

IN THE HON'BLE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 833/2013

UNDER ARTICLE 32 OF CONSTITUTION

IN THE MATTER OF:

Ms. Aruna Roy & Anr.

...Petitioners

VERSUS

Union of India & Ors.

...Respondents

**NOTE OF SUBMISSIONS BY ANAND MR. ANAND
GROVER, SENIOR ADVOCATE ON BEHALF OF THE
PETITIONERS**

I. *MP Sharma and Kharak Singhare not good law*

- i. *MP Sharma v. Satish Chandra, District Magistrate*, AIR 1954 SC 300 (8 judge bench), did not deal with Article 21 but only with Articles 19(1) and 20(3). The decision in was given in the *Gopalanera (A.K.Gopalan v. State of Madras*, AIR 1950 SC 27) where the fundamental rights were held to be mutually exclusive. The decision in *M.P. Sharma* was in relation to searches which, according to the Petitioner violated his fundamental right under

Article 20(3). It was in the context of Article 20(3) where the Petitioner relied on American judgments on 4th and 5th Amendments of the American Constitution, contending that searches were akin to compelling to be a witness against oneself under Article 20(3). In that context, the Court found that, “*when the Constitution makers have thought fit not to subject such regulation to the 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.*” (see para 17)

- ii. *Kharak Singh v. State of UttarPradesh* AIR 1963 SC 1295 (6 judge bench) again is in the *Gopalan*. It dealt with the issue of personal liberty under Article 21. The issue that arose was whether the U. P. Police Regulations violated Article 21, which according to the Petitioner included the fundamental right to privacy. The majority held that privacy is not a part of personal liberty. Being in the *Gopalan* era, the majority looked at Article 19(1)(d) and Article 21 as exclusive rights. However it did hold that, “*We feel unable to hold that the term 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)."(see para 13)

- iii. While noting *Wolf v. Colorado* (1949) 338 U.S. 25, which interpreted the 4th Amendment of the U.S. Constitution providing protection against unreasonable searches, the majority in *Kharak Singh* held that *"our Constitution does not in terms confer any like constitutional guarantee"* (the guarantee of privacy) (see para 15). Thereafter it found, *"As already pointed out, 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."* (see para 17)
- iv. However, the minority in *Kharak Singh*, through Subbarao, J. found, *"It is true our Constitution does not expressly declare a 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 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": it is his rampart against encroachment on his personal liberty." (see para 28)

- v. Thereafter, in *Maneka Gandhi v. Union of India* 1978 1 SCC 248 (7 judge bench), in a case dealing with personal liberty under Article 21, this Hon'ble Court specifically overruled the majority judgment in *Kharak Singh*, which includes the holding that privacy is not included as a facet of personal liberty and specifically upheld the minority judgement to the effect that privacy is included in the concept of personal liberty under Article 21. The Court held, "*There can be no doubt that in view of the decision of this Court in R. C. Cooper v. Union of India the minority view must be regarded as correct and the majority view must be held to have been overruled.*" (See page 279 of the judgment)
- vi. It needs to be noted that in *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148 (3 judge bench) which was pronounced before *Maneka Gandhi* specifically included privacy as part of Article 21.
- vii. After *Gobind* and *Maneka Gandhi*, the right to privacy has become entrenched in Indian Constitutional by diverse judgments of this Hon'ble Court. These judgments have followed the minority judgment of

Kharak Singh. These judgements *inter alia* include *Malak Singh v. State of Punjab*, (1981) 1 SC 420; *R. Rajagopal v. State of Tamil Nadu* (1994) 6 SCC 632; *People's Union of Civil Liberties v. Union of India* (1997) 1 SCC 301; *District Registrar and Collector, Hyderabad and Another v. Canara Bank and Others*, 2005 1 SCC 496; *Selvi & Ors. versus State of Karnataka* (2010) 7 SCC 263; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

- viii. Therefore, it is not correct to say that privacy is not a part of constitutional law in India. In fact, it has been held that privacy is a part of right to life under Article 21, as has been held in minority of *Kharak Singh* and later upheld in *Maneka Gandhi*.

II. The Constitution is a living document and its interpretation must be revised with respect to changes with the passage of time

- ix. The interpretation of the Constitution must be done in light of the developing law domestically and internationally and India's obligations under various International legal instruments.
- x. This Hon'ble Court in *IR Coelho v. State of Tamil Nadu* (2007) 2 SCC 1, held, in Para 42, that "*The Constitution is a living document. The constitutional provisions have*

to be construed having regard to the march of time and the development of law.” Further, this Hon’ble Court also held that fundamental rights are inter-connected and that they form part of the basic structure of the Constitution of India. (See para 123)

- xi. This Hon’ble Court in *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, contemplated an expansive interpretation of the Constitution, in a manner so as to anticipate and take account for the changing circumstances. It held, “A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges”. (See para 19)
- xii. Pertinently, at the time when this Hon’ble Court pronounced the decision in *Kharak Singh v. State of Uttar Pradesh* 1964 SCR (1) 332, the prevailing decision of the Supreme Court of the U.S.A. on the similar issue of telephone surveillance was *Olmstead v. United States* 277 US. 438. In fact, the dissenting judgment of Brandeis J. in *Olmstead* was echoed in *Roe v. Wade* 410 U.S. 113 (1973) and *Katz v. United States* 389 U.S. 347

(1967) both of which overturned *Olmstead* and conclusively held that invasion of privacy without justifiable reason in public interest was illegal and unconstitutional.

- xiii. The International Covenant on Civil and Political Rights (ICCPR) was adopted on 16th December, 1969 and came into effect on 23rd March, 1976. India formally ratified the ICCPR on December 11th, 1977. Article 17 of the Covenant provides as –

“Article 17

(1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

(2) *Everyone has the right to the protection of the law against such interference or attacks.”*

- xiv. General Comment 16, which elaborates the rights under Article 17 and has specifically states that:

“The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right.”

- xv. Articles 51 (Promotion of International Peace and Security) and Article 253 (Legislation for giving effect to

International Agreements) of the Constitution of India require India to give effect to International treaties.

- xvi. In *Bachan Singh v. State of Punjab* (1982) 3 SCC 24, this Hon'ble Court considered the question of the India's obligations *qua* the death penalty in light of the ratification of the ICCPR. It held that the requirements of Article 6 of the ICCPR were substantially the same as the guarantees or prohibitions contained in Articles 20 and 21 of the Constitution of India, and its penal laws. It held that India's penal laws, included the impugned provisions, and were entirely in accord with its international commitment. (See para 139)
- xvii. This Hon'ble Court in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, held that in the absence of domestic law, the International treaty is directly applicable. Further, it states that where domestic law comes into force in accordance with changed international law, the latter may be relied upon for interpretation of relevant portions of the Constitution. [See para 7]
- xviii. In the case of *National Legal Services Authority v. Union of India* (2014) 5 SCC 438, this Hon'ble Court held that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is

no inconsistency between them and there is a void in domestic law. It held, “*However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law.*” [See paras 57-60]

xix. Therefore, Article 21 and other articles of the Constitution of India dealing with personal liberty have to be interpreted in line with Article 17 of the ICCPR, read with General Comment 16, so as to include the right to privacy.

III. Privacy is contained in and must be recognized as part of fundamental rights under Part III Constitution

xx. A perusal of the Fundamental Rights Chapter of the Constitution makes it clear that Fundamental Rights are:-

- a) *Conferred*: e.g. Article 19 (1) All citizens *shall* have the right to...
- b) *Protected*: e.g. Article 21: no person shall be deprived of...
- c) *Recognized*: By prohibiting certain practices that are antithetical to them e.g. Article 17, untouchability is abolished and its practice in any form is forbidden. Though not enumerated this

Article recognizes the right to equality of all persons.

- xx. The underlying value all these Fundamental Rights is dignity of human beings.
- xxi. The Preambles to the other international human rights instruments like UDHR, ICCPR and ICESR recognize that rights are derived from the inherent dignity of the human person.
- xxii. This is reinforced in the Preamble of the Constitution, which states:-

*WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to **secure to all its citizens:***

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 and the unity and integrity of the Nation;

- xxiii. It is a settled position in law that when a constitutional provision is to be interpreted the cardinal rule is to look to the Preamble of the Constitution as the guiding star.

(Ashoka Kumar Thakur v. Union of India and Others (2008)
6 SCC 1 see para 668).

- xxiv. Article 21 does not confer the right to life and personal liberty which inheres in human beings from the time they are born. If privacy is part of the right to life and personal liberty, it does not need to be conferred but only protected.
- xxv. In light of the Preamble, it is ex-facie evident that the expression personal liberty under Article 21 has a wider import than the position in *Kharak Singh*. It may include aspects of privacy.
- xxvi. Fundamental rights under Part III are inextricably linked to and flow from one another. This has been recognized in *Maneka Gandhi* and several judgements thereafter.
- xxvii. The underlying object of all Fundamental Rights, as is evident from the plain reading of the Preamble is to promote the dignity of all human beings.
- xxviii. It is in this context that privacy-dignity claims have been seen. (See *Gobind*). Though independent of dignity, privacy is right associated with dignity. Seen in this light it becomes the bulwark of fundamental rights especially the those that are strung by the “*golden thread of the Indian Constitution*” Articles 14 (equality), Article 15 (non-discrimination), Article 19 (freedom) and 21 (right to life and liberty).

- xxix. If privacy is stripped off, other fundamental rights become vulnerable. For example, pursuant to the *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (*NALSA*) which affirmed the right to self-determination to ones' gender many transgender persons (who changed their gender from male to female or *vice versa*) need such private information to be protected so that their dignity is not impaired in any manner.
- xxx. It is necessary to appreciate human dignity is materially different from dignity accorded to animals by this Hon'ble Court in *Animal Welfare Board of India v Nagaraja*???. Whereas in the most essential activities of all animals, morning ablutions, human beings need privacy animals do not despite the fact that both are accorded dignity.
- xxxi. In it has been held in that Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects dignity of human life, one's personal autonomy and one's right to privacy. (*NALSA* para 73).
- xxxii. As noted above, the underlying core of all fundamental rights is dignity of human life. More so, the right under Article 21.
- xxxiii. Thus, Article 21 must be interpreted in a manner that enhances the dignity and worth of the human person. (*Francis Coralie Mullin v. Administrator, UT of Delhi*, 1981

AIR 746atpara 6,See also *Maneka Gandhi at para 4*). In this context privacy is vital part of the unenumerated fundamental rights of the Indian Constitution, Therefore, privacy must be recognized and protected under Article 21.

xxxiv. Since the right to life includes the right to dignity, any act that offends human dignity constitutes a violation of the right to life. (*Francis Coralie*, see para 8). Failure to protect privacy impairs human dignity and would therefore constitute a violation of Article 21. Therefore privacy is vital Fundamental Right to be protected.

III. The Right to Privacy is required to protected to realize and enjoy other Constitutional Rights

xx. This Hon'ble Court has held in several cases that privacy is associated with many fundamental rights and is necessary to be protect and to enjoy those fundamental rights.

Reproductive Health:

xxi. This Hon'ble Court in *Suchitra Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1 held that a woman's right to make reproductive choices is an integral part of *right to privacy, dignity and bodily integrity* under Article 21 of the Constitution of India while holding that there shall be no restrictions whatsoever on the woman's right to *insist on use of contraceptive methods* (Para 22).

Testimonial Compulsion & Freedom from Torture:

xxii. In *Selvi v. State of Karnataka*, (2010) 7 SCC 263 this Hon'ble Court held *right against self-incrimination under Article 20(3)* should be read as intersecting with *right to privacy under Article 21* (Para 225) and that forcible administration of medical techniques to extract testimony constitutes *cruel, inhuman and degrading treatment* in context of Article 21 (Para 244).

Transgender Rights:

xxiv. In *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, this Hon'ble Court held that Article 21 which takes within its fold *right to life with human dignity, personal autonomy and right to privacy*

I. are fundamental rights guaranteed to transgender persons under Article 19(1)(a) of the *Constitution* for the self-

determination and expression of gender identity for transgender persons (Paras 72 and 73).