The Right to Privacy

Arguments of Ms. Meenakshi Arora

Part A: Privacy generally

1. Privacy did not emerge one fine day fully formed and structured from the theoretical penumbras of various constitutional articles. Rather it is an amorphous and a protean concept that emerges from values and principles that have evolved from case law over hundreds of years.

2. One workable definition of the right the privacy, one recognised by Brandeis in his seminal article "The right to privacy" (1890) 4 Harv. Law Review 193 is the right to be left alone. The right to be left alone can be described merely an expression at a higher level of abstraction of several rights that flow directly from the principles of life and liberty that were enshrined in clause 39 of the Magna Carta[1] (1215).

3. In England, eavesdropping was criminalised under the Justices of Peace Act 1361. In his seminal "Commentaries on the Laws of England" (8th edition, 1778, volume IV, p. 167,168), Blackstone writes of common nuisances which he states are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and are indictable only… In this category he includes, "*6. Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after recourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior.*"

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[1] *No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.* As correctly pointed out by this Court in Mohd. Arif v. Supreme Court of India, (2014) 9 SCC 737, para 18 the original charter did not get off the ground and was later re-enacted many times. In *Coke's Second Institute (2nd Edition 1797),* clause 39 appears as *"No Freeman shall be taken, or imprisoned, or be disseised of his freehold, or outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, , but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."*

4. Nowadays privacy rights are explicitly recognised or are recognised by implication under the Universal declaration of Human Rights (1948) (arguably part of customary international law and therefore part of the law of India[2]), the International Covenant of Civil and Political Rights (ratified by India and so to be read into the Constitution[3]), the European Convention of Human Rights, the Constitutions of the United States, the United Kingdom and virtually every other democratic or liberal Constitution. Constitutional courts in India have explicitly recognised a right to privacy for over 40 years. Our statutes recognise privacy interests as well. In particular the Protection of Human Rights Act, 1993 is relevant.

5. Privacy or the right to be left alone has the following, amongst other important components:

A. **Privacy of one's home and residence**: This flows directly from *Semayne's Case*, (1604) 5 Co. Rep. 91, which famously held that "every man's home is his castle" and has been applied to India by the Privy Council in *Aga Karboolie Mohammad* v. *the Queen*, (1841-46) 3 MIA 164. It was also specifically endorsed in the majority by Justice Ayyangar in *Kharak Singh*'s judgment.

B. **Privacy of personal belongings and freedom from arbitrary searches and seizures**: This flows from the landmark judgments of Lord Camden in *Huckle* v. *Money* (1763) 2 Wils. 205 (cited in *Common Cause* v. *Union of India*, (1999) 6 SCC 667 on damages for tort) and *Entick* v. *Carrington* (1765) 2 Wils. 275 (cited in *MP Sharma*, *District Collector* v. *Canara Bank* and many other cases) and also includes the law of protection of confidential information in cases like *Prince Albert* v. *Strange,* [1849] EWHC Ch J20: (1849) 1 Mac & G 25. This forms the basis of the fourth amendment and fifth amendment in the United States. In India as well there is a long line of judgments by which

[2] See *Vellore Citizens Welfare Forum* v. *Union of India*, (1996) 5 SCC 647
[3] See *Jolly George Verghese* v. *Bank of Cochin*, AIR 1980 SC 470; *Visakha* v. *State of Rajasthan*, (1997) 6 SCC 241

arbitrary searches and seizures have been quashed and stringent guidelines have been laid down in cases like *DGIT* v. *Spacewood Furnishing*, (2015) 12 SCC 179 and *ITO* v. *Seth Bros* (1969) 2 SCC 324 each dealing with powers under Section 134 of the IT Act or the Constitution bench decision in *Karnail Singh* v. *State of Haryana*, (2009) 8 SCC 539 dealing with powers under s. 50 of the NDPS Act.

C. **Privacy of personal data, and freedom from surveillance**: This flows from the cases such as the phone tapping case, *PUCL* v. *Union of India*, (1997) 1 SCC 301 as well as the duty of state authorities to protect confidential information in *Marcel* v. *Commissioner of Police* (1992) Ch. 225: (1992) 1 All ER 72: (1991) 2 WLR 1118 and *S and Marper* v. *United Kingdom* (2008) ECHR 1581. Also relevant is decision of the German Federal Court in the Census Case (1983). An important Indian case is *Selvi* v. *State of Karnataka* (2010) 7 SCC 263

D. **Privacy of personal choice**: This includes judgments the landmark decision of Lord Mansfield in *Da Costa* v. *Jones*, 2 Cowp. 729 wherein his lordship was pleased to hold unenforceable a wager between 2 persons over the biological sex of a third person, as well as landmarks such as *Griswold* v. *Connecticut* (1965) 371 US 489(contraceptives for married couples), *Eisenstadt* v. *Baird* (1972) 405 US 438(contraceptives for unmarried couples), *Roe* v. *Wade* (1973) 410 US 113 (abortion), *Planned Parenthood* v. *Casey* (abortion) (1992) 505 US 833, *Lawrence* v. *Texas* (gay rights) (2003) 539 US 558, *Obergefell* v. *Hodges*, (2015) 576 US _____ (gay marriage) et al. In fact a curative petition is pending in this Hon'ble Court on the gay rights in the *Naz Foundation case*.

6. Each of these liberties forms an important core or at the very least a penumbra of fundamental rights guarantees in Part III of the Constitution, whether considered historically or even in terms of jurisprudence.

A and B: Articles 21 (right to personal liberty), 300A (right to property)

C: Articles 20(3), 21, 19(1)(c), 19(1)(a)

D: Articles 14, 19, 21 (right to life)

7. The correctness and validity of *MP Sharma* v. *Satish Chandra*, AIR 1954 SC 300 ("MP Sharma") and *Kharak Singh* v. *State of UP*, (1964) 1 SCR 332 ("Kharak Singh") need to be evaluated in this background.

Part B: MP Sharma and Kharak Singh

8. The stray observations in the judgment in *MP Sharma* about the lack of a right of privacy were inaccurate as being somewhat overbroad in 1954 and are clearly erroneous today. As such, this Hon'ble Court may clarify the same and limit the ratio of the judgments to the facts of that case.

8.1 It is axiomatic that judgments are not be interpreted as Euclid's theorems but are authorities to what was argued and what was decided. In *MP Sharma* the petitioners argued that the provisions of search and seizure contained in the criminal procedure code were bad in view of the provisions of Article 20(3) on the basis of *Boyd* v. *United States*, (1886) 116 US 616 States which in turn was based on the 4th and 5th amendments to the US Constitution and on *Entick* v. *Carrington* (*supra*). The court rejected this argument stating that there was no 4th amendment in the Indian Constitution. In doing so, the court wrongly conflated the 4th amendment with the right to privacy. The 4th amendment is an important part of privacy (point 5B above) but not the only component. Other components were not required to be considered, were not argued and were thus not considered. Thus the stray observation in *MP Sharma* needs to be clarified as obiter and not a proposition against the right to privacy.

8.2 The provisions in the Criminal Procedure Code and other statutes such as the NDPS, IT Act etc dealing with search and seizure may be struck down or read down on a case to case basis if they confer

arbitrary or uncanalized powers or if they are draconian and thus bad under Article 21 or even under Article 20(3). However, there is no general prohibition on search and seizure provisions imposed by Articles 21 and 20(3). This merits some clarification by this Hon'ble Court.

9. The observations and findings contained in the majority judgment of *Kharak Singh* that limit the right to privacy and deny the right against surveillance cannot be sustained in the light of the judgment in RC Cooper v. Union of India (1970) 1 SCC 248 (11 judges), and Maneka Gandhi v. Union of India, AIR 1978 SC 597 (7 judges), and in particular the finding in paragraph 5 of the judgment in Maneka Gandhi by which the minority view of then Justice Subba Rao is deemed as correct and the majority view overruled merits re-affirmation and clarification.

9.1 The majority in *Kharak Singh* relies upon the reasoning in AK Gopalan v. State of Madras, AIR 1950 SC 27 dealing with the exclusivity of fundamental rights, a view set aside by *RC Cooper* (11 judges) and clarified by *Maneka Gandhi* (7 judges)

9.2 The majority in *Kharak Singh* fails to correctly interpret the word "freely" in Article 19(1)(c) and errs in confining it to physical restraints alone. It also ignores the impact a lack of privacy has on free speech under 19(1)(a). This is both a-historical and problematic in terms of jurisprudence and theory.

(a) Blackstone (8th edition, 1778) Volume I, page 134-1337) states that "*personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraints, unless by due course of law... the confinement of the person in any wise, is an imprisonment...And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we*

before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond."

(b) Bentham, the father of legal positivism, (and who dismissed Blackstone's Natural Law predilections as nonsense upon stilts!!) conceptualized the idea of an ideal or model security institution, known as the Panopticon. The Panopticon is an architectural creation, within which constant and round-the-clock watch can be kept on the inmates, workers or patients. The characteristic feature of this arrangement is that there is a complete asymmetry of knowledge, and hence power: the guards in the central tower can see into any of the cells at any given time, but due to special blinds the inmates cannot see the guards, or if they are being watched at any specific moment. In his own words, "*I think, without exception, to all establishments whatsoever, in which, within a space not too large to be covered or commanded by buildings, a number of persons are meant to be kept under inspection. No matter how different, or even opposite the purpose: whether it be that of punishing the incorrigible, guarding the insane, reforming the vicious, confining the suspected, employing the idle, maintaining the helpless, curing the sick, instructing the willing in any branch of industry, or training the rising race in the path of education: in a word, whether it be applied to the purposes of perpetual prisons in the room of death, or prisons for confinement before trial, or penitentiary-houses, or houses of correction, or work-houses, or manufactories, or mad-houses, or hospitals, or schools. It is obvious that, in all these instances, the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose X of the establishment have been attained. Ideal perfection, if that were the object, would require that each person should actually be in that predicament, during every instant of time. This being impossible, the next thing to be wished for is, that, at every instant, seeing reason to believe as much, and not being*

able to satisfy himself to the contrary, he should conceive himself to be so.[4]*"* Bentham's ideas for a prison form a philosophical base for a surveillance state with the State as a Panopticon all seeing and all knowing[5]. Michael Foucault contended that the nature of the oneway surveillance in the Panopticon – what he referred to as the gaze – resulted in an asymmetry of knowledge, and hence power. Ultimately, Foucault argued, the omniscient surveillance created conditions whereby the observed themselves became instruments of their own suppression. So whereas Bentham viewed his Panopticon as a technology for reforming men, Foucault saw a method for creating "docile bodies.[6]"

(c) Twentieth Century totalitarian dictatorships such as Nazi Germany or the Stalinist Soviet Union or even Communist East Germany point to the impact of perpetual surveillance on human conduct and human morals. The same is also reflected in George Orwell's *1984*, or the recent award winning movie "*The lives of Others*".

(d) Justice Subba Rao's dissenting opinion in *Kharak Singh* merits re-affirmation, particularly where he states, "*If a man is shadowed, his movements are obviously constricted. He can move physically, but it can be a movement of an automaton. How could a movement under the scrutinizing gaze of the policeman be described as a free movement? The whole country is his jail. The freedom of movement in clause (d) [of Article 19] therefore must be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom.*"

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[4] Bentham, Jeremy *The Panopticon Writings.* Ed. Miran Bozovic (London: Verso, 1995). p. 29-95

[5] In any case, Bentham as a utilitarian dismissed natural rights as "nonsense upon stilts". But even he envisaged such a structure only for prisons or institutions and not people at large.

[6] Scott O'Reilly, Philosophy and the Panopticon, Philosophy Now Issue 36 available at http://philosophynow.org/issues/36/Philosophy_and_the_Panopticon

(e) In Fali Nariman's book[7], "Before Memory Fades" at pp. 189-190, he writes about the impact of the emergency upon lawyers:

> "*CK Daphtary (CK) and ST Desai (ST) were distinguished contemporaries, very senior and both Gujarati speaking. They always came in early to the Bar library, sat opposite each other, occasionally exchanging pleasantries. One morning in August 1975, I was the sole witness to the following conversation:*
> *ST Desai: (holding a cigarette between his third and fourth fingers, with loosely clenched fists, as was his habit, and occasionally inhaling) Chandubhai- bolo (Chandubhai – speak)*
> *CK Daphtary: (puffing away at his pipe; his eyes sparkling with mischief) Sunderlal- tame pehle bolo (Sunderlal- you speak first).*
>
> *In those dark days of emergency when informers were around, you only spoke, within the hearing of others, when you had to. Unwittingly these stalwarts of the Bar had encapsulated, in an innocent, spontaneous one-act play, the entire climate of the times*!"

(f) The judgment in the phone tapping case clearly points out the detrimental impact on free speech that unauthorised tapping can have. The decision of the US Supreme Court in *Katz* v. *United States*, (1967) 389 US 347 as well as the dissent in *Olmstead* v. *United States* (1928) 227 US 438 are also illustrative.

(g) The importance of privacy for the right to association can also be gleaned by the US Supreme Court decision in *NAACP* v. *Alabama*, (1958) 357 US 449 wherein the Court was faced with the legality of the demand of the State of Alabama of the member list of the National Association for the Advancement of Colored People. In those days because of widely prevalent attitudes of pro segregation in Alabama, disclosure of such membership lists would have had a detrimental impact on the people. The Supreme Court in a unanimous decision struck down the law holding per Justice Harlan,

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[7] Fali S. Nariman, BEFORE MEMORY FADES: AN AUTOBIOGRAPHY, 1st ed. 2010, pp. 189-190.

> "*It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in American Communications Ass'n v. Douds, supra, 339 U.S. at page 402, 70 S.Ct. at page 686: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs...We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.... We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.*

9.3 *Kharak Singh*, while quoting with approval the famous "limb and faculty test" of *Munn* v. *Illinois* (1886) 94 US 113 per Field, J., proceeds to completely ignore that privacy is a vital "limb and faculty" without which we are indeed reduced to animal existence. Kharak Singh espouses a cribbed, cabined and confined view of privacy- the right to be secure in one's home [Semayne's case *supra*], and the right

to be free from arbitrary search and seizure [*Wolf* v. *Colorado*, (1949) 338 US 25] are upheld but the right to be free of surveillance or the valuable aspect of "life" in terms of personal choices are ignored (See 5A-D above). In this regard, it is pertinent to consider the dissenting view of Justice Harlan in *Poe* v. *Ullman*, (1961) 37 US 497, which echoes our own Maneka Gandhi, interpreting the term "liberty" in terms of the 5th and 14th amendments to the US Constitution to mean "*a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.*"

10. The line of judgments from Gobind v. State of MP, (1975) 2 SCC 148, R Rajagopal v. State of TN, (1994) 6 SCC 632, PUCL v. Union of India (1997) 1 SCC 301, Sharada v. Dharampal, AIR 2003 SC 3450; District Collector v. Canara Bank, (2005) 1 SCC 496; *Selvi* v. *State of Karnataka* (2010) 7 SCC 263 etc are not *per incuriam* but instead correctly lay down the law and need to be re-affirmed.

10.1 This Hon'ble Court has correctly interpreted the provisions of Part III to uphold the rights contained in Para 5A-D. For 40 years they have formed a vibrant and important part of our law and our national culture. An invitation to hold them *per incuriam* is an invitation to government led lawlessness and to medieval despotism and tyranny. In the words of Lord Camden in *Huckle* v. *Money (supra)* or *Entick* v. *Carrington (supra)* eg. "*worse than the Spanish inquisition*". To paraphrase Senator Kennedy's famous speech about Judge Robert Bork, an India without the right to privacy is a land in which women would be forced into back alley abortions, and where rogue police could break down citizens doors in midnight raids.

10.2 A table encapsulating only some of the law laid down by this Hon'ble Court based on the right to privacy is as under:

Case title	Issue(s) Involved	Guidelines developed
Gobind v. State of M.P.,	Surveillance of an individual, including	Regulations permitting surveillance of an individual

(1975) 2 SCC 148	domiciliary visits and picketing of residences	were upheld, if sufficient evidence is present indicating that the person under surveillance could lead a life of crime or cause social unrest in the future. *"Compelling State Interest"* test evolved. Paragraph 22- *"There can be no doubt that privacy- dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test."* Paragraph 33- *"Mere convictions in criminal cases where nothing gravely imperilling safety of society cannot be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow- up at the end of a conviction or release from prison or at the whim of a police officer."*
PUCL v. Union of India, (1997) 1 SCC 301	(a) Interception of phone messages (b) Challenge to the constitutional validity of S. 5(2) of the Telegraph Act	The Hon'ble Supreme Court created guidelines, in respect of interception of telephonic messages, which mandatorily have to be observed, in addition to the requirements contained in S. 5(2) of the Telegraph Act.

		Paragraph 30- *"The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable."*
District Registrar v. Canara Bank, (2005) 1 SCC 496	Challenge to the constitutionality of S. 73 of the Indian Stamp Act, 1989, as amended by the State of Andhra Pradesh, empowering (a) the Collector to carry out inspection of documents in *private custody* and (b) the Collector to allow "any person" to inspect, make notes from papers in public offices	The Hon'ble Supreme Court declared S. 73 of the Indian Stamp Act to be *ultra vires* the Constitution of India. Paragraph 58- *"Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out."*
State of Maharashtra v. Bharat Shantilal Shah, (2008) 13 SCC 5	Challenge to the constitutional validity of the MCOCA	The Hon'ble Supreme Court held that the MCOCA does not contravene Constitutional provisions. Paragraph 61- *"The object of MCOCA is to prevent the organised crime and a perusal of the provisions of the Act under challenge would indicate that the said law authorises the interception of wire, electronic or oral*

		communication only if it is intended to prevent the commission of an organised crime….Thus as the Act under challenge contains sufficient safeguards and also satisfies the aforementioned mandate the contention of the respondents that provisions of Sections 13 to 16 are violative of the Article 21 of the Constitution cannot also be accepted."
Selvi v. State of Karnataka, (2010) 7 SCC 263	Use of narco-analysis, polygraph tests and Brain Electrical Activation Profile, against the will of the accused	Guidelines were published by the National Human Rights Commission in 2000, suggesting the procedure to be followed while administering a polygraph test and the same were adopted by the Hon'ble Supreme Court. Paragraph 226- *"Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination"."*
Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission For Women and Another, (2010) 8 SCC 633	Whether the High Court possesses the power to order the administration of a DNA test of a child	Paragraph 22- *"In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter,*

		DNA test is eminently needed."
Girish Ramchandra Deshpande v. Central Information Commissioner, (2013) 1 SCC 212	Whether the CIC correctly classified the information sought as "personal information"	The Hon'ble Supreme Court held that the Petitioner did not exhibit *bonafide* public interest in seeking information. Paragraph 12- *"The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which could cause unwarranted invasion of privacy of that individual."*

10.4 These judgments insofar as they incorporate customary international law and various international conventions to which India is a party are a part of the law of India.

10.5 The judgments in *MP Sharma* and *Kharak Singh*, to the extent that they contradict these judgments require clarification and/or setting aside.