" , he held that each of three aspects were central to the idea if liberty guaranteed by both Articles 21 and 19 (paragraph 36) . He then took a series of examples of privacy violations (forced feeding, abortion, telephone tapping and intimate association, to name a few), and grounded them within the broader rights to freedom of the body and freedom of the mind (paras 38-40).

Justice Bobde, founded his judgement on "two values….The innate dignity and autonomy of man" (para12) which he located in the overarching structure of the Constitution. in addition, he held that privacy was a" necessary and unavoidable logical entailment of rights guaranteed in the text of Constitution" (para 35). In Justice Bobde's opinion, we find the important in sights that to be effectively exercised, the liberties in Article 19(1) (speech, expression, association, assembly, movement) and 21(personal liberty) require, on occasion, to be exercised in seclusion. Privacy, Therefore, was, "an enabler of guaranteed freedoms" (para29) and "an inarticulate major premise in Part III of the Constitution" (para25).

Justice Nariman made an overarching argument, linking the three aspects of privacy (bodily integrity, informational privacy and privacy of choice) (para 81) with the Preamble of the Constitution, which guaranteed democracy, dignity, and fraternity. (para 82). It was here that the Constitutional foundations of privacy could be found. The connection was drawn by him in this manner:

"The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information."(para 85).

In other words, individual self- development- which lay at the heart of democracy , dignity, and fraternity- was simply meaningless without a right to privacy that guaranteed, at the minimum, security of intimate choices.

Very similar reasoning- based on dignity and individual self- determination- was employed by justice Sapre, who noted that dignity imposes "an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain self- fulfilment."(para8). It was also employed by Justice Kaul, who brought dignity and liberty together, noting that "privacy…is nothing but a form of dignity, which itself is a subset of liberty" (para40) and key to the freedom of thought" (para 52).

These complementary strands of reasoning were brought together by Justice Chandrachud in his judgement. He grounded privacy in dignity (paras 32,107 and 113), "inviolate personality… the core of liberty and freedom' (para 34), autonomy (paras 106 and 168), liberty (para 138), bodily and mental integrity (para 168), and across spectrum of protected freedoms (paras 169). Therefore, "The freedoms under Article 19 can be fulfilled where the individual s entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of mind. The Constitutional right to the freedom of religion under Article25 has implicit within t the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling s that right to privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right to privacy: this is not an act of judicial redrafting. . Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination". (para169).

There is something of tremendous significance here. Even as it agreed with the petitioners that privacy was a fundamental right, the Curt could have chosen to give it a narrow cast and frame. The Court may have limit it to an aspect of dignity or restricted it to a derivative right under Article 21. This would have thrown up difficult initial barriers in future cases, compelling petitioners to shoehorn their claims within the shifting and largely symbolic concept of dignity (and jurisdictions such as Canada provides salutary warnings about how easy it is to constrict

rights by pegging them to dignity), or the(diluted) umbrella of Article21. The Court, however, did the exact opposite. Starting with the basic idea that privacy encompassed body (and bodily integrity), the mind (and informational self-determination), an intimate choices, all nine judges agreed that privacy was at the heart of individual self-determination, of dignity, autonomy and liberty, and concretely, inseparable from the meaningful exercise of guaranteed freedoms such as speech, association, movement, personal liberty, and freedom of conscience. Privacy, therefore, was both an overarching, foundational value of the Constitution and incorporated into the text of Part III's specific, enforceable rights.

The verdict locates privacy in the grand sweep of democracy and within the core human values of autonomy, dignity, and freedom, while also placing it within the realm of the concrete, the flesh-and –blood relationship between the State and individual. In its attention to the abstract and to the world of concepts, it does not ignore the world in which individual struggle against coercive power; and in its care to outline how privacy is concretely meaningful, t does not forget to include it within that constellation of ideas that fame this reality and give its meaning. This is a difficult path to travel. However, all nine judges have demonstrated the intellectual courage required traveling it, and the result is a ringing endorsement of central place of privacy in a modern, constitutional, democratic republic.

Proposition 4: Decisions subsequent to Kharak Singh which have enunciated the position in proposition 3 lay down the correct position in law:

As the Petitioners had repeatedly argued before the Court, there was no need to reinvent the wheel. After *Govind* v. *State of M.P.*[12], there was an unbroken line of Supreme Court Judgements, spanning forty years that had repeatedly affirmed the status of privacy as a fundamental right (Justice Chandrachud's judgement examines all the precedent on the point). Petitioners asked the Court to affirm the line of judgments. The Court agreed.

REASONABLE RESTRICTIONS ON THE FUNDAMENTAL RIGHT TO PRIVACY THAT HAVE BEEN RECOGNISED BY THE COURT

Since the fundamental rights are not to be read in a silo, any infringement of fundamental rights will therefore have to pass the basic tests of Article 21 and 14 of the Constitution. These tests

[12] *Supra* note 7

are[13]:

- The need for existence of a law.
- The law should not be arbitrary
- The infringement of the right by such law should be proportional for achieving a legitimate state aim.

The judgments have recognised the below mentioned restrictions on the right to privacy.

- The lead judgement notes that the tests for the reasonable restrictions on the right to privacy in paragraph 3(H) of the conclusion. It holds 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 is "just, fair and reasonable". The three fold requirement for such infringement would be: (i) legality which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim and (iii) proportionality which ensure a rational nexus between the objects and means adopted to achieve them.
- Justice Bobde, in paragraph 45 of his judgement held that any infringement of 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[14], such law must be "fair, just and reasonable, not fanciful, oppressive or arbitrary".
- Justice Nariman has held in paragraph 60 of his judgement that statutory restrictions on privacy would prevail if it is found that ' social and public interest and reasonableness of the restrictions outweigh the particular aspect of privacy claimed.
- Justice Sapre in paragraph 72 of his judgement said that right to privacy would prevail if it is found that the 'social, moral and compelling public interest that the state is entitled to impose by law'
- Justice Kaul has held in paragraph 72 of his judgement that right to privacy would be

[13] Paragraph 120 of the Lead judgement and Paragraph 3(H) of the Lead Judgement's conclusion
[14] 1978 SCR (2) 621

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

CONCLUSION

The 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 in seven decades ago and the raid 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.

Like other rights which form part of the fundamental freedoms protected by Part III of the Constitution, 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 with stand 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 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 invention of life and or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law (ii) need, defined in terms of legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

The lead judgement recommended 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 interest and legitimate concerns of the State. The legitimate concerns 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.