IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO. 37 OF 2015

IN THE MATTER OF:

Mathew Thomas ...Petitioner

Versus

Union of India & Ors ... Respondents

WRITTEN SUBMISSIONS OF
MR. GOPAL SUBRAMANIUM

1. It is submitted that the decisions in ***M.P. Sharma & Ors. v. Satish Chandra & Ors. [1954 SCR 1077]*** and ***Kharak Singh v. State of U.P. & Ors. [1964 1 SCR 332]***, to the extent they interpret fundamental rights on a distinctive basis (as recognized in ***A.K. Gopalan v. State of Madras [1950 SCR 88]***) are no longer good law. In view of the fact that ***A.K. Gopalan's*** case stands overruled in ***R.C. Cooper v. Union of India [(1970) 1 SCC 248]***, it follows *a fortiori* that neither of the above decisions are effective.

2. It is submitted that the ratio of the judgment in ***M.P. Sharma (Supra)*** merely observed that there is no right to privacy located in Article 20(3) of the Constitution; it did not extinguish a general right to privacy. This arose in the context of searches in a criminal investigation and whether the same amounted to a violation of the right in Article 20(3). Thus, it cannot be said that the decision in ***M.P. Sharma (Supra)*** is an authority for the proposition that there is no fundamental right to privacy in the Constitution. The observations in ***M. P.***

Sharma (Supra) being relied upon by the Respondents must be read in the context in which they were made:

> *"17. ... A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches. It is to be remembered that searches of the kind we are concerned with are under the authority of a Magistrate (excepting in the limited class of cases falling under Section 165 of the Criminal Procedure Code). Therefore, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed. We are not unaware that in the present set up of the Magistracy in this country, it is not infrequently that the exercise of this judicial function is liable to serious error, as is alleged in the present case. But the existence of scope for such occasional error is no ground to assume circumvention of the constitutional guarantee."*

3. The dissenting Judgment of Subba Rao J. in ***Kharak Singh (Supra)*** states clearly that:-

   a. The question was, in the absence of any law, what was the fundamental right of the Petitioner that was infringed?

   b. Clauses (a) to (f) of Regulation 236 contained in Chapter 22 of the UP Police Regulations were measures adopted for the purpose of supervision or close observation of his movements and therefore parts of surveillance. The

question was whether such a surveillance infringed any of the Petitioner's fundamental rights.

c. Even though fundamental rights may be distinct, they could yet be overlapping. The fundamental right of life and personal liberties have many attributes and some of them are part of Article 19.

d. If an action violated Article 19(1) of the Constitution, it could be argued that there was a law to sustain that action "*but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned*".

e. The expression 'life' in Article 21 meant more than mere 'animal existence'. The expression 'liberty' is given a very wide meaning in the USA. It takes in all the freedoms.

f. In ***A. K. Gopalan (supra),*** liberty was described to mean liberty concerning the person or body of the individual. Subba Rao, J. observed that the right to personal liberty takes in not only a right to be free from restrictions placed on his movement but also free from encroachments on his private life. He further continues to say that while it is true that our Constitution does not expressly declare right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him/her rest, physical happiness, peace of mind and security. In the last resort a person's house where he lives with his family is 'his castle'. He observed:

> *"28.... Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. It so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."*

4. In fact, in some sense Subba Rao, J. also noticed that privacy was a facet of Article 19(1)(d).

> *"29.... The freedom of movement in clause (d) 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. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Article 19(1)(d) of the Constitution"*

5. ***AK Gopalan (Supra)*** proceeded both on the distinctiveness of each of the fundamental rights; that 'procedure established by law' under Article 21 was not used approximately to mean 'due process of law' as interpreted by the Supreme Court of the United States. In ***A.K. Gopalan (Supra)*** , it was held that:

> *"17. In my opinion, this line of approach is not proper and indeed is misleading. As regards the American Constitution its general structure is noticed in these words in The Government of the United States by Munro (5th Edn.) at p. 53: "The architects of 1787 built only the basement. Their*

> *descendants have kept adding walls and windows, wings and gables, pillars and porches to make a rambling structure which is not yet finished. Or, to change the metaphor, it has a fabric which, to use the words of James Russell Lowell, is still being 'woven on the roaring loom of time'. That is what the framers of the original Constitution intended it to be. Never was it in their mind to work out a final scheme for the Government of the country and stereotype it for all time. They sought merely to provide a starting point". The same aspect is emphasized in Professor Willis's book on Constitutional Law and Cooley's Constitutional Limitations. In contrast to the American Constitution, the Indian Constitution is a very detailed one. The Constitution itself provides in minute details the legislative powers of Parliament and the State Legislatures. The same feature is noticeable in the case of the judiciary, finance, trade, commerce and services. It is thus quite detailed and the whole of it has to be read with the same sanctity, without giving undue weight to Part III or Article 246, except to the extent one is legitimately and clearly limited by the other."*

6. The Court held that Article 19(1)(d) was distinct of personal liberty under Article 21 and the freedom to move freely in Article 19(1)(d) was not a facet of Article 21 and since a detention was duly authorized under the impugned law, the requirement of reasonableness for examining such action under Article 19(1)(d) did not arise. Further, the contention to correlate Articles 19 and 21 was rejected.

7. It may be noted in fairness that in ***A. K. Gopalan (Supra)*** the following words occur in para 122**,** which contain footprints of future evolution:

> *"122. There can be no doubt that the people of India have, in exercise of their sovereign will as expressed in the preamble, adopted the democratic ideal which assures to the citizen the dignity of the individual and other*

> *cherished human values as a means to the full evolution and expression of his personality, and in delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, so called, I apprehend, because they have been retained by the people and made paramount to the delegated powers, as in the American model. Madison (who played a prominent part in framing the First Amendment of the American Constitution) pointing out the distinction, due to historical reasons, between the American and the British ways of securing "the great and essential rights of the people", observed "Here they are secured not by laws paramount to prerogative but by Constitutions paramount to laws:" Report on the Virginia Resolutions, quoted in Near v. Minnesota [283 US 697] . This has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the high purpose and spirit of the preamble as well as the constitutional significance of a declaration of fundamental rights should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit, no less than its intendment should be collected primarily from the natural meaning of the words used."*
>
> (emphasis supplied)

8. It is submitted however that although the Learned Judges in ***A. K. Gopalan (Supra)*** understood the values of the Preamble of the Constitution to be relevant, yet they were constrained to hold that the fundamental rights were distinctive in character. The interpretation was informed by formalism.

9. In ***R.C. Cooper (Supra)***, it is respectfully submitted that the issues relating to interrelation between the diverse provisions affording the guarantee of fundamental rights in Part III fell

to be determined. A reference was made to the decision in ***A.K. Gopalan (Supra)***. This Hon'ble Court held in para 45 as under:

> *"45. Early in the history of this Court the question of inter-relation between the diverse provisions affording the guarantee of fundamental rights in Part III fell to be determined. In A.K. Gopalan v. State of Madras [(1950) SCR 88] a person detained pursuant to an order made in exercise of the power conferred by the Preventive Detention Act, 4 of 1950 applied to this Court for a writ of habeas corpus claiming that the Act contravened the guarantee under Articles 19, 21 and 22 of the Constitution. The majority of the Court (Kania, C.J., and Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.), held that Article 22 being a complete code relating to preventive detention, the validity of an order of detention must be determined strictly according to the terms and "within the four corners of that Article". They held that a person detained may not claim that the freedom guaranteed under Article 19(1)(d) was infringed by his detention, and that validity of the law providing for making orders of detention will not be tested in the light of the reasonableness of the restrictions imposed thereby on the freedom of movement, nor on the ground that his right to personal liberty is infringed otherwise than acceding to the procedure established by law. Fazl Ali, J., expressed a contrary view. This case has formed the nucleus of the theory that the protection of the guarantee of a fundamental freedom must be adjudged in the light of the object of State action in relation to the individual's right and not upon its influence upon the guarantee of the fundamental freedom, and as a corollary thereto, that the freedoms under Articles 19, 21, 22 and 31 are exclusive — each article enacting a code relating to protection of distinct rights."*

10. In particular, Shah J. analysed how each one of the learned judges referred to an examination of legislation 'to be directly in respect of one of the rights mentioned in the sub-clauses'. In fact the observation of Sastri J. that the fundamental or

personal freedoms rested only in Article 19 while Articles 20 to 22 secure Constitutional guarantees was also noticed. The view of Mahajan J. that Article 22 was self-contained in respect of the laws on the subject of preventive detention was noticed. Similarly, the observation of Mukherjea J. that there was no conflict between Article 19(1)(d) and Article 22 because the former did not contemplate freedom from detention either punitive or preventive but speaks of a different aspect of civil liberties. In the view of Mukherjea J., Articles 20 to 22 provided for the entire protection both in relation to deprivation of life and personal liberty with regard to substantive as well as procedural law. (See para 46, ***R.C. Cooper (Supra)***)

11. It is respectfully submitted that Shah, J. enunciated the theory of 'direct effect upon individual freedom'. It was held:

> *"49. We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.*

> *50. We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme. Each freedom has different dimensions or facets. ....".*
>
> (emphasis supplied)

12. Thus, ***A.K. Gopalan (Supra)*** was overruled by ***R.C.*** **Cooper** ***(Supra)*** in the following words*:*

> *"55. .... In our judgment, the assumption in A.K. Gopalan case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct."*

13. It is respectfully submitted in the light of the above*,* the majority opinion in ***Kharak Singh (Supra)*** delivered by Rajagopala Ayyangar, J. has proceeded upon the basis that express constitutional guarantee like the Fourth Amendment being absent. Hence, it was not possible to read in Article 19(1)(d) any such right of privacy since the right to privacy in the US was derived from the Fourth Amendment (set out below):

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

14. Hence, Rajagopala Ayyangar, J. fell back on the theory of common law to hold that the common law embodied in a binding principle transcends mere protection of property rights and expounds a concept of personal liberty. It may also be noted that to the extent Rajagopala Ayyangar, J (i.e. majority) held that:

> *"We feel unable to hold that the term [personal liberty] was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those deal with in the several clauses of Art. 19 (1)."*

15. Hence, the majority held that Article 21 could not in any event influence Article 19(1)(d). The majority further held that:

> *"The right of privacy is not a guaranteed right under our Constitution, and therefore the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and is not an infringement of a fundamental right guaranteed in Part III..."*
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> (emphasis supplied)

16. According to the judgment of Subba Rao, J. the following consequences will emerge:

(a) The expression liberty is not a residuary expression.

(b) It is a substantive expression;

(c) It contemplates right to privacy;

(d) If it is to be read as informed by Preambular values of dignity, liberty and freedom – which expressions are contained in the Preamble. There can be no manner of doubt

that right to privacy is an established fundamental right under the Constitution.

17. It is respectfully submitted that in ***Gobind v. State of Madhya Pradesh (1975) 2 SCC 148*** at 154, the Court noticed the decision of ***Griswold v. Connecticut, 381 U.S. 479*** *at 510* and noted that:

> "*In an opinion by Douglas, J., expressing view of five members of the Court, it was held that the statute was invalid as an unconstitutional invasion of the right of privacy of married persons. He said that the right of freedom of speech press includes not only the right to utter or to print but also the right to distribute, the right to receive, the right to read and that without those peripheral rights the specific right would be less secure and that likewise, the other specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance, that the various guarantees create zones of privacy, and that protection against all governmental invasion "of the sanctity of a man's home and the privacies of life" was fundamental. He further said that the inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' and that 'privacy is a fundamental personal right, emanating from the totality of the Constitutional scheme under which we (Americans) live'.*""
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> (emphasis supplied)

18. This Hon'ble Court also noticed the decision of ***Jane Roe v. Henry Wade 410 U.S. 113*** where the litigant wanted exercise the right to abortion and the Court recognized "*that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution*".

19. The judgment in ***Gobind (Supra)*** clearly noticed that right to privacy contained multiple aspects, such as: (See para 21 to 25, ***Gobind (Supra)***)

    a. Spatial privacy;

    b. Informational privacy;

    c. Decisional autonomy; and,

    d. Full development of personality;

20. It may be said that in ***Gobind (Supra)*** Mathew J. realized that the law relating to privacy was still in a state of evolution which is why he clearly noted that:

> "*...28. The right to privacy in any event will necessarily have to go through a process of case-by-case development.*"

21. Mathew J. referred to Art. 8(1) & (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Hence, the regulations authorizing surveillance were necessarily read down.

22. It is submitted that in ***Maneka Gandhi v. Union of India (1978) 1 SCC 248*** , the issue was fully settled. It was clearly held that:

    (a) ***A.K. Gopalan (Supra)*** stands overruled by ***R.C. Cooper (Supra)***.

    (b) Therefore, there is an indivisible connection between all the fundamental rights, and any law creating restrictions on rights must be in

conformity with Articles 14, 19 and 21 of the Constitution.

(c) The law must satisfy the test of substantive as well as procedural due process.

(d) In particular, Bhagwati, J. affirmed the minority view expressed by Subba Rao, J. in ***Kharak Singh (Supra)***:

> ***"5.*** *It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in A.K. Gopalan v. State of Madras [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] and the observations made by Patanjali Sastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of*

> *man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue.* ***The minority Judges, however, disagreed with this view taken by the majority*** *and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned."* ***There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled****.*
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> **(emphasis supplied)**

23. Further, in para 96, Krishna Iyer, J, in his inimitable style stated as under:

> *"****96.*** *A thorny problem debated recurrently at the bar, turning on Article 19, demands some juristic response although avoidance of overlap persuades me to drop all other questions canvassed before us. The Gopalan verdict, with the cocooning of Article 22 into a self-contained code, has suffered suppression at the hands of R.C. Cooper [Rustom Cavasjee Cooper v. Union of*

India, (1970) 3 SCR 530 : (1970) 1 SCC 248] . By way of aside, the fluctuating fortunes of fundamental rights, when the proletarist and the proprietarist have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of sub-conscious forces in judicial noesis when the cycloramic review starts from Gopalan, moves on to In re Kerala Education Bill [1959 SCR 995 : AIR 1958 SC 956] and then on to All-India Bank Employees' Association [All-India Bank Employees' Association v. National Industrial Tribunal, (1962) 3 SCR 269 : AIR 1962 SC 171 : 21 FJR 63 : (1961) 2 LLJ 385] , next to Sakal Papers [Sakal Papers (P) Ltd. v. Union of India, (1962) 3 SCR 842 : AIR 1962 SC 305 : (1962) 2 SCJ 400] , crowning in Cooper and followed by Bennett Coleman [Bennett Coleman & Co. v. Union of India, (1973) 2 SCR 757 : (1972) 2 SCC 788] and Shambhu Nath Sarkar [Shambhu Nath Sarkar v. State of W.B., (1973) 1 SCC 856 : 1973 SCC (Cri) 618] . Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."

24. In ***Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225***

Sikri C.J. noticed:

a. The Preamble is a part of the Indian Constitution.

b. The Preamble constitutes India into a sovereign democratic republic and to secure to all its citizens and guarantees

"...JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual...."

c. *"The Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble...."*.

d. The Universal Declaration of Human Rights, 1948 was considered and it was held as follows:

> *"148-49. I may here mention that while our fundamental rights and directive principles were being fashioned and approved of by the Constituent Assembly, on December 10, 1948, the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. The Declaration may not be a legally binding instrument but it shows how India understood the nature of human rights."*

e. Regard may be had to the following recital in the Universal Declaration of Human Rights, 1948 "*Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom"*.

f. Further, that certain inalienable right ought to be guaranteed, and held:

"150. In the Preamble to the International Covenant on Economic and Social and Cultural Rights, 1966, inalienability of rights is indicated in the first para as follows:

> *"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.""*

25. The fundamental proposition that was held in ***Kesavananda (Supra)*** was that certain rights are basic and inalienable.

26. While describing the Basic Structure, Sikri C.J. remarked:

> ***"292.*** *The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:*
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> *(1) Supremacy of the Constitution;*
>
> *(2) Republican and Democratic form of Government;*
>
> *(3) Secular character of the Constitution;*
>
> *(4) Separation of powers between the legislature, the executive and the judiciary;*
>
> *(5) Federal character of the Constitution.*
>
> ***293.*** *The above structure is built on the basic foundation i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed."*
>
> **(emphasis supplied)**

27. Sikri, C.J. held that some rights were natural and inalienable and he cited a large number of decisions to describe what could be natural and inalienable rights. The liberty of the person and his essential freedoms for whom the Constitution is intended and from which the State is injuncted from interfering, and must be viewed as a part of the Basic Structure. In this respect Sikri C.J. held as under:

> *"**299.** I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Rights which I have already referred to and that Declaration describes some fundamental rights as inalienable."*

28. It is submitted that the right to privacy invariably means the inviolability of the person. The expression 'person' includes the body as well as the inviolate personality. It is submitted that privacy really is intended to indicate the realm of inviolable sanctuary that most of us sense in our beings. It refers to spatial sanctity, freedom in decisional autonomy, informational privacy as well as the ability to freely develop one's personality and exercise discretion and judgment. It may be noted that both in ***Abington School District v. Schempp 374 US 203 (at pp. 226)*** and ***Fisher v. United States 425 US 391 (at pp. 416)***, the expression on inviolability uses spatial imagery of the castle or the sanctuary to convey the appropriate inaccessibility of the person, the inviolable citadel of a person's heart and mind, or the inner sanctum of individual feeling and thought. The usage of the term personhood in privacy jurisprudence is attributed to

Professor Freund, who in 1975 made the following observations:

> *"The theme of personhood is ... emerging. It has been groping, I think, for a rubric. Sometimes it is called privacy, inaptly it would seem to me; autonomy perhaps, though that seems too dangerously broad. But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood."*[1]

29. In the context of the Indian Constitution, three articles, i.e. Articles 14, 19 and 21-- form its sanctum sanctorum. Identifying the special status of these three articles, the Hon'ble Supreme Court in ***Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625*** observed:

> *"74. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."*
>
> (emphasis supplied)

30. Laurence Tribe, in order to show the underlying purpose of the right to privacy and why it is one of the foundational elements of a democratic nation, wrote in his book[2] as under:

> *"Finally, the right to privacy is a requirement of democracy. When none of us can be certain what the state knows about us or how it might use that information, the relationship between the governed and the government is fundamentally*

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[1] *Personhood: The Right to be Left Alone* (1976) Duke LJ 699, 702.
[2] Tribe, Laurence, and Joshua Matz. *Uncertain Justice: The Roberts Court and the Constitution*. Henry Holt and Company, 2014.

> *altered. The state's unlimited access to whatever information it wishes to obtain about each citizen can create a profound power imbalance and feeling of vulnerability. As Justice Robert Jackson once wrote of searches and seizures, "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart." This is especially true when the state develops the ability to combine many small pieces of data into a full picture of our lives. Even if we trust the state not to abuse the information and search only for true threats, the risk that our vast intelligence bureaucracy will make an egregious error is unavoidable. Entirely innocent personal information can be abused, leaked, distorted, and put to mischievous use in unpredictable ways. Without protection of privacy, democratic life could suffer a dangerous chill."*

31. Roscoe Pound, while expounding on natural rights, observed that "the law does not create them, it only recognizes them."[3] He further observed:

> *"Individual interests which it is conceived the law ought to secure are usually called "natural rights" because they are not the creatures of the state and it is held that the pressure of these interests has brought about the state. In the stage of equity or natural law, when what ought to be law is made the test of what is, it is natural to confuse the interests which the law does secure, the interests it ought to secure, and the means of securing them under the one name of "rights." Those which are secured and the means whereby they are secured are called legal rights; those which ought to be secured are called natural rights."*

32. Privacy is a part of personhood and is therefore a natural right. This is why the natural right is not conferred but only recognized by the Constitution.

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[3] Interests of Personality" Vol. XXVIII No. 4 February 1915.

33. In ***I.R. Coelho v. State of Tamil Nadu***, ***(2007) 2 SCC 1,*** the Court observed:

> *"56. The fundamentalness of fundamental rights has thus to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. This transition from a set of independent, narrow rights to broad checks on State power is demonstrated by a series of cases that have been decided by this Court. In State of Bombay v. Bhanji Munji [AIR 1955 SC 41 : (1955) 1 SCR 777] relying on the ratio of Gopalan [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383] it was held that Article 31 was independent of Article 19(1)(f). However, it was in Rustom Cavasjee Cooper v. Union of India [(1970) 1 SCC 248 : (1970) 3 SCR 530] (popularly known as Bank Nationalisation case) that the viewpoint of Gopalan [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383] was seriously disapproved... While examining this question the Court stated that the actual effect of the law on the right guaranteed must be taken into account. This ratio was applied in Bank Nationalisation case [(1970) 1 SCC 248 : (1970) 3 SCR 530] . The Court examined the relation between Article 19(1)(f) and Article 13 and held that they were not mutually exclusive. The ratio of Gopalan [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383] was not approved.*

60. It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. Thus post-Maneka Gandhi case [(1978) 1 SCC 248] it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of State power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

61. The approach in the interpretation of fundamental rights has been evidenced in a recent case M. Nagaraj v. Union of India [(2006) 8 SCC 212] in which the Court noted: (SCC pp. 241-42, para 20)

> *"20. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value... An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in A.K. Gopalan v. State of Madras [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383] . Article 21 of the Constitution provides that*

> *no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan [AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383] and held in its landmark judgment in Maneka Gandhi v. Union of India [(1978) 1 SCC 248] that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees."*"

(emphasis supplied)

34. In ***Selvi v. State of Karnataka (2010) 7 SCC 263***, the Court reaffirmed the position laid down in ***Maneka (Supra)*** case and clarified that the decision of Bhagwati, J. in ***Maneka (Supra)*** had effectively made it clear that the minority opinion of Subba Rao, J. was the correct exposition of law. In fact, it may not be out of place to suggest that the understanding of ***MP Sharma (Supra)*** and ***Kharak Singh*** (***Supra)*** being urged by the Attorney General is no longer tenable in view of the

decision in ***Selvi (Supra)*** having firmly closed the door on such an argument and having held that there is a fundamental right to privacy notwithstanding the decisions in ***M.P. Sharma (Supra)*** and ***Kharak Singh (Supra)***. The Court made the following observations:

> *"205. In M.P. Sharma [AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] it had been noted that the Indian Constitution did not explicitly include a "right to privacy" in a manner akin to the Fourth Amendment of the US Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement.*
>
> *206. Similar issues were discussed in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] , where the Court considered the validity of the Police Regulations that authorised police personnel to maintain lists of "history-sheeters" in addition to conducting surveillance activities, domiciliary visits and periodic inquiries about such persons. The intention was to monitor persons suspected or charged with offences in the past, with the aim of preventing criminal acts in the future. At the time, there was no statutory basis for these Regulations and they had been framed in the exercise of administrative functions. The majority opinion (Ayyangar, J.) held that these Regulations did not violate "personal liberty", except for those which permitted domiciliary visits. The other restraints such as surveillance activities and periodic inquiries about "history-sheeters" were justified by observing: (AIR p. 1303, para 20)*
>
> > *"20. ... the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."*

> *207. Ayyangar, J. distinguished between surveillance activities conducted in the routine exercise of police powers and the specific act of unauthorised intrusion into a person's home which violated "personal liberty". However, the minority opinion (Subba Rao, J.) in Kharak Singh [AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] took a different approach by recognising the interrelationship between Articles 21 and 19, thereby requiring the State to demonstrate the "reasonableness" of placing such restrictions on "personal liberty". (This approach was later endorsed by Bhagwati, J. in Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597] , see AIR p. 622.) Subba Rao, J. held that the right to privacy "is an essential ingredient of personal liberty" and that the right to "personal liberty" is "a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures". (AIR at p. 1306, para 31)...*
>
> *209. Following the judicial expansion of the idea of "personal liberty", the status of the "right to privacy" as a component of Article 21 has been recognised and reinforced..."*

35. Rohinton Nariman, J. in ***Mohd Arif v. Supreme Court of India (2014) 9 SCC 737*** in a concise and lucid summary identified the change from the Gopalan era to the Maneka Gandhi era in the following passages:

> *"25. In Kharak Singh v. State of U.P. [(1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] , Gopalan's [A.K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] reading of fundamental rights in watertight compartments was reiterated by the majority. However, they went one step further to say that "personal liberty" in Art. 21 takes in and comprises the residue after all the rights granted by Art. 19.*
>
> *Justices Subba Rao and Shah disagreed. They held:*

"The fundamental right of life and personal liberty have many attributes and some of them are found in Art. 19. If a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Art. 19(2) so far as the attributes covered by Art. 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Art. 19(1)(d) and Art. 21 are infringed by the State." (at pages 356-357)

26. The minority judgment of Subba Rao and Shah, JJ. eventually became law in Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India [Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India, (1970) 1 SCC 248] , where the 11-Judge Bench finally discarded Gopalan's [A.K. Gopalan v. State of Madras, 1950 SCR 88 : AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] view and held that various fundamental rights contained in different articles are not mutually exclusive: (SCC p. 289, para 53)

> *"53. We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore,*

> *to agree that Articles 19(1)(f) and 31(2) are mutually exclusive."*
>
> *27. The stage was now set for the judgment in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 2 SCR 621 : (1978) 1 SCC 248] . Several judgments were delivered, and the upshot of all of them was that Article 21 was to be read along with other fundamental rights, and so read not only has the procedure established by law to be just, fair and reasonable, but also the law itself has to be reasonable as Articles 14 and 19 have now to be read into Article 21. [See at SCR pp. 646-48 : SCC pp. 393-95, paras 198-204 per Beg, C.J., at SCR pp. 669, 671-74 & 687 : SCC pp. 279-84 & 296-97, paras 5-7 & 18 per Bhagwati, J. and at SCR pp. 720-23 : SCC pp. 335-39, paras 74-85 per Krishna Iyer, J]*

36. In view of the above submissions, it is respectfully submitted that the right to privacy is recognized as a fundamental right under Article 21 of the Constitution. It is also submitted that this has been the settled position of law since the overturning of the decision in ***A.K. Gopalan (Supra)*** by way of judgments in ***R. C. Cooper (Supra)*** and ***Maneka Gandhi (Supra)***. The concept of privacy is embedded in liberty as well as honour of a person.[4]

19th July 2017

SUBMITTED BY

GOPAL SUBRAMANIUM

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[4] Whitman, James Q. "The two western cultures of privacy: Dignity versus liberty." *Yale LJ* 113 (2003): 1151.