

PRIVACY AND THE INDIAN SUPREME COURT:

A Compendium of Case Briefs

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Privacy and the Indian Supreme Court: A Compendium of Case Briefs

Edition I:

The first edition of the book contained 53 cases, spanning a period of 65 years from 1954 to 2019.

Edition II:

The second edition of the book has been updated with 11 more cases from the Supreme Court from 2020 to 2023.

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About the National Law University, Delhi

The National Law University Delhi is one of the leading law universities in the capital city of India. Established in 2008 (by Act. No. 1 of 2009), the University is ranked second in the National Institutional Ranking Framework for the last five years. Dynamic in vision and robust in commitment, the University has shown terrific promise to become a world-class institution in a very short span of time. It follows a mandate to transform and redefine the process of legal education. The primary mission of the University is to create lawyers who will be professionally competent, technically sound and socially relevant, and will not only enter the Bar and the Bench but also be equipped to address the imperatives of the new millennium and uphold constitutional values.

The University aims to evolve and impart comprehensive and interdisciplinary legal education which will promote legal and ethical values, while fostering the rule of law. The University offers a five year integrated B.A., LL.B (Hons.) and one-year postgraduate masters in law (LL.M), along with professional programs, diploma and certificate courses for both lawyers and non-lawyers. The University has made tremendous contributions to public discourse on law through pedagogy and research.

Over the last decade, the University has established many specialised research centres and this includes the Centre for Communication Governance, the Centre for Innovation, Intellectual Property and Competition, the Centre for Corporate Law and Governance, the Centre for Criminology and Victimology, and Project 39A. The University has made submissions, recommendations, and worked in advisory/consultant capacities with government entities, universities in India and abroad, think tanks, private sector organisations, and international organisations. The University works in collaboration with other international universities on various projects and has established MoU's with several other academic institutions.

About the Centre for Communication Governance

The Centre for Communication Governance at the National Law University Delhi (CCG) was established in 2013 to ensure that Indian legal education establishments engage more meaningfully with information technology law and policy and contribute to improved governance and policy making. CCG is the only academic research centre dedicated to undertaking rigorous academic research in India on information technology law and policy in India and in a short span of time has become a leading institution in Asia. Through its academic and policy research, CCG engages meaningfully with policy making in India by participating in public consultations, contributing to parliamentary committees and other consultation groups, and holding seminars, courses and workshops for capacity building of different stakeholders in the technology law and policy domain. CCG works across issues such as privacy and data governance, platform governance, and emerging technologies.

CCG has built an extensive network and works with a range of international academic institutions and policy organisations. These include the United Nations Development Programme, Law Commission of India, NITI Aayog, various Indian government ministries and regulators, International Telecommunications Union, UNGA WSIS, Paris Call, Berkman Klein Center for Internet and Society at Harvard University, the Center for Internet and Society at Stanford University, Columbia University's Global Freedom of Expression and Information Jurisprudence Project, the Hans Bredow Institute at the University of Hamburg, the Programme in Comparative Media Law and Policy at the University of Oxford, the Annenberg School for Communication at the University of Pennsylvania, the Singapore Management University's Centre for AI and Data Governance, and the Tech Policy Design Centre at the Australian National University.

The Centre has had multiple publications over the years including the Hate Speech Report, the first edition of this book titled Privacy and the Indian Supreme Court, an essay series on Democracy in the Shadow of Big and Emerging Tech, a comprehensive report on intermediary liability in India, an edited volume of essays on emerging trends in data governance, and most recently a guide for States to draft data protection legislation in collaboration with the United Nations Development

Programme. It has also published reports from the first two phases of the Blockchain Project conducted in collaboration with the Tech Policy Design Centre at the Australian National University, which maps the blockchain ecosystem in India and Australia.

Privacy and data protection have been focus areas for CCG since its inception and the Centre has shaped discourse in this domain through research and analysis, policy inputs, capacity building, and related efforts. In 2020, the Centre launched the Privacy Law Library, a global database that tracks and summarises privacy jurisprudence emerging in courts across the world, in order to help researchers and other interested stakeholders learn more about privacy regulation and case law. The PLL currently covers 250+ cases from 20+ jurisdictions globally and also contains a High Court Privacy Tracker that tracks emerging High Court privacy jurisprudence in India.

CCG also has an online ‘Teaching and Learning Resource’ database for sharing research-oriented reading references on information technology law and policy. In recent times, the Centre has also offered Certificate and Diploma Courses on AI Law and Policy, Technology Law and Policy, and first principles of cybersecurity. These databases and courses are designed to help students, professionals, and academicians build capacity and ensure their nuanced engagement with the dynamic space of existing and emerging technology and cyberspace, their implications for the society, and their regulation. Additionally, CCG organises an annual International Summer School in collaboration with the Hans Bredow Institute and the Faculty of Law at the University of Hamburg in collaboration with the UNESCO Chair on Freedom of Communication at the University of Hamburg, Institute for Technology and Society of Rio de Janeiro (ITS Rio) and the Global Network of Internet and Society Research on contemporary issues of information law and policy.

About the book

In celebration of CCG's ten-year anniversary, we are very proud to present the second edition of "Privacy and the Indian Supreme Court", which tracks and summarises the Supreme Court's jurisprudence on privacy over more than 70 years. The first edition of the book contained 53 cases, spanning a period of 65 years from 1954 to 2019. The second edition of the book has been updated with 11 more cases from the Supreme Court from 2020 to 2023. This book is part of CCG's larger efforts to track privacy jurisprudence across the globe in order to help researchers and other interested stakeholders understand how the right to privacy is developing and is being applied in various jurisdictions. Our database, the Privacy Law Library, has more than 250 cases from over 20 jurisdictions, and is one of the largest and most diverse resources in the world on privacy jurisprudence. The Privacy Law Library is available at <https://privacylibrary.ccgnlud.org/>.



Pamidighantam Sri Narasimha
Judge, Supreme Court of India

FOREWORD

In an era marked by remarkable advancements in technology and rapid changes in societal norms, the fundamental right to privacy has never been more vital. While the text of our Constitution does not mention privacy as a fundamental right, it is undeniably an indispensable facet of personal liberty. These profound words, resonating from the dissenting opinion in the case of *Kharak Singh vs. State of Uttar Pradesh*, 1962, serves as a compelling reminder of the timeless struggle to safeguard our individual freedoms.

The Supreme Court of India has had a long history of judicial pronouncements which have developed and enhanced the right to privacy in India. In 2017, the Court marked a watershed moment in the nation's jurisprudence with the landmark decision in the case of *Justice K.S. Puttaswamy vs. Union of India*. This momentous ruling unequivocally reaffirmed the existence of a fundamental right to privacy enshrined in the Constitution of India. In the judgement, the Court considered academic literature, developments in other jurisdictions, as well as its own judgements, which have over the years evolved the status of privacy as a fundamental right to its current iteration.

Privacy is now understood as a right that is crucial to exercise all other fundamental rights and freedoms. As *Puttaswamy* noted, the right to privacy is an intrinsic aspect of dignity, autonomy and liberty, and is integral to freedoms guaranteed across fundamental rights. It is not an elitist construct, but rather an intrinsic ideal which is important for all persons.

The evolution of privacy did not end with the *Puttaswamy* case. In the years since, the Supreme Court has continued to rely on this case to reaffirm and explore the right to privacy. This includes some landmark cases surrounding issues such as the decriminalisation of homosexuality and adultery, women's right to enter temples, and the right to marry a person of their choosing, among others.



Pamidighantam Sri Narasimha
Judge, Supreme Court of India

The right to privacy and related jurisprudence is poised to play a critical role in shaping the future of our constitutional rights and values in the digital age. As technology continues to advance, it relies on the collection and use of vast amounts of personal data through social media platforms, smartphones, and other online services. Courts will need to interpret the right to privacy in the context of novel challenges, and strike a balance between protecting individual and community rights and preserving the benefits of technology. With data-driven technologies playing an increasingly prominent role in shaping our social, political, and economic systems, the evolution of this jurisprudence will be instrumental in the ethical and responsible development of emerging technologies, fostering trust in the digital ecosystem, and safeguarding our fundamental rights and freedoms.

This book, "*Privacy and the Indian Supreme Court: A Compendium of Case Briefs*," is a remarkable repository of knowledge, offering invaluable insights for judges, lawyers, academics, and all those who engage with the intricacies of the right to privacy in India. It covers 64 Supreme Court judgments from 1954 to 2023, categorising them into eight distinct categories for easy reference. Each case is carefully summarised, allowing readers to navigate through them swiftly. The book provides an overview of the evolution of the right to privacy in the Supreme Court of India, and would be useful for all lawyers, judges and researchers who study constitutional rights.

I would like to congratulate the Centre for Communication Governance at the National Law University Delhi for their work on this compendium. I hope this book will continue to serve as an essential reference for all those who work to protect and promote the right to privacy in the complex and ever-changing landscape of the digital age.

(Pamidighantam Sri Narasimha)

December 11, 2023

Preface

The right to privacy is inextricably bound up with all exercises of human liberty - both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails.

*Justice K.S. Puttaswamy (Retd.) &
Anr. vs. Union of India & Ors, 2017*

The ‘Right to Privacy’ was first mentioned in legal jurisprudence in a law review article published almost 130 years ago by Warren and Brandeis. They examined “whether the existing Jaw affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is”. This article went on to become one of the most influential law review articles of all time, and over the years, the right to privacy has found its place internationally as a universal, constitutional and legal right.

The Supreme Court of India reaffirmed the existence of the right to privacy in 2017 through the decision of a nine-judge bench in *Justice K.S. Puttaswamy vs Union of India*. However, the Supreme Court of India had previously discussed the right to privacy: within the first four years of the Court’s existence in *M.P Sharma (1954)* and then again in 1962, in *Kharak Singh*, where the dissenting opinion held that the right to privacy was an essential ingredient of personal liberty under Article 21 of the Constitution. The Court, in its dissenting opinion in *Kharak Singh*, stated “ the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. 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.”

Subsequently, in 1975, the Supreme Court in *Gobind* did not specifically state a finding on the existence of a right to privacy under the Constitution but did acknowledge the existence and value of a legal concept of privacy, observing that privacy was an essential

facet of enjoyment of other constitutional freedoms and liberties. Since *Gobind*, there has been an unbroken line of at least 35 cases till *Justice K.S. Puttaswamy*, which recognised the existence of a fundamental right to privacy.

The *Justice K.S. Puttaswamy* judgement was a watershed moment in Indian jurisprudence- an unequivocal reaffirmation of the right to privacy by an unprecedented bench strength of the Indian Supreme Court. Nine justices of the Supreme Court unanimously reaffirmed that a fundamental right to privacy is guaranteed by the Constitution of India. The judgments traversed global jurisprudence in upholding the right to privacy providing the Indian legal system a rich tapestry to draw on for interpreting the right to privacy in the Indian context. Additionally, at least five judges also discussed the application of the proportionality principle for adjudication of rights violations which has been described as “a foundational element of global constitutionalism.” The principle has since then been applied by the Court in a number of constitutional challenges.

Justice K.S. Puttaswamy decided that privacy is the necessary condition for the enjoyment of any of the guarantees provided in Part III of our Constitution. It discussed how currently, the exercise of a right to privacy is required in order to meaningfully guarantee rights under Articles 19(1), 20³, 25, 28 and 29 of the Constitution. However, this is not an exhaustive list, and as we see developments in technology and social ordering, more constitutional sites in which a right to privacy exists will be revealed.

Since the pronouncement of the judgement, the Supreme Court has repeatedly relied on *Justice K.S. Puttaswamy* in subsequent decisions. In 2018, the Supreme Court used the judgement to protect the right to engage in consensual homosexual relations (*Navtej Johar*, 2018), for decriminalising adultery (*Joseph Shine*, 2018), to read down certain provisions of the Aadhaar Act, 2016 (*Justice K.S. Puttaswamy*, 2018), and to invalidate the tradition that bars the entry of women (between the ages of 10 and 50) into the *Sabarimala Temple* (*Indian Young Lawyers’ Association*, 2018; the judgement is currently under review). The Court continued to rely on *Justice K.S. Puttaswamy* in 2019. It examined the contours of the judgement in a case which held that the Office of the Chief Justice of India comes under the ambit of the Right to Information Act (*Central Public Information Officer, Supreme Court*

of India, 2019). The Court also relied on the judgement to set aside the condition requiring the installation of CCTV cameras in certain areas of dance bars (*Indian Hotel and Restaurant Association, 2019*).

In this second edition, the book includes, among others, case briefs relating to the right to marry a person of one's choice (*Laxmibai Chandaragi, 2021*) and the constitutionality of a government order which prohibited female Muslim students from wearing headscarves inside schools and colleges (*Aishat Shifa, 2022*; this case has been referred to a larger bench). All these cases have been comprehensively covered in this book.

This book, *Privacy and the Indian Supreme Court: Compendium of Case Briefs* is a ready reference and a definitive guide on privacy in India. It is a great resource for judges, lawyers, academics and anyone working on issues related to the right to privacy. It examines and summarises 64 Supreme Court judgments (till 2023) that have dealt with the issue of privacy and further classifies them into eight different categories, including autonomy, dignity, and informational privacy, for easy reference. It provides a brief overview of each case and the major issues raised, allowing readers to glance through the case quickly.

While the cases from the Indian Supreme Court have an outsized impact on various issues in Indian legal jurisprudence, they are also increasingly being relied upon and referenced by courts outside India. In this context, I would also like to complement the Centre for Communication Governance at National Law University Delhi (CCG) for its project, the 'Privacy Law Library', which is a database which tracks privacy jurisprudence globally and is a one-of-a-kind resource for lawyers, students, policymakers and other stakeholders. This database covers more than 250+ cases across 20 jurisdictions globally.

At the National Law University Delhi, our research centres work on conducting research at the forefront of various legal developments, as well as contemporary issues that affect the law. The Centre for Communication Governance has been one such centre undertaking cutting-edge research at the intersection of information technology, law, and policy over the course of more than a decade, and has done wonderful work on issues relating to technology, internet governance, and privacy.

I wish to express my appreciation for the dedication of the team at the Centre for Communication Governance in creating this publication and the Privacy Law Library online database and hope they will continue to undertake projects that will assist judges, lawyers, policymakers, industry, academia, and students.



Professor (Dr.) G.S. Bajpai
Vice Chancellor
National Law University Delhi

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Dignity



M. P. Sharma & Ors. vs. Satish Chandra & Ors.

(1954) 1 SCR 1077

1954

Surveillance, Search and Seizure
Informational Privacy

This was one of the first judgments of the Supreme Court relating to the right of privacy in India. An eight-judge bench of the Court, while discussing the constitutionality of the search and seizure provisions of the Code of Criminal Procedure, 1898, also briefly discussed the right to privacy and its interplay with Article 20³.

Constitutional
Provision(s)

Articles 19 and 20

Case Type

Writ Petition

Case Status

Overruled*

* by Justice KS Puttaswamy
vs. Union of India, (2017)
10 SCC 1

Bench Strength

8

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice B. Jagannadhadas on behalf of
Justice M.C. Mahajan,
Justice B.K. Mukherjea,
Justice G. Hasan,
Justice N.H. Bhagwati,
Justice S. R. Das,
Justice T.L.V. Aiyar and
Justice V. Bose and himself.

“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 American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction.”

Case Brief

This was one of the first judgments of the Supreme Court (“Court”) relating to the right of privacy in India. An eight-judge bench of the Court, while discussing the constitutionality of the search and seizure provisions of the Code of Criminal Procedure, 1898 (“CrPC”), also briefly discussed the right to privacy and its interplay with Article 20③. In this judgment, the Court held that search and seizure of documents did not amount to “compelled testimony” and is thus not violative of Article 20③.

The Petitioners argued that search and seizure by the police violated the fundamental right to property under Article 19①(f)*, as well as the right against compelled self-incrimination guaranteed under Article 20③. The Court rejected the former argument and held that police searches would not infringe upon the right to property as there was no interference with the ability to enjoy the property and the right was in any case subject to reasonable limitations.

* The Right to Property is no longer a fundamental right. It was removed from Part III of the Constitution by The Constitution (Forty-fourth Amendment) Act, 1978.

The argument relating to compelled self-incrimination was discussed substantively. The Court noted that the power of search and seizure was an overriding power of the State which was necessary for the protection of society. It was observed that the power of search and seizure could not be subjected to the right to privacy as there was no provision in the Constitution of India analogous to the Fourth Amendment of the US Constitution prohibiting unreasonable searches and seizures. The Court, therefore, upheld the government's power of search and seizure.

Case Summary

Facts

The Government of India ordered an investigation under the Companies Act, 1913 into the affairs of a company after it went into liquidation in 1952. The investigation was on the ground that the company had attempted to embezzle funds and to conceal the true state of affairs from the share-holders, by falsifying balance sheets and accounts. It alleged that the dishonest and fraudulent transactions would constitute various offenses under the Indian Penal Code, 1860.

Accordingly, an FIR was registered in 1953 and an application for a search warrant was submitted to the District Magistrate under Section 96 of the CrPC. The District Magistrate issued the warrant and simultaneous searches and seizures occurred at thirty-four different premises. The Petitioner filed a petition in the Supreme Court asking for the search warrants to be quashed as being violative of Articles 19①(f) and Article 20③, and requested for the return of the documents seized.

Issue

Whether the power to search and seize materials granted by the CrPC was violative of Article 19①(f) and Article 20③ of the Constitution.

Arguments

The Petitioner argued that the searches violated Article 19①(f), the freedom to acquire, hold, and dispose of the property. They argued that the searches conducted were unreasonable and constituted an infringement of their right, as their buildings had been invaded, their documents were taken away, and their reputation affected.

The Petitioners also argued that the process of searching for documents violated the constitutional guarantee against compelled self-incrimination. Utilizing American jurisprudence, the Petitioners argued that the scope of Article 20③ should not be limited to oral testimony, but also documentary testimony. The Petitioners argued that searches were a substitute for compelled production on summons, and therefore would be a form of compelled testimony prohibited by Article 20③.

To substantiate this argument, the petitioners relied upon decisions of the US Supreme Court interpreting the Fourth Amendment of the US Constitution.

Decision

The Court rejected the contention of the Petitioners that the right to acquire, hold and dispose of the property was infringed upon by the search and seizure process. The Court observed that the act of conducting the search did not deprive a person of the enjoyment of their property. Further, the Court noted that though seizures did involve taking away property from the affected person, it was only a temporary and limited measure, and the State would be well within its powers to seize items discovered during a search. It was further noted that seizures were only temporary disruptions of the right to property and therefore would not amount to an infringement of the fundamental right.

The Court then delved into the question relating to the right of protection against self-incrimination guaranteed under Article 20③. It examined the theoretical arguments in favor of and against the existence of self-discrimination and noted that the existence of the right encourages the police to carry out active investigations instead of solely relying on confessions. Given this background, the Court observed that the right should not be narrowly read and confined to its literal meaning, and rather a liberal definition should be used which would advance the intent of the fundamental right. It noted that Article 20③ uses the term “to be a witness” and not “to appear as a witness”, and therefore the protection against compelled testimony did not simply apply to oral testimony, but would include the com-

pelled production of documents. Further, it was observed that under evidence law, one could be a witness by methods other than giving oral evidence, through the production of documents. Therefore, the Court held that Article 20③ would apply to the production of documents as well as oral testimony.

However, the Court disagreed with the Petitioner’s contention that search and seizure was a substitute for summons, as it noted that during the process of a search and seizure, the warrant was addressed to a government official, not the owner of the premises. Therefore, the accused had no role to play during the search in producing evidence. It was the action of the government official which produced evidence, rather than the accused being compelled to give evidence. The Petitioners had argued that the search and seizure of documents amounted to compelled production which violated Article 20③ and had relied upon decisions of the US Supreme Court interpreting the Fourth Amendment of the US Constitution. The Court rejected this argument as it observed that the Constitution of India did not have a fundamental right to privacy analogous to that of the Fourth Amendment of the US Constitution. The Court refused to import the principles of the Fourth Amendment in the form of the right to privacy.

The Court noted that the power of search and seizure was an integral part of the powers of the State, as it was necessary in order to maintain law and order. It was observed that since the framers of the Constitution chose not to subject statutory provisions to the fundamental right of privacy it would be

incorrect for the Court to import it without justification. Therefore, the Court held that the State's power to effect searches and seizures was constitutional.



Kharak Singh vs. State of Uttar Pradesh & Ors.

AIR 1963 SC 1295,
[1964] 1 SCR 332

1962

Surveillance, Search and Seizure

The majority held that unlawful intrusion into the home violated personal liberty under Article 21 and also opined that the right to privacy was not guaranteed in the Constitution. The minority held that the right to privacy was an essential ingredient of personal liberty under Article 21.

Constitutional Provision(s)

Articles 19 and 20

Case Type

Writ Petition

Case Status

Partially Overruled*

* by Justice KS Puttaswamy vs. Union of India, (2017) 10 SCC 1

Bench Strength

6

Number of Opinion(s)

2/1

OPINIONS DISSENT

1 opinion by

Justice N. R. Ayyangar on behalf of Chief Justice B. P. Sinha, Justice J. R. Mudholkar, Justice S. J. Imam, and himself,

and 1 dissenting opinion by

Justice K. S. Rao on behalf of Justice J.C. Shah and himself.

“(...) the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. 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. [Minority Judgement]”

Case Brief

This was the first case before the Indian Supreme Court that recognised the right to privacy in any form. In this case, the majority judgment by the Supreme Court invalidated Regulation 236(b) of the U.P. Police Regulations that permitted nightly domiciliary visits by policemen to persons classified as habitual criminals. In doing so, the Court noted that the U.P. Police Regulations were not legislations but had been promulgated by the executive, and therefore could not restrict fundamental rights under Part III of the Constitution. The Court further noted that the domiciliary visits amounted to unauthorized intrusion into a person’s home and were in violation of the concept of ordered liberty and dignity of the individual, and therefore contravened the right to life and personal liberty guaranteed under Article 21.

However, the Court upheld other surveillance clauses of Regulation 236 on the ground that the right to privacy was not guaranteed under the Constitution and that other actions of the police observing his movements could not be said to impose a physical restriction on the rights of the Petitioner under Article 19. The minority judgment took a broader view, and recognised the right to privacy as an essential ingredient of personal liberty under Article 21. It further considered the psychological impact of constant surveillance on the actions of the person being surveilled, and held the entire Regulation unconstitutional.

Case Summary

Facts

Kharak Singh, the Petitioner was released from an investigation of dacoity for lack of evidence against him, but the U.P. Police opened a ‘history sheet’ against him under Chapter 20 of the U.P. Police Regulations. These Regulations allowed surveillance on individuals who were habitual criminals or were considered likely to become habitual criminals. The police conducted surveillance as per Regulation 236 of the U.P. Police Regulations, which involved secret picketing of Petitioner’s house, nightly domiciliary visits, periodic inquiries by officers as well as tracking and verification of his movements. The Petitioner challenged the constitutionality of Chapter 20 of the U.P. Police Regulations that allowed police officials to conduct this nature of surveillance upon him.

Issue

Whether “surveillance” under the impugned Chapter 20 of U.P. Police Regulations constituted an infringement of fundamental rights guaranteed by Part III of the Constitution.

Arguments

The Petitioner argued that all the clauses of Regulation 236 violated his constitutional freedom ‘to move freely throughout the territory of India’ guaranteed under Article 19①(d) and ‘personal liberty’ under Article 21. He argued that shadowing a person obstructed his ‘free movement’ and could induce psychological inhibitions.

The Respondent-State argued that the Regulations were not unconstitutional as they did not violate any fundamental rights. *In arguendo*, they claimed that even if they did violate fundamental rights, the Regulations were framed “in the interest of the general public and public order” and allowed the police to perform their duties efficiently, and therefore, qualified as ‘reasonable restrictions’ on fundamental rights.

Decision

The Court at the outset noted that the Regulations were executive and not legislative in nature as they did not have any statutory basis, whether delegated or otherwise. Since the Regulations were departmental instructions framed for the guidance of police officers,

they neither constituted law as required within the meaning of ‘procedure established by law’ in Article 21 nor did they satisfy the test laid out in Articles 19②-⑥. Therefore, the Respondent would not be able to make use of the protection of ‘reasonable restrictions’ if the Regulations were found to violate fundamental rights as that defence was reserved for duly made ‘law’.

The Court considered the constitutionality of all the clauses of Regulation 236. With regard to clause (a), authorising secret picketing of the houses of suspects, and clauses (c), (d) and (e), which were meant to maintain records of shadowing of history-sheeters, the Court held that keeping a watch over a suspect and secretly recording their activities did not impede movement in physical terms and that a psychological barrier to action was not protected by Article 19①(d). Further, it also did not deprive the suspect of his ‘personal liberty’ within the meaning of Article 21.

With regard to clause (b), which provided for nightly domiciliary visits of the history-sheeters, the Court discussed whether intrusion into a citizen’s house constituted a violation of Articles 19①(d) or 21. The Court found that Article 19①(d) was not infringed as it did not cover psychological inhibition, but physical movement, which had not been impaired. While analysing Article 21, the Court examined the width, scope and content of the term ‘personal liberty’, and reviewed several US Supreme Court cases in this context.

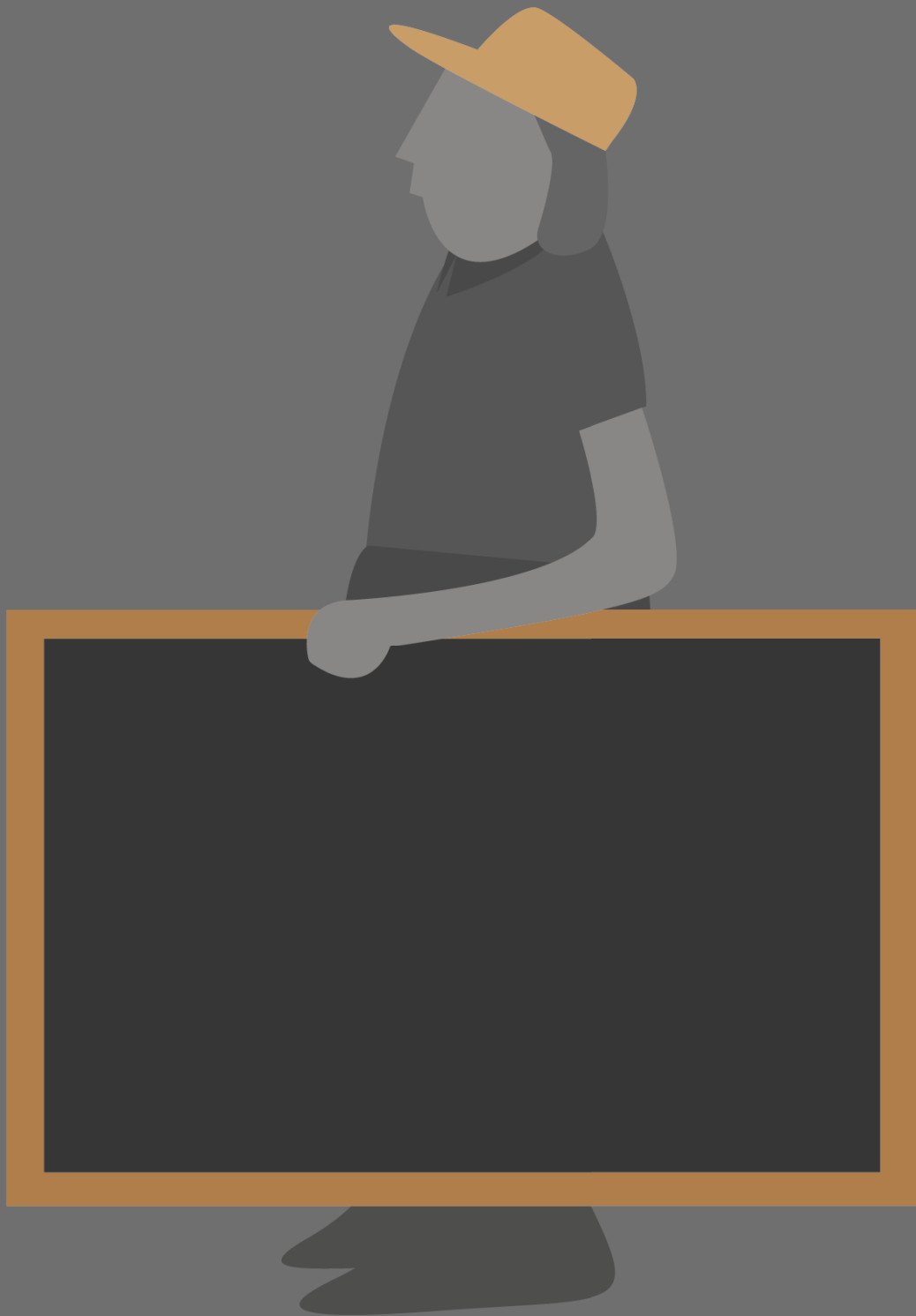
It referred to the judgment of Justice Field in *Munn vs. Illinois* ((1877) 94 U.S. 113), and affirmed its observation that “life” in the Fifth and Fourteenth amendments of the U.S. Con-

stitution corresponding to Article 21 “means not merely the right to the continuance of a person’s animal of existence, but a right to the possession of each of his organs - his arms and legs etc”, and Justice Frankfurter in *Wolf vs. Colorado* ((1949) 338 U.S. 25), which held that “security of one’s privacy against arbitrary instruction by the police...is basic to a free society” and it is “implicit in ‘the concept of ordered liberty’”. It also alluded to the Fourth Amendment to the US Constitution, which encapsulates the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and noted that the Indian Constitution lacked a corresponding provision. While discussing the concepts related to personal liberty, the Court also alluded to the English common law maxim that “every man’s house is his castle”.

Further, the Court analysed the relationship between the ‘liberties’ in Articles 19① and 21, and found that while Article 19① dealt with particular species or attributes of freedom, “the term ‘personal liberty’ is used in Art. 21 as a compendious term”, which took in and comprised the residue. It observed that the term ‘personal liberty’ intends to promote the constitutional objective mentioned in the Preamble to the Constitution of assuring the dignity of the individual. On the basis of the above discussion, the Court found that clause (b) fell afoul of Article 21, and struck down Regulation 236(b), which authorised domiciliary visits. However, it upheld the rest of the Chapter 20 of the U.P. Police Regulations, as attempts to surveil the movements of an individual only invade his privacy, and that “the right of privacy is not a guaranteed right under our Constitution”.

However, the minority opinion noted that “*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.*” It further noted that “*nothing is more deleterious to a man’s physical happiness and health than a calculated interference with his privacy*”, and referred to the observations of Justice Frankfurter in *Wolf vs. Colorado*, to reiterate the importance of securing the privacy of a person against arbitrary intrusion by the police. It held that the term ‘personal liberty’ was wide enough to take in a right to be free from restrictions, placed directly or indirectly on his movements.

Further, the minority held the entire Regulation to be unconstitutional and not just Regulation 236(b), on grounds of infringing both Articles 19①(d) and 21, and observed that the attempt to dissect the act of surveillance into different consequences was unjustified as all the sub-clauses of the Regulation 236 were adopted for the same purpose. Moreover, it found that Regulation 236 violated freedom of expression under Article 19①(a), as it prevented a person from expressing their real and intimate thoughts.



Govind vs. State of Madhya Pradesh & Ors.

AIR 1975 SC 1378,
(1975) 2 SCC 148

1975

Surveillance, Search and Seizure

The Supreme Court for the first time extensively discussed the right to privacy under Articles 19(d) and 21 of the Constitution in the context of police surveillance. The Court did not explicitly read the right to privacy into Articles 19(d) or 21 but made a strong case for the existence of the right, observing that privacy is an essential facet of enjoyment of other constitutional freedoms and liberties.

Constitutional Provision(s)

Articles 19 and 21

Case Type

Writ Petition

Case Status

Not Overruled

Bench Strength

3

Number of Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice K.K. Mathew on behalf of
Justice P.K. Goswami,
Justice V.R. Krishna Iyer, and himself.

“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. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right.”

Case Brief

In this case, a three-judge bench of the Supreme Court for the first time extensively discussed the right to privacy under Articles 19①(d) and 21 of the Constitution in the context of police surveillance. The writ petition challenged the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations made by the Government under the Police Act, 1961 (“Police Act”) that permitted domiciliary visits and other forms of surveillance of individuals with criminal history.

The Court did not explicitly read the right to privacy into Articles 19①(d) or 21 but made a strong case for the existence of the right, observing that privacy was an essential facet of enjoyment of other constitutional freedoms and liberties. While they discussed the right to privacy as an independent fundamental right, the Court noted that it could not be absolute and would be subjected to reasonable restrictions including in furtherance of a superior countervailing interest that satisfied the compelling state interest test. The Court dismissed the writ petition and upheld the validity of the impugned regulations on the ground that they were validly enacted, and constituted reasonable restrictions under Article 19⑤. But in doing so, it canalised the powers of police

officials under the Regulations and observed that they were “verging perilously near unconstitutionality”.

Case Summary

Facts

This writ petition challenged the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations, made by the Government of Madhya Pradesh under Section 46②(c) of the Police Act.

The Petitioner’s grievance was that he had been deemed a habitual offender based on several criminal cases filed against him, which were allegedly false. Because of this, a history sheet was opened against him and he was being consistently surveilled. The Petitioner alleged that the police had been making frequent domiciliary visits, secretly picketing his residence and harassing him. The Petitioner argued that such surveillance violated his fundamental rights under Articles 19①(d) and 21 of the Constitution.

Issue

Whether Regulations 855 and 856 of the Madhya Pradesh Police Regulations were unconstitutional.

Arguments

The State argued that the Petitioner had been charged and convicted in several criminal cases, and was a dangerous criminal whose conduct was evidence of his intention to lead a criminal life. It was thus necessary, in public

interest, to put him under surveillance in order to prevent him from committing offences.

The Petitioner submitted that he had been implicated in several false cases and had been acquitted in all but two. The Petitioner further submitted that the impugned regulations were not framed under any provision of the Police Act, because Section 46②(c) only permitted framing regulations to give effect to any provision of the Act and the regulations in question were not made for any such purpose. The Petitioner, in arguendo, submitted that even if they were lawfully made, they must be declared void as violative of Petitioner’s fundamental rights under Articles 19①(d) and 21.

Decision

The Court dismissed the Petitioner’s first submission, as surveillance with the purpose of preventing further commission of offence was in furtherance of the objects of the Police Act. On the second question, the Court discussed the concept of privacy and personal liberty extensively.

The Court first observed that the Bench in *Kharak Singh vs. State of U.P.* (AIR 1963 SC 1295) had upheld the constitutionality of Regulation 236 of the UP Police Regulations (which was in *pari materia* with Regulation 856), but had held that domiciliary visits under

Regulation 236(b) were unconstitutional. This was because it construed ‘personal liberty’ under Article 21 to cover liberty, freedom and protection from intrusion in one’s own house. The Court also specifically discussed Justice K.S. Rao’s minority judgment in *Kharak Singh*, which read the right to privacy into Article 21. Justice K.S. Rao had held that domiciliary visits not only violated the freedom of unrestricted movement under Article 19(d), but also constituted an interference with the right to privacy and impeded an individual’s enjoyment of their right under Article 21.

The Court also cited the U.S. Supreme Court’s decisions in *Griswold vs. Connecticut* (381 U.S. 479), which held that banning dissemination of information and advice on contraception was violative of the right to privacy of married people, and *Roe vs. Wade* (410 U.S. 113), which protected a woman’s right to abortion and held that while privacy wasn’t explicitly enshrined in the US Constitution, protection of certain personal spaces and ideals was protected. Both cases, as the Court observed, made reference to “penumbral” rights emanating from the Bill of Rights and other Constitutional provisions. The Court further discussed how these personal spaces corresponded to “private affairs”, which are essential to the pursuit of happiness and enjoyment of liberty envisaged by the Constitution.

The Court observed that privacy-dignity claims could only be denied when an “important countervailing interest is shown to be superior” and the law infringing the right to privacy “must satisfy the compelling state interest test.” Accordingly, the right to privacy could only be interfered with in furtherance of a compelling and permissible State interest,

which was of such importance that it could justify infringement of a right. The Court held that even if it was assumed that the freedoms under Article 19 and Article 21 gave rise to a distinct fundamental right of privacy, this right could not be absolute and would be subject to restrictions on the basis of the compelling public interest test as under Article 19(5). For this, the Court also relied on the example of Article 8 of the European Convention on Human Rights, which recognized the right to privacy but also allowed for reasonable restrictions on its enjoyment.

Based on the discussions above, it was held that domiciliary visits would not automatically amount to an unreasonable restriction on the Petitioner’s privacy. In this case, the Court held that presuming that the right to privacy is enshrined in summing that the right to privacy was enshrined in Article 21, it could only be restricted by a procedure established by ‘law’. Regulation 856 had the “force of law” and thus fell within the caveat allowing abrogation of the right to life and liberty under Article 21. The question then was of whether the regulation amounted to an unreasonable restriction under Article 19(5).

In this evaluation, the Court upheld the impugned Regulation by reading it narrowly, in order to save it from unconstitutionality. This narrow interpretation was such that the effects of the Regulations were to be confined to a limited class of citizens determined to lead a criminal life, and excluded those who were trying to earn an honest livelihood (even if they had a criminal history). Domiciliary visits were to be limited to instances of a danger to community security, and not frequent or routine check-ups. Further,

the Court advised the state to revise the Regulations while noting that they were on the verge of being unconstitutional, as they did not sit well with the 'essence of personal freedoms'. The Court upheld the validity of the impugned regulations by interpreting their effects narrowly.



Malak Singh & Ors. vs. State of Punjab and Haryana & Ors.

AIR 1981 SC 760,
(1981) SCC (Cri)
169

1980

Surveillance, Search and Seizure

The questions raised in this case were primarily regarding the entry of persons into surveillance registers maintained by the police, however, the Supreme Court also considered the validity of certain types of surveillance under the Punjab Police Rules vis à vis constitutional freedoms.

**Constitutional
Provision(s)**

Articles 19 and 21

Case Type

Special Leave Petition

Case Status

Not Overruled

Bench Strength

2

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice O.C. Reddy on behalf of
Justice R.S. Pathak and himself.

“[S]urveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Article 21 of the Constitution and the freedom of movement guaranteed by Article 19(1)(d). That cannot be permitted.”

Case Brief

Although the questions raised in this special leave petition were primarily regarding the entry of persons into surveillance registers maintained by the police, the Supreme Court in this petition also considered the validity of certain types of surveillance under the Punjab Police Rules (“Rules”) *vis à vis* constitutional freedoms.

The Bench recognized that there exists a need to balance the State’s aim of preventing crime and ensuring public safety with constitutional freedoms under Article 21 and Article 19①(d), and held that police surveillance could not intrude upon the personal liberty, dignity and privacy of an individual. Further, it noted that while crime prevention was a valid public interest, surveillance for this purpose should not constitute an ‘illegal interference’ with another individual’s life. Surveillance must be reasonably limited to allow full actualisation of an individual’s fundamental rights. In this case, it was suggested that surveillance would be adequately limited if it was discreet, unobtrusive, confined only to the people whose names were validly entered into the surveillance register and limited to the purpose of prevention of crime.

Case Summary

Facts

The Appellants claimed that they were law-abiding citizens of Amritsar, but due to political enmity with a Congress MLA, they had been falsely implicated in some criminal cases. Their names were entered in a surveillance register with a police station in Amritsar, following which they would be harassed frequently by being called to the police station or being involved in investigations without cause. This petition originated from an appeal preferred against the judgment of the High Court of Punjab and Haryana, which dismissed the writ petitions filed by the Appellants, Malak Singh and Jaswant Singh who were seeking the removal of their names from the surveillance register maintained with the police. The surveillance register was maintained in accordance with Rule 23.4 of the Rules. Rule 23.7 further prescribed that police surveillance would comprise of *“close watch over the movements of the person under surveillance, by Police Officers, Village headmen and village watchmen as may be applicable without any illegal interference [emphasis supplied].”*

Issues

- A. Whether a person was entitled to be given an opportunity to show cause before his name was included in the surveillance register; and
- B. Whether there existed a reasonable ground for the Appellants to be included in the surveillance register.

Arguments

It was the case of the respondents that the Appellants were opium smugglers and habitual offenders, as indicated by confidential history sheets, due to which their names were entered in the surveillance register.

The Appellants submitted that there was no justification for entering their names in the register of surveillance as there was no proof that they were habitual offenders of the nature alleged. They further submitted that surveillance was a serious encroachment on the liberty of citizens and therefore, it was necessary that a person should be given an opportunity to show cause before their names were included in the register, without which such action would be bad in law.

Decision

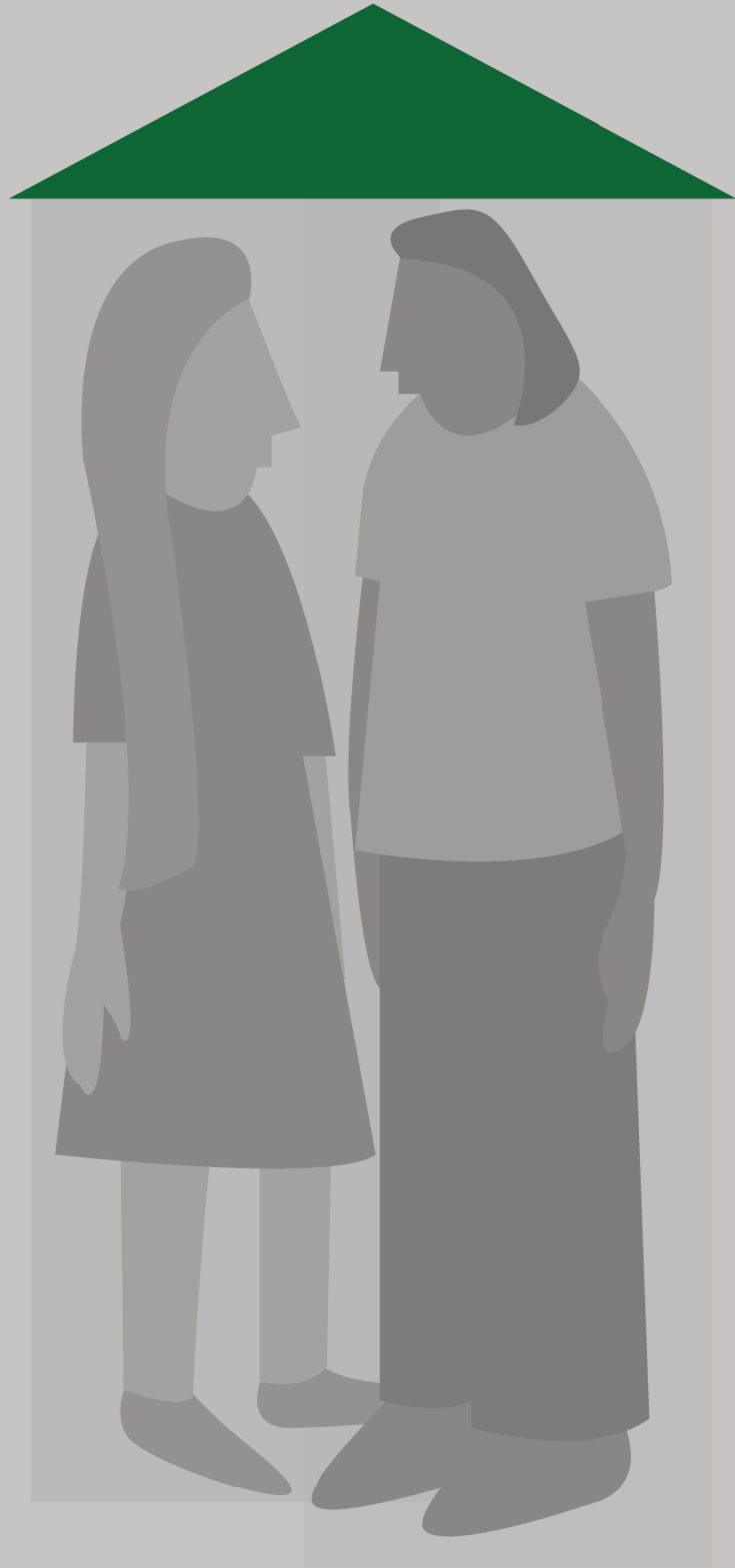
The Supreme Court observed that while the prevention of crime was of utmost importance, the means for prevention of crime must be within the contours of the right to personal liberty guaranteed under Article 21 and the right to freedom of movement under Article 19①(d) of the Constitution. It attempted to balance the two interests, holding that while it might be necessary to surveil habitual or potential offenders in order to prevent organized crime, such surveillance could not be so intrusive that it infringes upon constitutionally guaranteed freedoms including the right to privacy.

The Court cited Article 8 of the European Convention on Human Rights to buttress the need to protect private and home life, and therefore personal dignity and liberty. This, it observed, was recognized by the Rules 23.7 of

the Punjab Police Rules itself, which provide that “(p)ermissible surveillance is only to the extent of a close watch over the movements of the person under surveillance and no more.”

The Court noted that surveillance must strictly be of people who were legitimately listed in the surveillance register, and for the purpose of crime prevention. Excessive surveillance falling beyond the limits prescribed by the Rules would entitle a citizen to the court’s protection.

The Court further held that there was no right to be heard prior to entry into a surveillance register, because such registers, by their nature, were confidential documents that should not be publicized. However, when an entry into the register was challenged, the Superintendent of Police may be called upon to demonstrate grounds for a reasonable belief that the persons whose names were entered into the register were habitual offenders. In the present case, the Court held that the facts and relevant records were sufficient to satisfy the Court that such a reasonable belief existed. Accordingly, the Court dismissed the appeals, subject to the aforementioned observations regarding the mode and limits of surveillance.



Smt. Saroj Rani vs. Sudarshan Kumar Chadha

AIR 1984 SC 1562,
(1984) 4 SCC 90

1984

Autonomy

The Supreme Court held that restitution of conjugal rights did not constitute an invasion of marital privacy by the Government.

Constitutional Provision(s)

Articles 14 and 21

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

Number of Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice S. Mukherjee on behalf of
Justice S. M. F. Ali and himself.

“...when the court has decreed restitution for conjugal rightsIt serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned single judge of Andhra Pradesh High Court has viewed it and we are therefore unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.”

Case Brief

Saroj Rani was a landmark case that overruled the Andhra Pradesh High Court in *T. Sareetha vs. Venkata Subbaiah* (AIR 1983 AP 356) and affirmed the Delhi High Court judgment of *Smt. Harvinder Kaur vs. Harmander Singh Choudhry* (AIR 1984 Delhi 66). The Supreme Court upheld the constitutionality of the right to restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 (“HMA”), which was considered violative of the fundamental right to privacy in *T. Sareetha*.

The Supreme Court here observed that restitution of conjugal rights offered a husband and wife the opportunity to settle any issues amicably and thus served a social purpose as an aid to the prevention of break-up of marriage. The Court stated that Section 9 did not mandate sexual cohabitation because conjugality went beyond mere procreation and sexual relations. The grounds considered by the Single Judge decision in *T. Sareetha* (i.e., that restitution of conjugal rights infringed upon

women's sexual autonomy, freedom to procreate and to act by their private choice) were not accepted by the Court.

Case Summary

Facts

The Appellant, i.e. the wife, was allegedly maltreated and thrown out of their marital home by the Respondent i.e. the husband, two years after their marriage and after the birth of their second daughter. Thereafter, the Appellant filed a suit for restitution of conjugal rights under Section 9 of the HMA before the sub-judge 1st class, who passed a consent decree. While the Appellant claimed that she had briefly cohabited with the Respondent following the decree, this was not believed by subsequent courts. The Respondent after one year filed for divorce under Section 13 of the HMA before the district judge, on the ground that a year had lapsed since the consent decree was passed, but no cohabitation had taken place between the parties.

The district judge dismissed the divorce petition because the decree for restitution of conjugal rights was a consent decree, following which the Respondent filed an appeal before the High Court, where the Single Judge referred the matter to the Chief Justice. He requested the Chief Justice to constitute a Division Bench to consider the question of whether a decree for restitution of conjugal rights could be passed with the consent of the parties. The Division Bench held that the consent decree could not be termed as collu-

sive and granted the Respondent the decree of divorce. The Appellant preferred an appeal before the Supreme Court.

Issues

- A. Whether the Respondent was entitled to the decree of divorce although he failed to comply with the consent decree for restitution of conjugal rights; and
- B. Whether Section 9 of the HMA violated Article 14 and Article 21 of the Constitution.

Arguments

The Appellant argued that the Respondent always intended to divorce her, and thus did not object to the decree for restitution of conjugal rights with the view to dishonor it and ultimately be granted a divorce on those grounds. She contended that the Respondent should not have been allowed to take advantage of his "wrong" as per Section 23 of the HMA and thus should not have been granted the decree for divorce. The Appellant also drew attention to the case of *T. Sareetha*, which held restitution of conjugal rights as unconstitutional as it violated the right to privacy of choice and autonomy under Article 21 of the Constitution.

Decision

The Court rejected the Appellant's contention as the aforementioned arguments were not in the pleadings, and the facts averred were contrary to those presented before the lower courts. The Appellant had first alleged that she had cohabited with the Respondent for two days, but later denied this while stating that the Respondent purposely disobeyed the consent decree for the purpose of obtaining the decree for divorce. The Court held this contradiction to be fatal to the Appellant's case.

Further, while the Appellant had not previously raised this plea, the Court considered the question of the constitutionality of Section 9 of the HMA that gives a party the right to file a suit for restitution of conjugal rights vis-à-vis the right to privacy. In the course of determining this question, the Court analysed *T. Sareetha's* case, which had held that Section 9 of the HMA violated the right to privacy and human dignity under Article 21 of the Constitution and was thus void. It considered courts' interference in mandating compulsory cohabitation a gross violation of personal choice and autonomy and observed that a decree for restitution of conjugal rights denied the woman sexual autonomy and the free choice of procreation, thereby denying her privacy over her most intimate decisions. Though the right under Section 9 of the HMA was equally available to both husband and wife, the High Court in *T. Sareetha* observed that it was mostly used by men and thus differentially and adversely impacted women.

The Court noted that the judgment of the Delhi High Court in *Harvinder Kaur* disagreed with the view taken by the Andhra Pradesh

High Court in *T. Sareetha*. The Delhi High Court held that Section 9 of the HMA did not violate Articles 21 or 14. It noted that the purpose of restitution of conjugal rights was to restore matrimonial harmony and not to enforce sexual cohabitation, and that sexual intercourse was not the only element of conjugal rights under Section 9 of the HMA.

The Supreme Court considered both the views and held that Section 9 of the HMA did not violate Article 21. It considered the technical definition of conjugal "*of or pertaining to marriage or to husband and wife in their relations to each other*", and thus sided with *Harvinder Kaur* in observing that matrimonial consortium did not necessitate sexual cohabitation. Although the Court did not explicitly discuss the right to privacy, in overruling *T. Sareetha*, it suggested that enforcing Section 9 of the HMA did not constitute a breach of privacy. Further, it held that the social purpose of preserving the sanctity of marriage was enough to balance any possible constitutional assailment. The Court noted that the remedy for failure to obey a decree for restitution of conjugal rights was attachment of property, but not specific performance.

The Court thus granted the Respondent the decree for divorce, and ordered him to pay maintenance to the wife until she remarried and for the daughter up till her marriage.



State of Maharashtra & Ors. vs. Madhukar Narayan Mardikar

AIR 1991 SC 207,
(1991) 1 SCC 57

October 23, 1990

Bodily Integrity
Autonomy

The Court observed that the character of a woman cannot adversely affect the sanctity of her testimony. It stated that even an unchaste woman has the right to protect her person along with a corresponding right to be protected by law in case her privacy is violated.

**Constitutional
Provision(s)**

Article 226

Case Type

Special Leave Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A.M. Ahmadi on behalf of
Justice K.J. Shetty and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.”

Case Brief

This case was a special leave petition against an order by the High Court of Bombay, Nagpur Bench, setting aside an order removing the Respondent from service. The Respondent was a police inspector who was accused of the attempted rape of Banubi, a woman of allegedly ‘easy’ virtue. Banubi had filed a complaint against the Respondent and in the course of investigation admitted to being in a relationship with another man while married.

The departmental enquiry found the Respondent guilty of perverse conduct and ordered his dismissal from service, but the High Court quashed the removal order as they believed it was unsafe to rely on the testimony of a woman of ‘doubtful reputation’ such as Banubi, and that the Respondent had not been provided necessary documents to meet the charges against him.

The Supreme Court (“Court”) set aside the order of the High Court and decided that there was sufficient evidence to corroborate Banubi’s testimony. The Court observed that the character of a woman could not adversely affect the sanctity of her testimony. It stated that even an unchaste woman has the right to protect her person along with a corresponding right to be protected by law in case her privacy is violated.

Case Summary

Facts

The Respondent was a police inspector when he allegedly visited the hutment of a woman called Banubi and made forceful attempts to have sexual intercourse with her. She resisted the attempt and later, made a written complaint against the Respondent, who averred that he was carrying out a prohibition raid at her residence, and some liquor was found at a location near her hutment.

Following Banubi's complaint, a departmental inquiry was conducted. The grounds included the Respondent's attempt at having forceful sexual intercourse with Banubi, and the alleged fabrication of documents to prove that he was conducting a prohibition raid in order to cover up his crime. In the course of investigation, Banubi admitted to being in a relationship with another man while married.

The departmental enquiry found the Respondent guilty of "perverse conduct" and ordered his removal from service. The Respondent filed a writ with the High Court of Bombay, Nagpur Bench, which set aside the order of removal for reasons including, inter alia, the fact that Banubi's moral character was doubtful. The High Court's order was appealed before the Supreme Court.

Issues

Whether the High Court was justified
A. in disbelieving the testimony of Banubi in arriving at an assessment of the Respondent's guilt; and

Whether the Respondent was provided
B. with sufficient material to meet the charges against him.

Decision

The Supreme Court, in evaluating the case history, noted that there was strong evidence and reasoning to support the order of removal, including the fact that it was unlikely that Banubi, who had an unfavourable reputation, would make a false complaint against a police officer and thus incur the wrath of the police force. They found that Banubi's testimony was further corroborated by evidence and the case sought to be made out by the Respondent suffered from several infirmities, including the shifting testimony of two police constables who had allegedly accompanied him on the raid. The Court also considered the fact that in the cross examination of Banubi and her husband, no serious infirmity could be brought out. The Court therefore disagreed with the High Court that it was difficult to make out a case for the Respondent's guilt on the basis of evidence provided. The Supreme Court further found that the High Court had entered into a reconsideration of the evidence placed before them, even though such an exercise was beyond their jurisdiction.

On the question of privacy and reliance to be placed on the testimony of a victim of assault, the Court noted that even a woman of "*easy virtue is entitled to her privacy*" and that it would not be open to any person to violate her private space. The Supreme Court differed from the High Court's assessment, which dismissed Banubi's evidence on the grounds that she was an unchaste woman and could not be believed to the extent of ruining a public officer's career and noted that she had been honest about her antecedents. The Supreme Court accordingly set aside the High Court's order and reinstated the order dismissing the Respondent from service.



R Rajagopal and Ors. vs. State of Tamil Nadu & Ors.

AIR 1995 SC 264,
(1994) 6 SCC 632

1998

Informational Privacy

This case dealt with questions concerning the freedom of press *vis-à-vis* the right to privacy.

Constitutional
Provision(s)

Articles 19 and 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice B.P.J. Reddy on behalf of
Justice S.C. Sen and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent—whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.”

Case Brief

This case dealt with questions concerning the freedom of press vis-à-vis the right to privacy. The Petitioners ran a magazine, which announced that they would be publishing Auto Shankar’s autobiography, which reportedly revealed his connections with several IAS, IPS and other officials. Auto Shankar was at that time a prisoner convicted of several murders. The Inspector General of Prisons wrote a letter requesting

the Petitioners to refrain from publishing the autobiography on several grounds, including that the autobiography was not authentic.

The Petitioners approached the Supreme Court to protect their right to publication. The Supreme Court ruled that the Petitioners had the right to publish the autobiography, even without the prisoner's consent, to the extent it was based on public records and noted that the State could not impose prior restrictions on the likelihood of the autobiography being defamatory; a remedy for defamation would only arise post publication.

The Court also discussed the right to privacy in some detail, referencing US and British jurisprudence in addition to Indian precedent, and concluded that the implicit right to privacy flowing from Article 21 could be limited in case a public controversy was voluntarily raised by the person whose right to privacy was said to be infringed or in case the publication of information was based on facts forming part of the public record. However, this rule was subjected to further limitations in the interest of decency under Article 19②. The right to privacy was made inaccessible to public officials for acts and conduct relevant to discharge of their public duties, unless false statements were made with reckless disregard for the truth or were malicious and the occasion for an action furthering the right to privacy would arise only subsequent to a violation, not preemptively.

Case Summary

Facts

The Petitioners, editors of a Tamil weekly magazine entitled Nakkheeran, intended to publish the autobiography of Auto Shankar, a convicted serial killer. The autobiography reportedly revealed the prisoner's connections with several State officials. The Inspector General of Prisons issued a warning letter to the Petitioners stating that Auto Shankar had not written the autobiography and if it was pub-

lished, legal action would be initiated against the Petitioners. The Petitioners claimed that Auto Shankar wrote his autobiography while confined in jail and had requested his advocate to publish it in the Petitioners' magazine. The Petitioners apprehended that the officials would interfere with the publication and in order to restrain them, the Petitioners filed a writ petition before the Madras High Court to safeguard their freedom to print the autobiography which they claimed was guaranteed under Article 19①(a) of the Constitution. The

Single Judge dismissed the petition because of objections relating to maintainability and the matter came before the Supreme Court.

Issues

- Whether any person could prevent
- A. another person from writing his life-story or biography if such unauthorised writing infringes the person's right to privacy;

- Whether the press was entitled to publish
- B. an unauthorised account of a person's life by virtue of the freedom of press guaranteed by Article 19(1)(a), and in case such publication leads to infringement of the right to privacy or defamation, were there any remedies available ;

- C. Whether the State or the public officials could maintain an action for defamation and place prior restraint on the press to prevent publication of defamatory material; and
- D. Whether prison officials were entitled to act on behalf of a prisoner and prevent the publication of the life-story of a prisoner in order to protect his rights.

Arguments

The Petitioners argued that Auto Shankar had requested his advocate to get his autobiography published in the Petitioners' magazine and had executed a power of attorney in favour of his advocate for this purpose. They further argued that the announcement of the publication of the autobiography unsettled several officials because it revealed the connections between the prisoner and various State officials. The Petitioners submitted that

the prisoner had the right to get his life story published and that they had the right to publish his autobiography under Article 19(1)(a). They also submitted that they had reason to believe that the prison authorities may take steps to harass them.

The Respondent submitted that the prisoner denied writing any book or executing a power of attorney in favour of his advocate for publishing the book, and the autobiography contained false information, which may be defamatory. They also submitted that the allegations that the prison authorities have tortured or coerced the prisoner were baseless.

The Supreme Court noted the progression of the right to privacy from being recognised as an independent and distinctive concept under Law of Torts to acquiring constitutional status. While discussing the right to privacy, the Court noted that where a person's life story was published without his consent, the right to privacy afforded an action for damages resulting from unlawful invasion by the publisher. Further, the Court noted that the right to privacy was not enumerated as a fundamental right, but was inferred from Article 21 in the Constitution. It referred to seminal cases on privacy, namely *Kharak Singh & Ors. vs. State of U.P. & Ors.* (1963 AIR SC 1295) and *Gobind vs. State of MP & Anr.* (AIR 1975 SC 1378) to note that an independent right of privacy could be assumed to have emanated from "right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech", "which one can characterize as a fundamental right". It noted

that the right to privacy was not an absolute right, and would “have to go through a process of case-by-case development”.

The Court cited relevant US and British jurisprudence where privacy had been a subject matter of discussion. It referred to *Griswold vs. Connecticut* ([1965] 385 U.S. 479) and *Roe vs. Wade* ([1973] 410 U.S. 113), which dealt with governmental invasion of privacy; and the principle laid down in *New York Times Co. vs. Sullivan* ([1954] 376 U.S. 254), which emphasised the freedom of press and held that citizens have a legitimate and substantial interest in the conduct of public officials / figures and that the freedom of press extends to engaging in uninhibited debate about the involvement of public officials / figures in public issues and events.

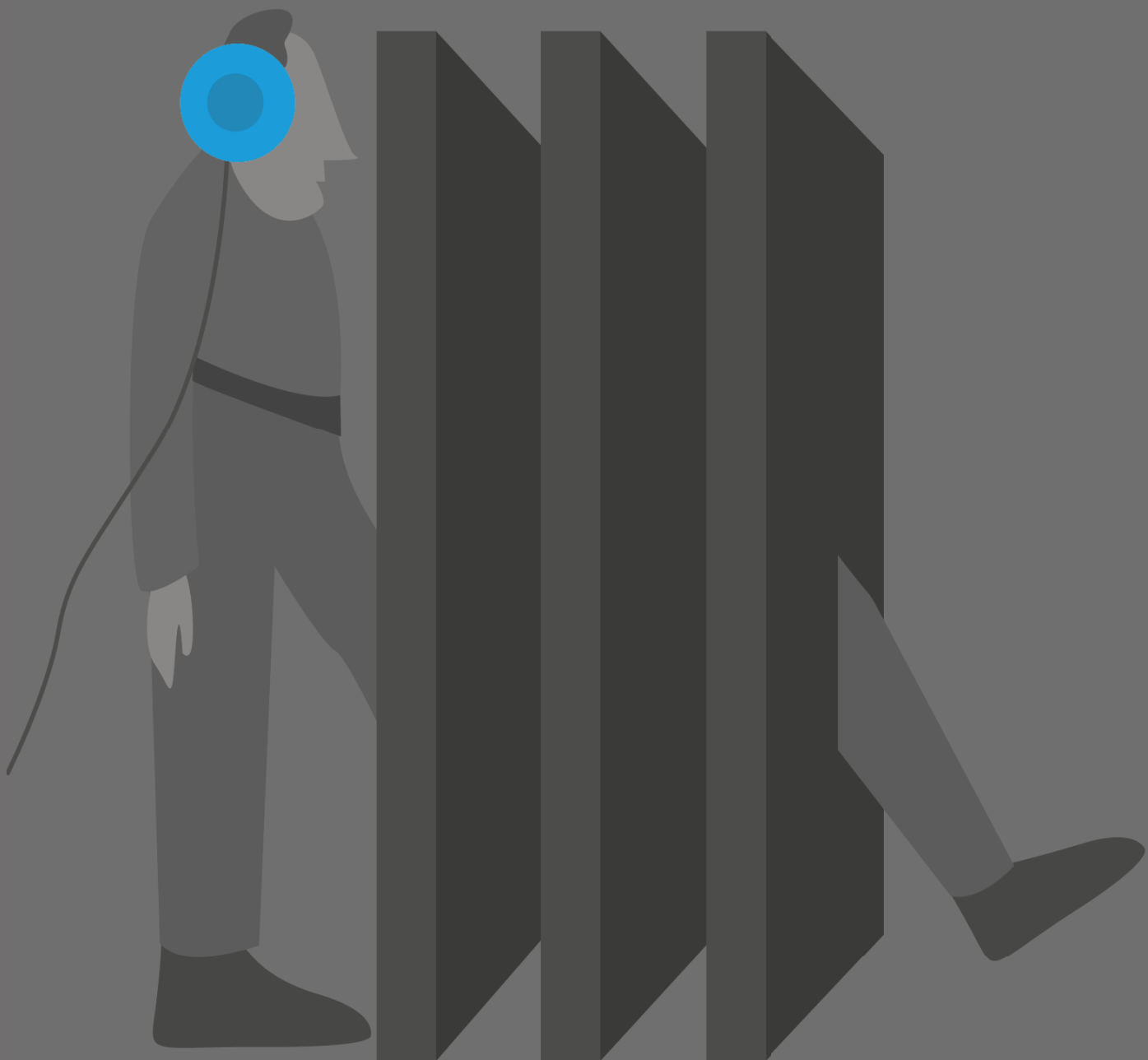
Further, the Court denied the State a right to impose a prior restriction on the proposed publication, while referring to *New York Times vs. United States* ([1971] 40 U.S. 713) which held that “any system of prior restraints of (freedom of) expression comes to this Court bearing a heavy presumption against its constitutional validity” and that the State “carries a heavy burden of showing justification for the imposition of such a restraint”. The Court held that any remedy for defamation would arise only after the publication. Similarly, public officials were not entitled to act on behalf of the prisoner and place prior restraint on proposed publication in order to safeguard the prisoner’s right to privacy, unless the occasion for any such action arose after the publication.

The Court analysed the applicability of these global principles and extracted a range of

broad principles dealing with the right to privacy. The Court explained that the freedom of the press flows from the freedom of speech and was subject to reasonable restrictions provided in Article 19②, and that it was important to strike a balance between the freedom of press and the right to privacy. For instance, in the interest of decency under Article 19②, incidents related to sexual assault, kidnap, abduction, etc. could not be published in order to protect the dignity of women.

The Court held privacy to be a “right to be let alone” and that no one could publish anything referring to an individual’s private affairs without the consent of the concerned person unless it was based upon public records. Further, it held that public officials did not have a right to privacy or a remedy for damages with respect to the conduct involved in discharge of their official duties. However, these rights were subjected to various exceptions and specifications. If a false publication was proven to be motivated by malice or personal animosity, a remedy for damages would be available to the aggrieved public official. Likewise, there would be no remedy for violation of privacy, in case an aggrieved person had voluntarily raised or invited a public controversy.

The Court allowed the petition and held that the magazine could publish the alleged autobiography of the prisoner without his consent insofar it was based on public records. It further cautioned the Petitioners against invading the right to privacy of the prisoner, if they published the life story of the prisoner.



People's Union for Civil Liberties vs. Union of India & Ors.

AIR 1997 SC 568,
(1997) 1 SCC 301

1996

Phone Tapping

Surveillance, Search and Seizure

The Court held that phone-tapping without appropriate safeguards, and without following legal process, was a violation of individuals' fundamental right to privacy.

Constitutional Provision(s)

Articles 19 and 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice K. Singh on behalf of
Justice S.S. Ahmed and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Telephone-Tapping is a serious invasion of an individual’s privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one’s home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence out-fit but at the same time citizen’s right to privacy has to be protected from being abused by the authorities of the day.”

Case Brief

The Supreme Court in this decision held that phone-tapping without appropriate safeguards, and without following legal process, was a violation of individuals’ fundamental right to privacy. By way of this public interest petition, the Petitioner, the People’s Union of Civil Liberties (“PUCL”), challenged the constitutionality of Section 5② of the Indian Telegraph Act, 1885 (“the Act”) for violating the right to privacy. This was in light of a report on tapping of politician’s phones published by the Central Bureau of Investigation, showing several procedural lapses in phone tapping conducted by Mahanagar Telephone Nigam Limited (“MTNL”) at the request of Government officials.

The Court, in considering the right to privacy, cited international instruments as well as Indian and international jurisprudence to affirm the right to privacy and noted that it could not be violated except by a procedure established by law. They further considered the fact that

Section 5② laid down specific situations in which phone tapping could be conducted, but noted that procedural safeguards for the fair and reasonable exercise of substantive power were missing. Accordingly, the Court did not strike down Section 5②, but laid down detailed guidelines for the exercise of surveillance powers by the executive in order to put a check on the misuse of these powers and to safeguard the right to privacy. It also criticised the lax attitude of the government in failing to prescribe appropriate safeguards despite previous criticism.

Case Summary

Facts

The Petitioner i.e. PUCL, a voluntary organization, filed a public interest petition challenging the constitutional validity of Section 5② of the Act, which allowed the Central Government or the State Government, during public emergency or for public safety, to intercept messages if satisfied that it is necessary or expedient so to do on various grounds including the sovereignty and integrity of India, friendly relations with foreign states and public order. The Petitioner challenged this section claiming it violated individuals' right to privacy in the wake of a report published by the Central Bureau of Investigations on 'Tapping of Politicians Phones'.

Issues

- A. Whether Section 5② of the Act was used to infringe the right to privacy; and
- B. Whether there was a need to read down Section 5② of the Act to include procedural safeguards in order to preclude arbitrariness and prevent indiscriminate phone tapping.

Arguments

The Petitioner argued that right to privacy was a fundamental right guaranteed under Articles 19① and 21 of the Constitution. The Petitioner further contended that to save Section 5② of the Act from being declared unconstitutional, it would be necessary to read down the provisions so as to safeguard the right to privacy and while Section 5② was vital for the several state purposes, it was essential to read in procedural safeguards. The Petitioner also argued that prior judicial sanction, *ex parte* in nature was the only safeguard that could eliminate the element of arbitrariness or unreasonableness.

The Respondents, the Union of India, argued that the striking down of Section 5② would injure public interests and jeopardise the security of the state. The Respondents further denied the allegations of misuse of power as they averred that phone tapping can only be ordered by an officer specifically authorized by the Central or State Government and only under certain conditions and was therefore sufficiently checked. They also contended that reasons for ordering phone tapping had to be recorded and if there was misuse of power,

the aggrieved party could approach the Government to take suitable action. Further, they argued that the party whose telephone was to be tapped could not be informed as it would defeat the purpose of phone tapping and it was absolutely necessary to maintain secrecy in the matter.

Decision

The Court placed reliance on the judgments in *Kharak Singh vs. State of U.P. & Ors.* (AIR 1963 SC 1295), *Gobind vs. State of MP & Anr.* (AIR 1975 SC 1378) and *R. Rajgopal vs. State of TN* (AIR 1995 SC 264) and noted that though the Indian Constitution did not expressly provide for a right to privacy, the right was a part of the right to “life” and “personal liberty” under Article 21 which could not be curtailed “except according to procedure established by law”. It held that only a case-by-case inquiry would reveal if the right had been infringed or not.

The Court observed that “the right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as ‘right to privacy’” and held that telephone-tapping would violate Article 21 unless it was permitted under a “procedure established by law”. The Court also stated that telephone conversations were an exercise of a citizen’s right to freedom of speech and expression under Article 19①(a) and hence interception of these conversations must be a reasonable restriction under Article 19② of the Constitution.

The Court reviewed the report of the Second Press Commission which stated that “tapping of telephones was a serious invasion of right to privacy. It is a variety of technological

eavesdropping.” and that the “relevant Statute i.e., Indian Telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping”. Moreover, the report stated that “tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy” and recommended that telephones may not be tapped except in the interest of national security, public order, investigation of crime and similar objectives. The Court analysed Section 5② and noted that the provision clearly laid down conditions under which interception orders could be given. The first step under this provision was to satisfy two prerequisites, i.e. ‘occurrence of any public emergency’ or in ‘the interest of public safety’. The officer authorised by the Government had to be satisfied that it was “necessary or expedient” in the interest of five grounds enumerated under this section:

Sovereignty and integrity of India;
Security of the State;

- i. Friendly relations with foreign States;
Public order; or
- ii. Preventing incitement to the commission of an offence.
- iii.

Moreover, the officer was empowered to issue the order for interception only after recording the reasons in writing. After making these observations, the Court refused to declare Section 5② unconstitutional, though it emphasised the need to strictly follow the two statutory prerequisites and the five grounds enumerated under Section 5②.

Further, the Court refused to accept the Petitioner’s submission regarding imposition of

prior judicial scrutiny as the only procedural safeguard before passing of interception orders. It reasoned that the power to make rules in this regard rests with the Central Government under Section 7 of the Act and censured the government for not framing proper laws despite the severe criticism attracted by Section 5②. However, the Court decided to lay down guidelines in the interim period in order to rule out arbitrariness, and to protect the right to privacy.

The guidelines laid down broadly entailed the following:

i. Orders for telephone tapping could be issued by the Home Secretary of the Central Government or a State Government, and this power could be delegated only in an emergency;

ii. The authority making the interception order must consider whether it was necessary to obtain the information required through such orders;

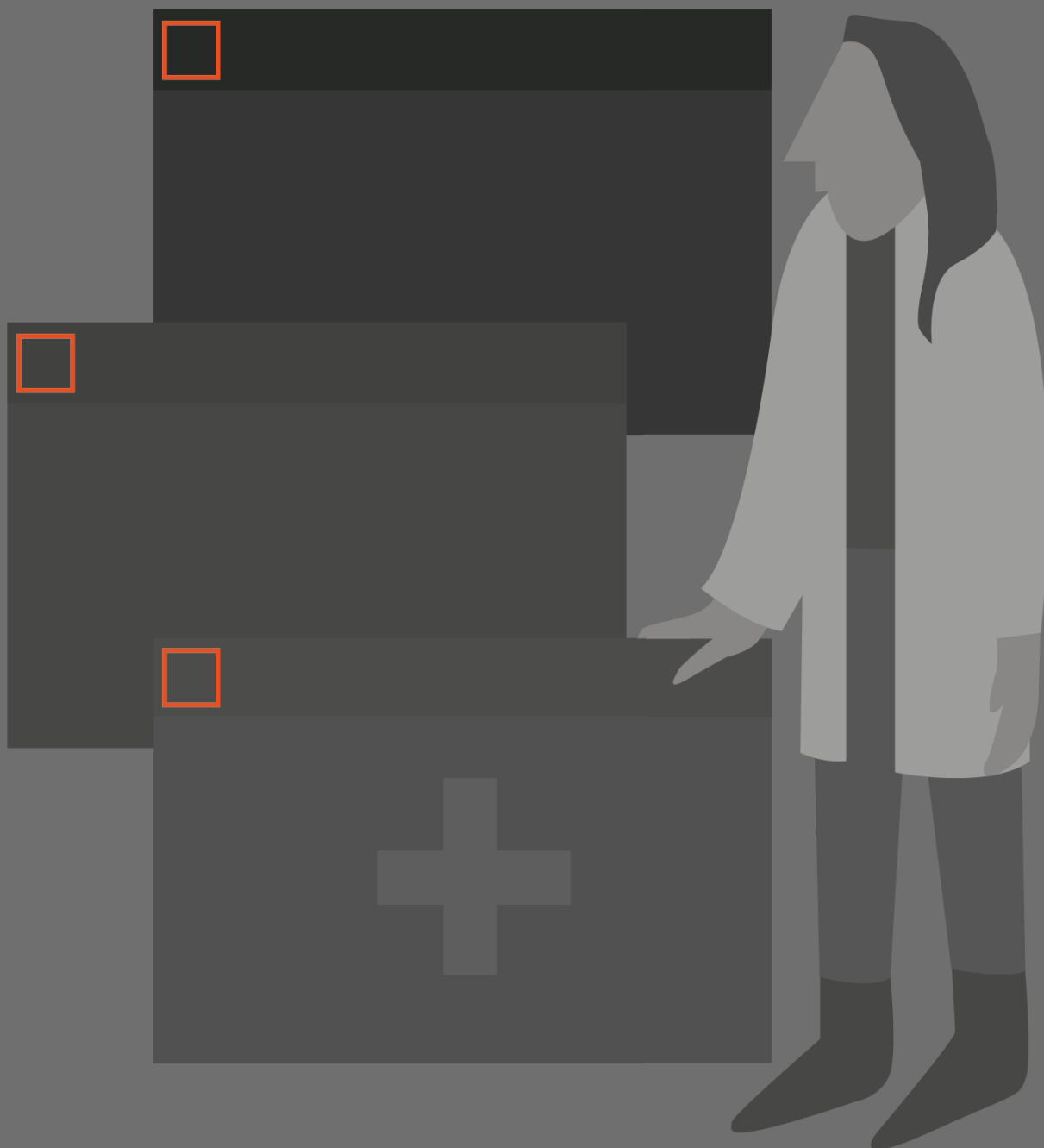
iii. The interception order, unless renewed, would cease to be effective after two months from the date of issue, and limited the total period of the operation of the order to six months;

iv. Detailed records were to be maintained of the intercepted communication and the procedure followed;

v. The use of intercepted material was limited to the minimum necessary for the purposes under the Act, and intercepted material would be destroyed when retention became unnecessary; and

Review committees should be constituted at Central and State levels to assess compliance with the law.

vi.



Mr. X vs. Hospital Z

AIR 1999 SC 495,
(1998) 8 SCC 296

Informational Privacy

Autonomy

Dignity

1998

The Court held that the right to privacy was not absolute, hence a doctor could disclose a patient's HIV status in public interest.

Constitutional
Provision(s)

Articles 19 and 21

Case Type

Civil Appeal

Case Status

Overruled*

* Mr. X vs. Hospital Z, (2003) 1 SCC 500 which held that the Court had exceeded its mandate in making observations as to what rights and obligations arose in case of HIV(+) persons and their rights to privacy or confidentiality. The Court in that case observed that the comments made by the present Bench, except to the extent of holding that the Appellant's right was not affected in any manner in revealing his HIV(+) status to the relatives of his fiancée, were uncalled for.

Bench Strength

2

1 opinion by

Justice S.S Ahmad on behalf of
Justice B.N. Kirpal and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Right of Privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political.... Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of [a] person’s “right to be let alone” with another person’s right to be informed.”

Case Brief

In this case, a three-judge bench of the Supreme Court for the first time extensively discussed the right to privacy under Articles 19①(d) and 21 of the Constitution in the context of police surveillance. The writ petition challenged the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations made by the Government under the Police Act, 1961 (“Police Act”) that permitted domiciliary visits and other forms of surveillance of individuals with criminal history.

The Court did not explicitly read the right to privacy into Articles 19① (d) or 21 but made a strong case for the existence of the right, observing that privacy was an essential facet of enjoyment of other constitutional freedoms and liberties. While they discussed the right to privacy as an

independent fundamental right, the Court noted that it could not be absolute and would be subjected to reasonable restrictions including in furtherance of a superior countervailing interest that satisfied the compelling state interest test. The Court dismissed the writ petition and upheld the validity of the impugned regulations on the ground that they were validly enacted, and constituted reasonable restrictions under Article 19⑤. But in doing so, it canalised the powers of police officials under the Regulations and observed that they were “verging perilously near unconstitutionality”.

Case Summary

Facts

The Appellant was working as an Assistant Surgeon Grade-I in the Nagaland State Health Service. He was directed to accompany one of the patients to a hospital in Madras by the Government of Nagaland for his treatment. The Appellant was asked to donate blood for the surgery of the patient, following which the Respondent-Hospital found that the Appellant was HIV(+). As a result of disclosure of this information, the Appellant’s marriage was called off, and knowledge of his HIV(+) status spread across his family and community, who ostracized him. This forced him to leave Nagaland, his hometown and settle in Madras.

The Appellant approached the National Consumer Disputes Redressal Commission (“NCDRC”) seeking damages against the Respondent for illegally disclosing information about his HIV(+) status, which he claimed should have been kept confidential. The NCDRC dismissed the petition, directing the Appellant to approach a civil court for remedy.

Issue

Whether the Respondent violated the Appellant’s right to privacy under Article 21 of the Constitution as well as the duty to maintain confidentiality as per medical ethics.

Arguments

The Appellant argued that the principle of “duty of care” was applicable to medical professionals and included the duty to maintain confidentiality; he alluded to the Hippocratic Oath, the International Code of Medical Ethics, and the Indian Medical Council Act, 1956 in this regard. He also argued that the Respondent infringed upon the Appellant’s right to privacy by disclosing his HIV(+) status. He contended that every man or woman has an absolute right to marriage and the Respondent should have maintained strict secrecy.

Decision

The Court observed that usually every right has a correlative duty and vice-versa, but this rule is not absolute, and has certain exceptions i.e. there may be instances where there is a right, but no corresponding duty. The Court analysed the relevant provisions of Code of Medical Ethics in India and guidelines by the General Medical Council of Brit-

ain on HIV infection and AIDS to understand the exceptions to the rule of confidentiality and found that disclosure of medical information was permitted in the public interest, particularly where there is an immediate future health risk to others, as in this case. It was held that the right to confidentiality of the Appellant was not enforceable in the present situation as the proposed marriage carried a health risk to an identifiable person who was saved from being infected with a dreadful disease.

Further, the Court traced the antecedents of the right to privacy in the Indian and American jurisprudence through judgments such as *Kharak Singh vs. State of Punjab* ((1964) 1 SCR 332); *Govind vs. State of Madhya Pradesh* ((1975) 3 SCR 946); *R. Rajagopal & Anr. vs. State of Tamil Nadu* (AIR 1995 SC 264); *Munn vs. Illinois* (94 US 113); *Wolf vs. Colorado* (338 US 25); *Jane Roe vs. Henry Wade* (410 US 113), to note that “*the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.*” It also noted that “*public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of a person’s “right to be let alone” with another person’s right to be informed.*” It held, therefore, that the disclosure in this case would not be violative of Appellant’s right to privacy.

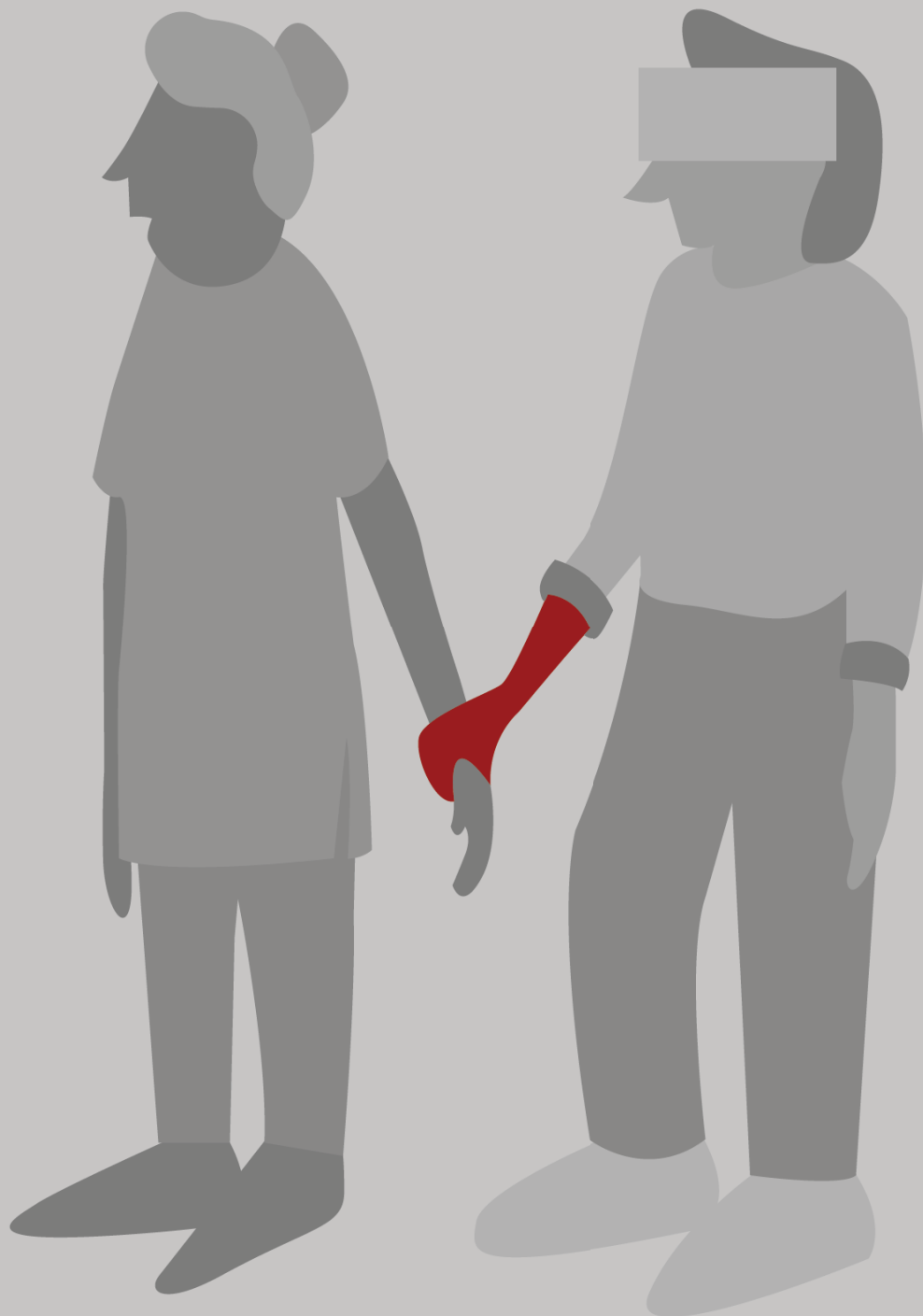
The Court further analysed the right to confidentiality in the context of marriage and referred to relevant provisions of the Hindu Marriage Act, 1955, Dissolution of Muslim Marriage Act, 1939, Indian Divorce Act, 1869,

and the Special Marriage Act, 1954, observing that all matrimonial systems were based on a healthy body and moral ethics and provide for the possibility of divorce in case one of the partners has a venereal disease. Therefore, it could not be considered that every person has a right to marry in absolute terms. Moreover, in this situation, “*the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person*”.

The Court therefore suggested that the Appellant had a moral duty to inform his spouse about his venereal disease, and until the person is cured of the communicable venereal disease, the right to marry could not be enforced in a court of law and should be treated to be a ‘suspended right.’ Further, the Court referred to Sections 269 and 270 of the IPC which criminalise a person who negligently or unlawfully, spreads an infectious or dangerous disease to another person, to hold that the Appellant was under a legal duty to not marry and if the Respondent maintained secrecy, their silence would have made them *participant criminis*.

The Court concluded that “*where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant’s right to privacy as part of right to life and Ms. Akali’s right to lead a healthy life which is her Fundamental Right under Article 21, the [right] which would advance the public morality or public interest, would alone be enforced through the process of Court*”. With regard to fundamental rights of Ms Akali under Article 21, the Court observed that this “*right would positively include the right to be told that a person, with whom she*

was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since the “Right to Life” includes right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy.”



State of Karnataka vs. Krishnappa

AIR 2000 SC 1470,
(2000) 4 SCC 75

2000

Bodily Integrity
Dignity

The Court held that sexual violence was an unlawful intrusion of the right to privacy and sanctity of a woman.

Constitutional Provision(s)

No Specific Constitutional Provision Referenced

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

3

1 opinion by

Chief Justice, Dr. A.S. Anand, on behalf of
Justice R.C. Lahoti,
Justice S.N. Variava, and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Sexual violence apart from being a dehumanising act, is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.”

Case Brief

The Supreme Court in this case dealt with the sentencing of the Respondent, who was convicted of raping an eight year old girl. The trial court had sentenced the Respondent to ten years of rigorous imprisonment after considering the facts of the case, including socio-economic, familial and other conditions attached to the Respondent. However, the High Court of Karnataka reduced this sentence to four years after noting the Respondent's dependents, alcohol dependence, and socio-economic status.

The Supreme Court noted the serious nature of the offence, and how severely it impinged on the rights of the victim. The Court further noted the significant impact sexual violence has on a woman, including the dehumanisation it perpetrates and the negative ramifications on a victim's rights to privacy and dignity. Accordingly, the Court held that the High Court's considerations did not constitute either special or adequate reasons for reducing the sentence as required by Section

376② of the Indian Penal Code, 1860 (“IPC”) and restored the sentence imposed by the trial court.

Case Summary

Facts

The Respondent entered the house of the victim’s family in an intoxicated state, and attempted to rape her mother, who escaped. He then raped the eight year old victim and assaulted her father, who came to find her subsequently. The Respondent was convicted and sentenced to rigorous imprisonment for ten years by the trial court. On appeal, the single-judge bench of the High Court of Karnataka refused to interfere. However, the Division Bench of the High Court on a subsequent appeal reduced the sentence to four years of rigorous imprisonment by reiterating the same facts considered by the trial court including the considerations that the Accused was an “unsophisticated and illiterate citizen belonging to weaker section of society”, had an old mother, wife and children dependent on him, and was a chronic addict to drinking and that he had raped the victim under intoxication. An appeal before the Supreme Court was filed against the High Court’s order.

Issue

Whether the Division Bench of the High Court had recorded adequate and sufficient reasons to reduce the mandatory sentence of ten years initially awarded to the Respondent under Section 376 of the IPC to four years of rigorous imprisonment.

Decision

The Court noted the gravity of sexual violence and observed that, “*sexual violence apart from being a dehumanizing act, is an unlawful intrusion of the right to privacy and sanctity of a female.*” It further noted that it was important for courts to deal sternly and severely with sexual violence to deter further commission. The Court cited the case of *State of Punjab vs. Gurmit Singh* ((1996) 2 SCC 384) to highlight that “*a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.*”

The Court noted that Section 376② of the IPC prescribes minimum imprisonment of ten years for the rape of a child under twelve years of age with a *proviso* vesting discretion in the court to impose a lesser sentence for “*adequate and sufficient reasons to be mentioned in the judgment.*” The Court held that the legislative mandate was clearly laid out in the provision and observed that determining the question of sentencing in a rape case

could not depend upon the victim or the social status of the accused and it could only be influenced by the “conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act.”

The Court also cited *A.P. vs. Bodem Sundara Rao* ((1995) 6 SCC 230) to highlight the importance of imposing adequate sentences to prevent injustice to the victim as well as society. The Court held that the trial court had given “sufficient and cogent reasons” for sentencing the accused to ten years of rigorous imprisonment based on his being a married 49 year-old man who cruelly victimised an “innocent helpless girl of 7/8 years”. It further held that there was no justification for the High Court to reduce that sentence and that the High Court’s considerations did not constitute either special or adequate reasons for reducing the sentence under Section 376② of the IPC. The Court held that the High Court’s casual approach evidenced a lack of sensitivity towards the victim and the society and restored the sentence passed by the trial court.



State of Karnataka vs. S. Nagaraju

2002 (3) ACR 2220 (SC), 2002 (2) ALD (Cri) 643

Bodily Integrity
Dignity

2002

The Court held that sexual violence was an unlawful intrusion of the right to privacy and sanctity of a woman.

Constitutional
Provision(s)

No Specific Constitutional
Provision Referenced

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by
Justice D.P. Mohapatra and
Justice B. Kumar.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Sexual violence apart from being a dehumanising act, is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.”

Case Brief

In this case, the Supreme Court heard an appeal against a reduced sentence granted by the Karnataka High Court against the Respondent, who was convicted of rape. The trial court had sentenced the Respondent to two years of rigorous imprisonment under Section 376 of the Indian Penal Code, 1860 (“IPC”) instead of the (then) minimum sentence of seven years, based on consideration of several factors including the socio-economic class of the Respondent as well as his many dependents. The Karnataka High Court further reduced this sentence on the basis of the same factors that the trial court had considered.

The Supreme Court, in setting aside the High Court’s judgment and restoring the judgment of the trial court, noted that it was important for courts to deal sternly with cases of sexual violence because such violence impinges on the right to privacy of the victim, as well as causing other harms.

Case Summary

Facts

The Prosecutrix, aged nineteen years, was affected by polio and had limited mobility. The Respondent was a family relative, who had free access to the house and raped the Prosecutrix when she was alone at her house. The trial court sentenced the Respondent to two years of rigorous imprisonment under Section 376 of the IPC. The Respondent challenged this judgment before the High Court, which reduced the sentence imposed by the trial court to six months of rigorous imprisonment with a fine of Rs. 5,000. The State of Karnataka preferred a criminal appeal before the Supreme Court against the sentence imposed by the High Court.

Issue

Whether the High Court had recorded adequate and sufficient reasons to reduce the sentence initially awarded to the Respondent under Section 376① of the IPC to six months of rigorous imprisonment and fine.

Arguments

The Appellant submitted that the trial court had already considered a variety of factors relating to the Respondent including his socio-economic status, his intoxicated state at the time of committing the crime and number of dependents, while passing the reduced sentence of two years of rigorous imprisonment. The Appellant argued that the judgment of the High Court was unsustainable in further reducing the sentence.

The Respondent argued that the High Court had rightly considered the circumstances of

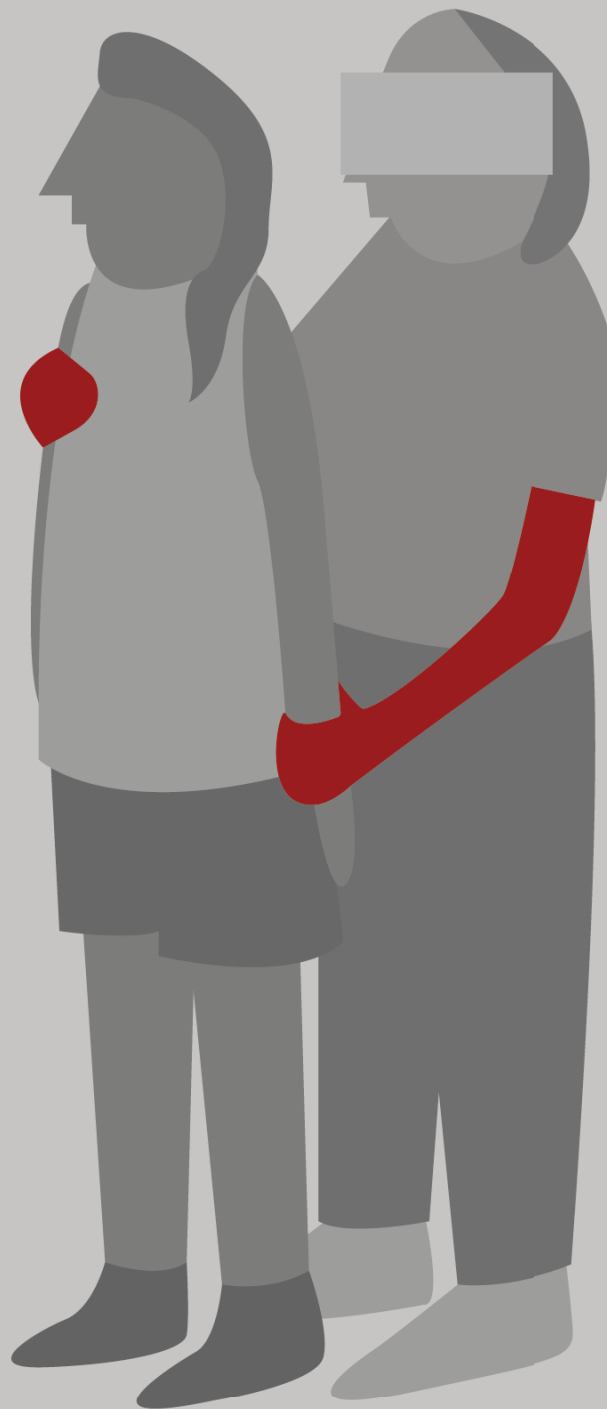
the Respondent while reducing the sentence to six months of rigorous imprisonment.

Decision

The Supreme Court in this case took note of the judgment in *State of Karnataka vs. Krishnappa* (AIR 2000 SC 1470) and reiterated similar considerations. The Court noted the gravity of sexual violence and observed that, “sexual violence apart from being a dehumanising act, is an unlawful intrusion of the right to privacy and sanctity of a female.” The Court therefore directed that it was important for the judiciary to deal sternly and severely with cases of sexual violence against women. The Court cited their decision in *State of Punjab vs. Gurmit Singh* (1996 AIR 1393) to highlight that “a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.”

The Court noted that Section 376① of the IPC, under which the Respondent was charged, prescribed minimum imprisonment of seven years with a proviso vesting discretion in the court to impose a lesser sentence for “adequate and sufficient reasons to be mentioned in the judgment”. The Court also noted that the trial court had already considered several factors relating to the accused, including his socioeconomic status, intoxicated state, and

his dependents and awarded a sentence of two years of imprisonment instead of the statutory minimum of seven years. The Supreme Court accordingly held that the High Court was wrong in reducing the sentence of the Respondent further while reiterating the factors already considered by the trial court, and set aside the order of the High Court.



Sudhanshu Sekhar Sahoo vs. State of Orissa

AIR 2003 SC 2136,
(2002) 10 SCC 743

2002

Bodily Integrity

The Court held that sexual violence was a dehumanising act and it was an unlawful intrusion into the right to privacy and sanctity of a woman.

**Constitutional
Provision(s)**

**No Specific Constitutional
Provision Referenced**

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice K.G. Balakrishnan on behalf of
Justice Y.K. Sabharwal and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“...sexual violence is a dehumanising act and it is an unlawful encroachment into the right to privacy and sanctity of woman. It is in the interest of the society that serious crimes like rape should be effectively investigated.”

Case Brief

In this case, the Supreme Court was approached in appeal against a judgment of the High Court of Orissa, which upheld an order of the sessions court holding the Appellant responsible for rape and wrongful confinement. In this decision, the Court reaffirmed precedent holding that the testimony of the victim in a rape case can suffice as the sole basis of conviction if it inspires confidence in the mind of the court.

The Court while reiterating the seriousness of such offences noted precedent observing that rape and sexual violence are an unlawful encroachment into the right to privacy and sanctity of a woman, thereby implying that sexual autonomy, consent and bodily integrity are linked to privacy. However, the Court held that even though the victim had no discernible motive to falsely implicate the Appellant, because there were various gaps in her testimony, the broad probabilities of the case indicated that the Appellant deserved the benefit of the doubt. The Supreme Court accordingly set aside the orders of the sessions court and the High Court.

Case Summary

Facts

This case was an appeal preferred against a judgment of the High Court of Orissa, which upheld the sessions court's conviction of the appellant under Section 376 and Section 342 of the Indian Penal Code, 1860 ("IPC").

According to the prosecution's case, the Appellant, a District Malaria Officer, made the prosecutrix (a supervisor with the Integrated Child Development Project) come to his house under the false pretense of her having to meet the District Social Welfare Officer. She was made to get into a jeep and driven to the Appellant's house, where she was forced to have sexual intercourse with the Appellant, after which she became unconscious. She woke up in a disheveled state. After returning to her home, she eventually filed a complaint with the police, following which she was sent for a medical examination.

The Appellant admitted to having the prosecutrix in his house, but denied the act of rape completely. The sessions and High Court believed that the victim had no motive to file a false case, and since she was the prosecutrix in a rape case, her evidence must be given due weight. After weighing other evidence, the sessions court convicted the Appellant under Section 376 and 342 of the IPC, following which an appeal filed by the Appellant before the High Court of Orissa was dismissed upholding the decision of the sessions court. Thereafter, the Appellant preferred a criminal appeal before the Supreme Court.

Issue

Whether a conviction of rape could be secured, based solely on the victim's testimony.

Arguments

The counsel for the Appellant argued that in the absence of any medical evidence the prosecution's story was highly improbable. The counsel for the Respondent-State contended that the evidence of the prosecutrix was accepted by both the sessions and the High Court and was sufficient to uphold the conviction of the Appellant, especially since in rape cases the sole testimony of the victim was sufficient to enter a conviction.

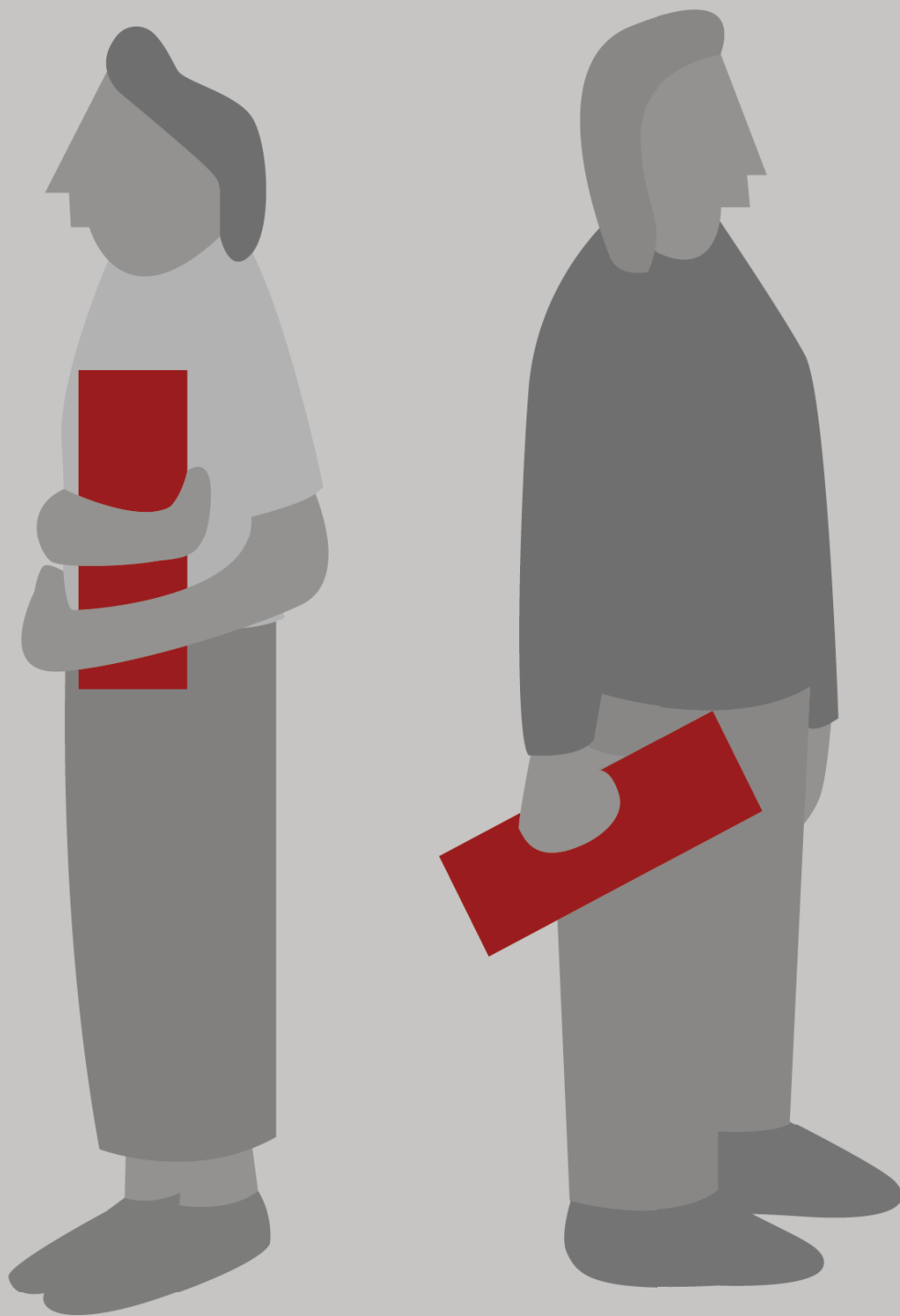
Decision

The Supreme Court, in arriving at their decision, noted that contrary to the victim's assertion that there were nail and bite marks on her person to prove force, and that her clothing had blood and semen stains, the sole medical certificate did not show such marks, and the clothes produced before the police had no such stains. The Court also remarked that there was no rational reason for an educated, unmarried woman like her to undertake a nocturnal journey with several men.

While the Court commented that the evidence of the victim in a rape case must be given due weight and that "sexual violence is a dehumanising act and it is an unlawful encroachment into the right to privacy and sanctity of woman", it also said that it would be important to ensure fairness to both sides and consider the accused as well as the victim. Accordingly, it evaluated whether conviction in a rape

case could be made on the sole basis of the victim's testimony. For this, the Court looked at judgments like *Balwant Singh vs. State of Punjab and Ors.* ((1987) 2 SCC 27), *Rafiq vs. State of UP* ((1980) 4 SCC 262), *Krishan Lal vs. State of Haryana* ((1980) 3 SCC 159) and *State of Maharashtra vs. Chandraprakash Kewalchand Jain* ((1990) 1 SCC 550), where it was held that the victim's testimony could be the sole basis for conviction and that common sense could not be subverted in favour of 'hyper technicalities' like 'judicial probability' and the need for corroboration, which are otherwise not required under the Indian Evidence Act, 1872.

The Court concluded that the legal position was that conviction could be based solely on the evidence of the victim if it inspired confidence in the mind of the court. However in the present case it noted "the evidence of the prosecution (should) be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material." In this light, the Court held that "on a consideration of the broad probabilities of the case, we feel that various factors cast a serious doubt about the genuineness of the case". One of the doubts which affected the Court's decision was that the victim had claimed to be a virgin but a medical examination showed this was not the case and she was "habituated" to sex. The Court therefore concluded that the lower courts had not sufficiently considered all the inconsistencies in the victim's statements and conduct. Accordingly, it gave the Appellant the benefit of the doubt and allowed the appeal.



Sharda vs. Dharmpal

(2003) 4 SCC 493,
AIR 2003 SC 3450

Bodily Integrity

Autonomy

Dignity

2003

The Court held that given the right to seek a divorce, it may be necessary to curtail the right to privacy in an attempt to balance competing rights by ordering medical tests to be conducted.

**Constitutional
Provision(s)**

Articles 14, 20, 21, 47 and 227

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

3

1 opinion by

Justice S.B. Sinha on behalf of

Chief Justice V.N. Khare,

Justice A.R. Lakshmanan, and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“ In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia...etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouses seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase “personal liberty” this right has been read into Article 21, it cannot be treated as [an] absolute right.”

Case Brief

In this appeal, the Supreme Court considered the question of whether a court could direct a person to undergo a medical examination during the course of matrimonial proceedings and if such a direction would be violative of the right to privacy. The context for the judgment was an appeal filed by the Appellant-wife challenging an order of the High Court of Rajasthan, which had directed her to undergo a medical examination in order to determine her soundness of mind. The question arose after the Respondent-husband filed an application seeking a decree of divorce.

The Supreme Court upheld the order of the High Court and noted the relevance of ascertaining the medical condition of a spouse by way of a medical examination after having cited leading Indian and American jurisprudence on this subject. The Court observed that there is neither any specific empowering provision which entitles the court to give such directions, nor do any provisions preclude it. However, under Section 151 of the Code of Civil Procedure, 1908 (“CPC”), a civil court has inherent powers to pass all orders necessary for ascertaining the truth and doing complete justice to the parties to the suit.

Further, the Court studied the evolution of the right to privacy in India and noted that it was not an absolute right, and where there are competing interests, such as in this case, the Court would have to balance them. In this case the conflicting rights were the right to seek divorce on grounds of unsoundness of mind of one party, which may require medical examination and the right to privacy of the other party. In the interest of balancing the rights, the Court held that the medical examination could be ordered only if there was a strong prima facie case and sufficient material in favor of it, and should the person refuse to submit to a medical examination, then the court would be entitled to only draw an adverse inference.

Case Summary

Facts

The Respondent-husband had filed an application for divorce against the Appellant-

wife under Section 12①(b) and Section 13① (iii) of the Hindu Marriage Act, 1955 (“HMA”) before a sessions judge. In addition to this, the Respondent filed an application seeking direction for medical examination of the

Appellant to determine whether she was of unsound mind, which was allowed. Aggrieved by this, the Appellant filed a revision petition before the High Court of Rajasthan, which was dismissed. The Appellant appealed against the decision of the High Court before the Supreme Court.

Issues

- A. Whether a matrimonial court has the power to direct a party to undergo a medical examination; and
- B. Whether passing of such an order would violate the Article 21 rights of the party against whom such an order is sought to be enforced.

Arguments

The Appellant contended that the High Court's order was violative of her right to 'personal liberty' guaranteed under Article 21. She argued that in the absence of a specific empowering provision, a matrimonial court could not subject a party to undergo medical examination against their volition. In case the party did not undergo such medical examination, then the court could merely draw an adverse inference.

The Respondent referred to Section 5, Section 12① and Section 13② of the HMA to submit that a matrimonial court was required to arrive at a finding in order to determine whether the Appellant was suffering from unsoundness of mind, mental disorder or insanity, because the state of mind of a party to the marriage may render the marriage voidable. Moreover, the Respondent submitted that a medical examination aided by scientific data

would not infringe the right to personal liberty under Article 21, and the court may consider taking an expert's opinion to satisfy itself of the existence of a condition for grant of a decree for divorce.

Decision

The Supreme Court emphasised the relevance of medical examination in granting a decree for divorce. It noted that a decree of divorce under Section 13②(iii) of HMA could be granted if it is established that unsoundness of mind is incurable, and the disease must be of such nature that the other spouse cannot be reasonably expected to live with them. The Court noted that the HMA, and all other acts in this field, do not contain any provision to compel a party to matrimonial proceedings to be subjected to medical examination; however, this did not preclude a court from issuing such an order.

The Court cited leading Indian and English jurisprudence on this matter including cases such as *Goutam Kundu vs. State of West Bengal* ((1993) 3 SCC 418), which held that a court could not compel a person against their wish to undergo medical examination and *B.R.B. vs. B.* ((1968) 2 All. E.R. 1023), which held that a High Court judge has the power to order a blood test if it was in the interest of the child, and the court should not hesitate in making use of advanced medical methods to ascertain the truth. The Court noted that the "*primary duty of a Court is to see that truth is arrived at*", and that though it may not have any specific provisions in the CPC and the Evidence Act, 1872, it had inherent power in terms of Section 151 of the CPC to pass all orders for doing complete justice to the parties to the suit. It held that a matrimonial court could direct a party to undergo

medical examination.

Further, the Court observed the evolution of the right to privacy in India. The Court analysed seminal cases on the right to privacy such as *M.P. Sharma & Ors. vs. Satish Chandra* (1954 SCR 1077) and *Kharak Singh vs. State of UP & Ors.* (1964 SCR ① 332), which recognised that the Indian Constitution lacked a right to privacy, analogous to the American Fourth Amendment; *R. Rajagopal vs. State of Tamil Nadu* ((1994) 6 SCC 632) and *People's Union of Civil Liberties vs. Union of India* (AIR 1995 SC 264) which read right to privacy within Article 21 by giving the phrase 'personal liberty' a broad interpretation; *Govind vs. State of Madhya Pradesh & Anr.* ((1975) 3 SCR 946) which held that right to privacy was not absolute and was subject to restrictions on the basis of "compelling public interest"; and *Mr. 'X' vs. Hospital 'Z'* ((1998) 8 SCC 296) which held that in the event of conflict between fundamental rights of two parties, the right which advances public morality would prevail.

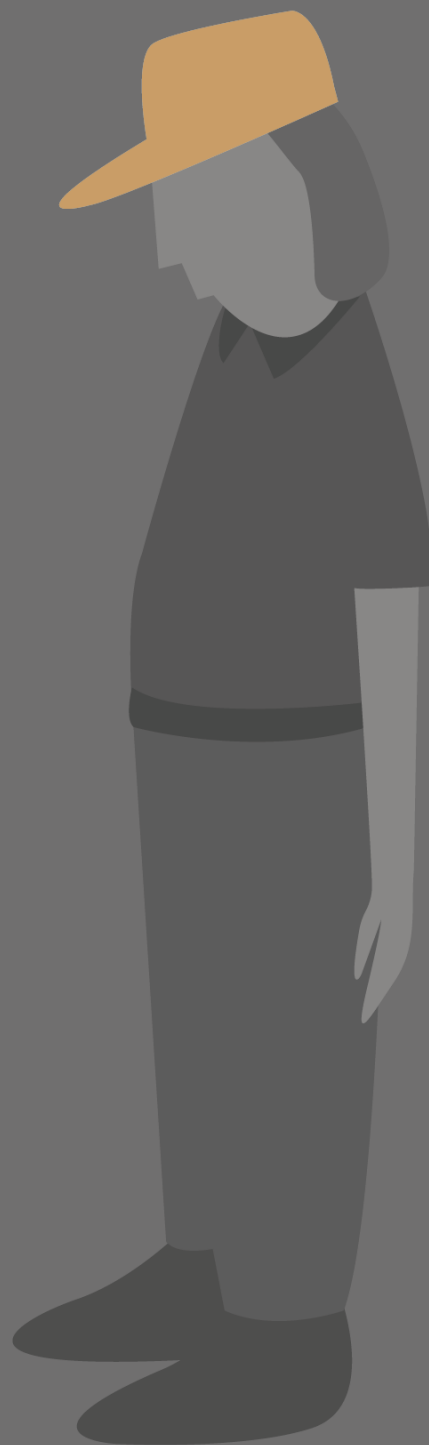
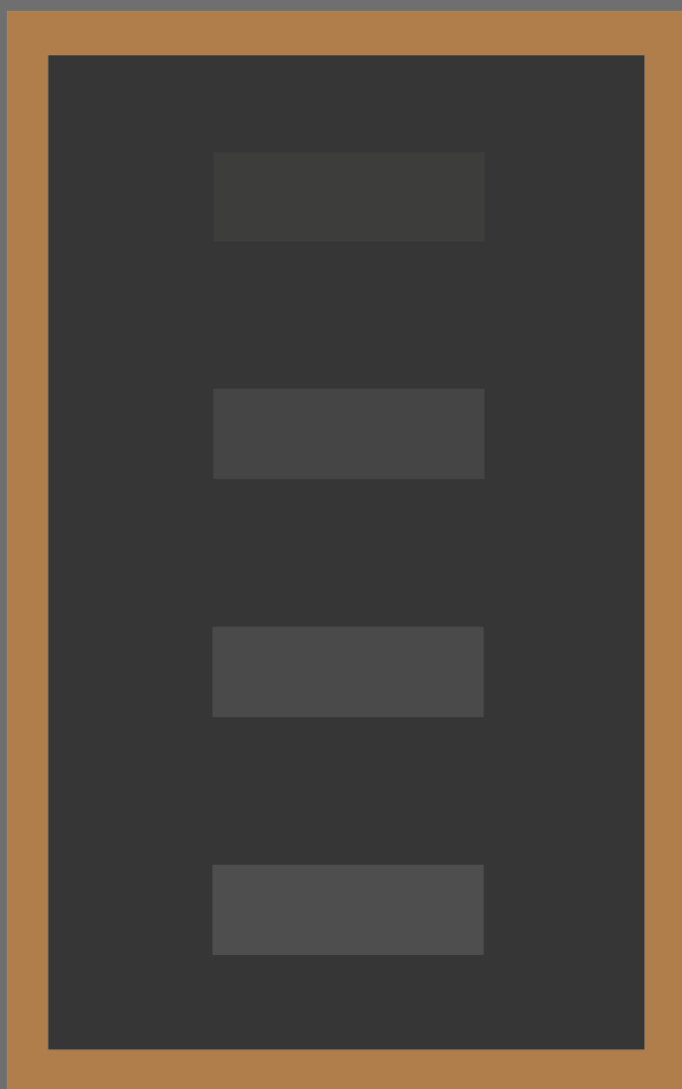
Having reviewed these cases, the Court also cited various Indian laws such as the Motor Vehicles Act (Sections 185, 202, 203, 20); Code of Criminal Procedure (Sections 53 and 54); Identification of Prisoners Act, 1920 (Section 3) and Indian Penal Code (Sections 269 and 270) that would allow the accused to be subjected to medical tests, and suggested that should these laws be constitutionally challenged, they would be upheld by the Supreme Court.

The Court also cited several international precedents allowing medical tests, such as the English Court of Appeal's decision in *R (on the application of S) vs. Chief Constable of South Yorkshire*, ((2003) 1 All ER 148), which upheld a legislation that compelled the preser-

vation of biometrics despite Articles 8 (Right to respect for private and family life) and 14 (Prohibition of discrimination) of the Human Rights Act, 1998. The Court noted that US state and federal laws allow medical records to be introduced in evidence while determining a child's custody dispute or dissolution of marriage proceedings. Moreover, though US Courts recognize the importance of confidentiality of such information, it has held that such privilege, if assigned while ascertaining the mental health and parental fitness, would seriously impact the child custody or dissolution of marriage proceedings.

The Court referred to *Zuniga vs. Pierce*, (714 F.2d 632) and *Laznovsky vs. Laznovsky* (74.5 A.2d 1054), which discussed the tripartite test used for balancing interests of multiple parties in a piece of evidence, used by many jurisdictions. The test that a "legitimate need" must be present for the evidence to exist, its relevance and materiality to the issue must be shown, and the party seeking the evidence must demonstrate that the information they are seeking access to "cannot be secured from any less intrusive source".

The Court noted that given the right to seek a divorce, it may be necessary to curtail the right to privacy in an attempt to balance competing rights. However, a court should exercise such power only if the applicant has a strong *prima facie* case. Moreover, in case a person refused to submit themselves to medical examination, then the court would be entitled to only draw an adverse inference. In view of the above, the Court noted that the right to privacy was not absolute, and a medical examination could be ordered of the Appellant.



Distt. Registrar & Collector, Hyderabad & Anr vs. Canara Bank Etc.

(2005) 1 SaCC
496, AIR 2005 SC
186

2004

Surveillance, Search and Seizure

The Supreme Court discussed parameters for reasonable search and seizure procedures to ensure that the fundamental right to privacy is not violated. It held that private documents, even if held by a public bank on behalf of a customer, continue to remain confidential as the right to privacy deals with persons and not places.

Constitutional Provision(s)

Articles 14, 19, and 21

Case Type

Special Leave Petition

Case Status

Not Overruled

Bench Strength

2

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Chief Justice R.C. Lahoti on behalf of
Justice A. Bhan and himself.

“Once we have accepted in Govind and in latter cases that the right to privacy deals with ‘persons and not places’, the documents or copies of documents of the customer which are in Bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer’s house and have been voluntarily sent to a Bank. If that be the correct view of the law, we cannot accept the line of Miller in which the Court proceeded on the basis that the right to privacy is referable to the right of ‘property’ theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the Bank tend, to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any unconstitutionality.”

Case Brief

Through this case, the Supreme Court discussed parameters for reasonable search and seizure procedures to ensure that the fundamental right to privacy was not violated. This appeal was filed by the District Registrar and Collector, Hyderabad, the Appellant, against an order of the High Court of Andhra Pradesh, which had declared Section 73 of the Indian Stamp Act, 1899 (“the ISA”) as amended by Andhra Pradesh Act No. 17 of 1986 *ultra vires* of Article 14 of the Constitution, and inconsistent with the other stamp laws of the State. The impugned provision empowered the stamp authorities to enter into any premises, inspect and seize agreements or documents, and compel persons to cede all documents in their custody for inspection, on the suspicion that some of them might be improperly stamped. Further, it allowed the Collector to authorize ‘any person’ to inspect documents. Using this provision, the stamp authorities requisitioned documents lodged with certain private banks in the ordinary course of banking transactions. The banks were then required to pay stamp duty on all improperly stamped documents, and claim reimbursement from their customers. These banks challenged Section 73 as being void for unconstitutionality.

In adjudicating this question, the Court referred to Indian and American jurisprudence to trace the origin and evolution of the right to privacy. It drew parallels between the two jurisdictions and observed that persons in India and the U.S have right to privacy “*both of the house and of the person*”. In view of this, the Court noted that even when a private customer’s documents were no longer at the individual’s house, but had been voluntarily handed over to the Bank, the documents continued to remain confidential. The Court further held that unless there was a probable or reasonable cause or basis, the State could not inspect or seize the documents without any prior reliable information supporting the inspection.

The Court also observed that without laying down guidelines for delegating power, and recording the availability of grounds on the basis of which the power may be exercised, the entire exercise would be unreasonable, and may prove to be disproportionate to the purpose sought to be achieved. The Court therefore upheld the order of the High Court striking down the amended Section 73 as *ultra vires* the Constitution.

Case Summary

Facts

The issue in this case arose when certain documents executed between private parties and retained in bank custody in the ordinary course of loan transactions were inspected by the stamp authorities. Following this, the banks were served with a request to remit the amount of deficit duty on the documents inspected and to recover the duty from the parties concerned. The grievance of private persons was that the documents in their possession were sought to be inspected, impounded and levied with duty though they were not tendered in evidence nor produced before any public office.

The Respondents were aggrieved by the provisions of Section 73 of the ISA under which the stamp authorities were empowered to inspect documents held by public institutions to examine whether the appropriate duty had been paid. Banks were also compelled under the law to pay the deficit stamp duty on the documents, even if they themselves were not party to the transactions recorded in the documents. They accordingly filed an application before the High Court of Andhra Pradesh which struck down the impugned provisions, following which the Appellant, the District Registrar and Collector and Assistant Registrar, Registration and Stamps Department, Hyderabad, filed the present appeal.

Issues

Whether the Appellant could lawfully delegate his power to authorize any person to carry out an inspection or seizure under the impugned provisions;

- B. Whether the Appellant could have unrestricted access to inspect and seize or make roving inquiries into all bank records; and
- C. Whether a roving inspection of all documents held with a bank would violate the right to privacy of the bank customers and thereby violate Article 21 of the Constitution.

Arguments

The Appellants submitted that the amendments made by the State were directed towards safeguarding the revenue of the State and preventing stamp duty evasion, and therefore constituted a reasonable restriction on fundamental rights.

The Respondents submitted that Section 73 interfered with the personal liberty of citizens as it allowed an intrusion into their privacy and property. It allowed for authorities to enter the home of a person or even another place, where they may have kept documents or instruments, based on a written permission of the Collector. It was argued that the provision was unconstitutional for being arbitrary and violative of the right to privacy. It was also argued that the provision allowed for excessive delegation and was therefore void.

Decision

The Supreme Court noted that the ISA was a fiscal legislation, and therefore had to be construed strictly as it imposed a burden upon the public. It further noted that courts had consistently held that the “(p)ower to *impound a document and to recover duty with or without penalty thereon has to be construed strictly and would be sustained only when falling within the four corners and letter of the law.*”

The Court upheld the decision of the Andhra Pradesh High Court, declaring the impugned provision unconstitutional on four grounds. First, the provision was inconsistent with the other provisions of the State’s stamp laws; second, it was violative of the principles of natural justice; third, it was arbitrary and unreasonable and hence violative of Article 14 of the Constitution; and fourth, it could be considered an excessive delegation of statutory powers, as it did not provide any guidelines for the exercise of power by the authorized persons.

The Court examined the impugned provision and noted several infirmities. The impugned provision allowed the Collector to authorize ‘any person’ to inspect, to take notes or extracts from the papers in the public office, which in the Court’s analysis amounted to excessive delegation as there were no guidelines in the ISA to control the exercise of power. The provision also empowered ‘any person’ authorized in writing by the Collector to have access to private documents without regard to how the documents were sought to be used. The Court noted that if the documents were sought to be produced in evidence or

otherwise, punishments had already been prescribed for failure to appropriately stamp the document and the interests of the revenue department were accordingly safeguarded. Further, the provision allowed facts relating to a customer’s person to potentially reach non-governmental persons, and was an unreasonable encroachment into the customer’s right to privacy.

In reaching this conclusion, the Court discussed, in some detail, the privacy rights of customers vis-à-vis their banking transactions. The Court reiterated the accepted position of Indian and American jurisprudence that the right to privacy dealt with persons and not places and stated that “*the documents or copies of documents of the customer which are in Bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer’s house and have been voluntarily sent to a Bank.*” It mentioned *Seyman’s* case decided in 1603 (77 Eng. Rep. 194), which laid down that ‘Every man’s house is his castle’ and *Entick vs. Carrington* ((1765) 19 HST 1029) which held that the right of privacy protected trespass against property, as well as the Fourth Amendment of the US Constitution, the Canadian Charter of Rights and Freedoms, and the New Zealand Bill of Rights, all of which had provisions against ‘unreasonable search and seizure’.

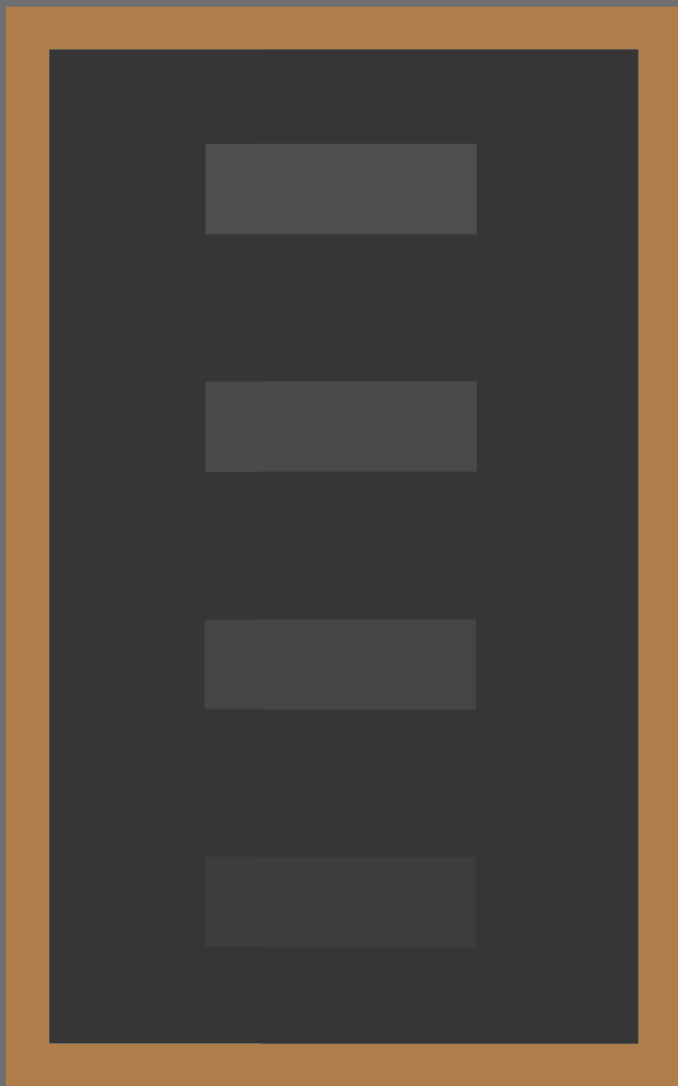
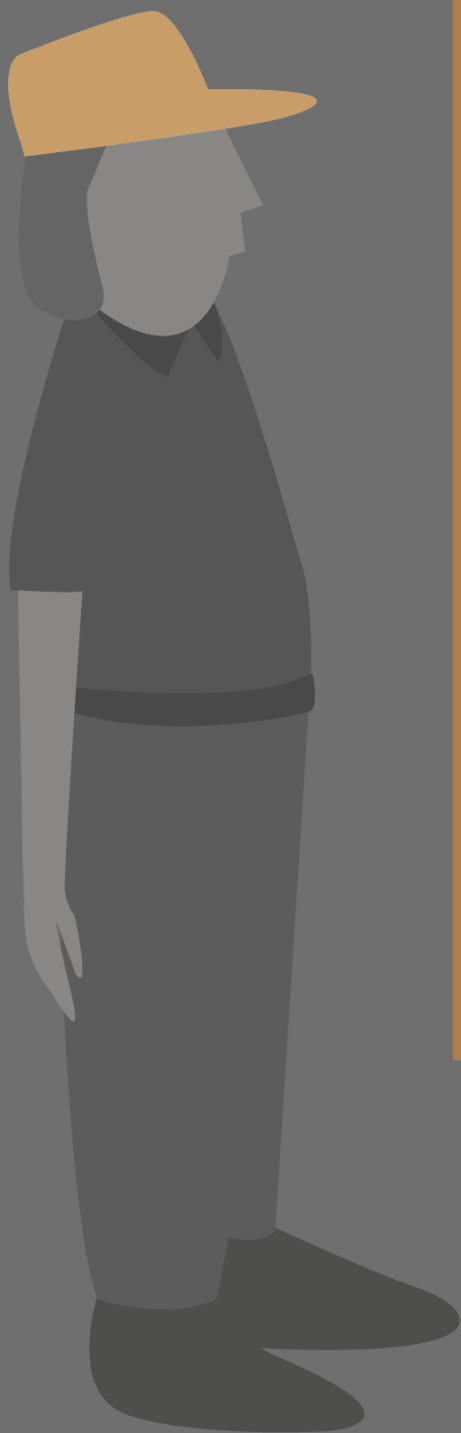
The Court noted that the Indian Constitution “*does not contain a specific provision either as to ‘privacy’ or even as to ‘unreasonable’ search and seizure, but the right to privacy has [...] been spelt out by our Supreme Court from the provisions of Article 19①(a) dealing with freedom of speech and expression,*

Article 19①(d) dealing with right to freedom of movement and from Article 21, which deals with right to life and liberty". The Court therefore suggested that to form a reasonable restriction, such a restriction would need to have a reasonable basis and reasonable materials to support it.

The Court further noted the decision in *Smt. Maneka Gandhi vs. Union of India & Anr.*, ((1978) 1 SCC 248) which discussed that laws restricting rights under Article 21 "*must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21.*"

The Court further confirmed that "*unless there is some probable or reasonable cause or reasonable basis or material before the Collector*" for arriving at an opinion that the documents in possession of the Bank may prove or lead to the discovery of any fraud, the search conducted could not be valid. The Court noted with approval the questions raised by Professor Laurence Tribe, such as whether the risk of intrusion of privacy would have to be run by every ordinary citizen who chose to use the telephone or enter into banking transactions.

The Court remarked that the impugned provision permitted inspection of documents held in private custody, and since Section 73 did not contain any safeguards to check the exercise of such power on the basis of reasonable or probable cause, it violated the right to privacy both of the person and of the home. The Court emphasised the need to provide procedural safeguards to ensure that the power of search and seizure of the nature contemplated by Section 73 was not exercised arbitrarily.



P. R. Metrani vs. Commissioner of Income Tax, Bangalore

(2007) 1 SCC 789,
AIR 2007 SC 386

2006

Surveillance, Search and Seizure

The Court held that search and seizure constituted a serious breach of privacy, therefore all provisions with regard to it must be construed strictly and not liberally, and the procedure established by law must be followed strictly as well.

**Constitutional
Provision(s)**

**No Specific Constitutional
Provision Referenced**

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A. Bhan on behalf of
Justice D. Bhandari and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Search and seizure is a serious invasion in the privacy of the person. Section 132 which is a complete code by itself provides that the money, bullion or the books of account etc. should not be retained unnecessarily and that the provisional assessment made under Section 132 for the purpose of retention of the books is passed within a specified time in accordance with law. It provides that the books of account, money and bullion which are not required are not retained unnecessarily thereby causing harassment to the person concerned.”

Case Brief

In this appeal, the Supreme Court analysed Section 132 of the Income Tax Act, 1961 (“the IT Act”), which was intended to prevent tax evasion by laying down schemes for search and seizure, and assessment of undisclosed incomes. In particular, it examined the scope of sub-Section 4A of Section 132, which enabled an assessing officer to raise a rebuttable presumption that confiscated materials belonged to a particular person. The appeal arose in this case on the ground that the Income Tax officer, after confiscating goods and documents from the Appellant’s house, intended to use them for the purposes of computing regular tax assessment of the Appellant, besides assessing them as per the provisions of Section 132. In doing so, the officer interpreted Section 132(4A) broadly to include regular assessment under Section 143, as well as under Section 132.

The Court, in its determination, observed that the search and seizure enabled by this provision was “a serious invasion in the privacy of the person” and therefore Section 132 would have to be construed in a strict sense. The Court deconstructed the provisions of Section 132 to understand its objective, and the procedures, and the nuances involved in sub-Section 4A. It noted that the presumption under sub-Section 4A was inserted as a procedural safeguard, and hence made rebuttable; it was intended to ensure that confiscated materials were not unnecessarily retained to harass the assessee, and that the assessment order for retaining such materials was made within the time frame prescribed under Section 132.

The Court also noted that the applicability of sub-Section 4A was limited to Section 132 for the purposes of search and seizure and did not extend to framing of regular assessment under Section 143, as wherever the legislature intended to extend such presumption, it was expressly mentioned. However, the confiscated materials could be used as evidence in any other proceedings under the IT Act. In reaching this conclusion, the Court affirmed the decisions of the Allahabad High Court in *Pushkar Narain Sarraf vs. CIT* ((1990) 183 ITR 388 (All)) and the Delhi High Court in *Daya Chand vs. CIT* ((2001) 250 ITR 327). It set aside the order of the Karnataka High Court and remitted the case back to the assessing authority for framing the assessment afresh in accordance with law.

Case Summary

Facts

A search of the residential premises of the Appellant and his brother was conducted under Section 132 of the IT Act. The search brought to light certain undisclosed money, gold biscuits, gold and silver jewellery, and some important financial documents. The Income Tax officer, apart from collecting tax and penalties upon these articles as per the provisions of Section 132, also sought to use the seized goods and documents for the pur-

poses of computing their regular tax assessment (Section 143). In doing so, he relied on the presumption under Section 132(4A) that the documents and goods found during the search ‘belonged to the assessee’. The Appellant filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) held that the presumptions under Section 132(4A) of the IT Act were not confined to Section 132 only but were available for framing the regular assessment as well. The Appellant appealed before the Income Tax Appellate Tribunal, Bangalore (Tribunal).

The Tribunal relied on the judgement of the Allahabad High Court in Pushkar Narain Sarraf and set aside the order of the Commissioner (Appeals); it held that the presumption under sub-Section 4A of Section 132 was confined to the framing of the order under Section 132⑤ only, and was not available for framing the regular assessment. However, the Tribunal referred the matter to the High Court of Karnataka. The Karnataka High Court decided the matter in favour of the Revenue Authority and recorded its dissent from the view taken by the Allahabad High Court in Pushkar Narain Sarraf. Being aggrieved by the order of the Karnataka High Court, the Appellant filed an appeal before the Supreme Court.

Issue

Whether the ‘presumption’ under Section 132(4A) of the IT Act was only for the limited purpose of passing an order under Section 132⑤.

The Court analysed the legislative intent behind Section 132, and the insertion of sub-Section 4A by the Taxation Law (Amendment) Act, 1975. It noted that the latter was inserted to enable an assessing authority to raise a rebuttable presumption that the books of account, money, bullion etc. seized, belong to a particular person and the former was introduced to prevent the evasion of tax, i.e., to unearth hidden or undisclosed income or property and bring it to assessment.

While examining the scope of sub-Section 4A, the Court noted that “(s)earch and seizure under Section 132 is a serious invasion

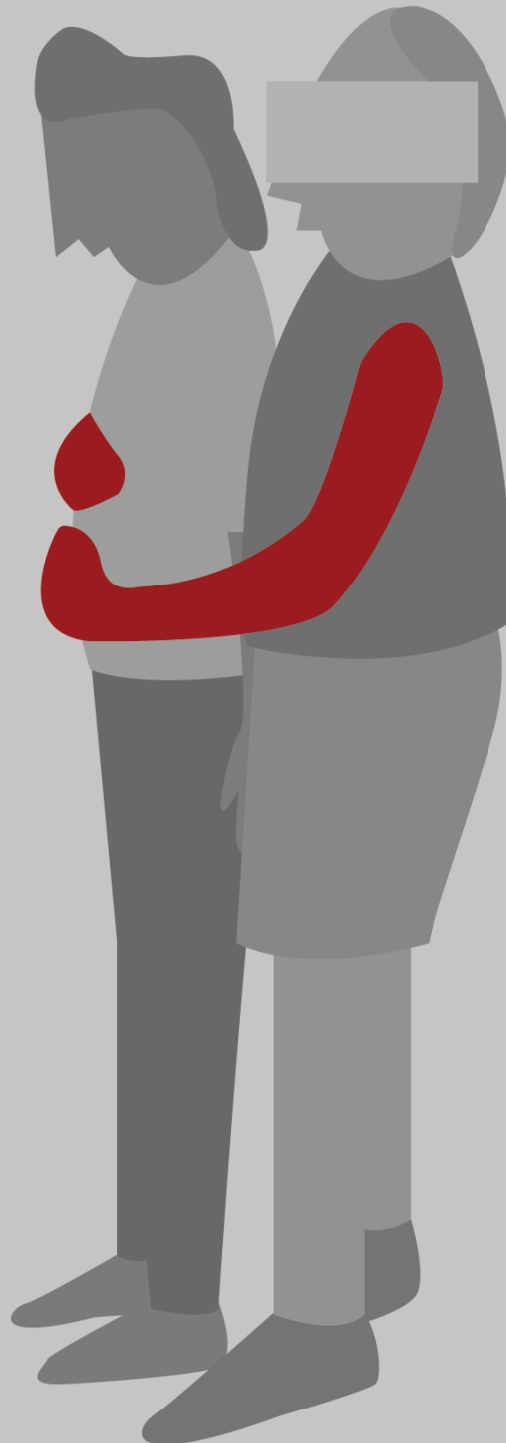
into the privacy of a citizen, therefore, it has to be construed strictly.” In order to ensure that books, money, bullion etc. were not retained unnecessarily causing harassment to the concerned person, and that the assessing authority has made the provisional assessment for retention of the aforementioned materials within a specified time frame prescribed under Section 132, the legislature provided sub-Section 4A.

The Court discussed several types of presumptions under the rule of law, and observed that the words used in sub-Section ④ are “*may be presumed*”, and therefore the presumption therein is rebuttable. Moreover, it found that the inference drawn by the Karnataka High Court which held the presumption as non-rebuttable insofar it related to the passing of an order under Section 132⑤, and rebuttable for the purpose of framing regular assessment under Section 143, was incorrect.

The Court noted that Sections 132 to 132B embody an integrated scheme for search and seizure. It deconstructed the provisions of Section 132 and observed that the “*provision exists in complete isolation of the other provisions of the Act*” and it can be considered as a “*small code in itself*” as it “*has its own procedure for the search, seizure, determination of the point in dispute, quantum to be retained and also the quantum of the tax and interest on the undisclosed income*”. In this backdrop, the Court noted that the legislature did not provide that “*the presumption available under Section 132(4A) would be available for framing the regular assessment under Section 143 as well*” because “*wherever the legislature intended to continue the presumption under Sub-section (4A) of Section 132, it has provided*

so”. Therefore, the Court concluded that the “presumption under Section 132(4A) is available only in regard to the proceedings for search and seizure and for the purpose of retaining the assets under Section 132⁵ and their application under Section 132B”. However, “the materials seized can be used as a piece of evidence in any other proceedings under the Act.”

The Supreme Court reviewed the decisions of the Allahabad High Court in *Pushkar Narain Saraf*, and the Delhi High Court in *Daya Chand*, and found them to be the “correct view”. It set aside the orders of the Karnataka High Court, assessing authorities as well as the Commissioner (Appeals), and remitted the case back to the assessing authority for framing the assessment afresh in accordance with law.



State of Madhya Pradesh vs. Babulal

AIR 2008 SC 582,
(2008) 1 SCC 234

2007

Bodily Integrity

The Court held that sexual violence was an unlawful encroachment into the right to privacy and sanctity of a woman.

**Constitutional
Provision(s)**

**No Specific Constitutional
Provision Referenced**

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice C.K. Thakker on behalf of
Justice A. Kabir and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Sexual violence apart from being a dehumanizing act is also an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and leaves behind a traumatic experience. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. The courts are, therefore, expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.”

Case Brief

This case was an appeal filed by the State against an order of the High Court of Madhya Pradesh, which reduced a seven-year sentence imposed on the accused to the period ‘already undergone’, which amounted to approximately two months. The Respondent was convicted for committing the offence of rape and sentenced to the statutory minimum seven-year imprisonment under Section 376① of the Indian Penal Code, 1860 (“IPC”) by the trial court. The Supreme Court held that the High Court’s reduction of sentence based on the considerations that the Respondent was an illiterate agriculturist from a rural area did not constitute either special or adequate reasons under

the proviso of Section 376① of the IPC and directed that the sentence be restored to seven years of rigorous imprisonment, as given by the trial court.

The Court, in its assessment of the adequacy of the sentence, referred to several principles, statutory provisions and case laws including the 84th Report of the Law Commission of India and subsequent amendments by Criminal Law (Amendment) Act, 1983. The Bench in particular, considered the proviso to Section 376①, which entitled a Judge to reduce the sentence on the basis of 'adequate and special reasons'. Further, the Court discussed the importance of giving exemplary importance to offences against women and dealing strictly with crimes involving sexual violence, as apart from such crimes being dehumanizing, they affronted a woman's privacy, dignity, and sanctity.

Case Summary

Facts

Babulal, the Respondent was an illiterate agriculturist, who criminally intimidated and raped the victim while she was washing a drum in broad daylight and threatened her with death. A case was registered against the Respondent under Sections 376 and 506 of the IPC. The trial court convicted him only for rape under Section 376① of the IPC and sentenced him to rigorous imprisonment for seven years along with a fine of INR 2500. The Respondent appealed before the High Court of Madhya Pradesh praying for leniency in his sentence. The High Court noted the Appellant's poor socio-economic status, and the fine imposed, and considered it 'just and proper' to reduce the sentence of the Respondent to the term already served i.e approximately two months. Aggrieved by this, the State preferred an appeal before the Supreme Court

Issue

Whether the High Court was justified in reducing the sentence of a rape convict without recording any special or adequate reasons, below the minimum statutory requirement of seven years under Section 376① of the IPC.

Arguments

The Appellant-State argued that the High Court had committed a serious error in law in reducing the punishment of the Respondent as Section 376① provided for minimum sentence of seven years for a rape convict, and a maximum of ten years. Moreover, the High Court did not record any 'adequate and special reasons' as per the proviso to Section 376①, and also did not consider the fact that the offence was committed in broad daylight. The Respondent argued that the High Court had considered the position of the accused before exercising discretion, and hence their order deserved no interference.

Decision

The Court reviewed the decision of the trial court and upheld its order of conviction, also confirmed by the High Court of Madhya Pradesh. The Court noted that *“if a Court of Law finds evidence of prosecutrix truthful, trustworthy and reliable, conviction can be recorded solely on the basis of her testimony and no further corroboration is necessary.”* It relied on its opinion in *Bharwada Bhoginbhai vs. State of Gujarat* (1983 SCR ③ 280), which held that *“refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury”*, and *State of Rajasthan vs. Narayan* ((1992) 3 SCC 615), which held that unless the evidence discloses that the rape victim had strong reasons to falsely implicate the accused, ordinarily the court should have no hesitation in accepting the victim’s version regarding the incident.

Further, while assessing the adequacy of sentence of the Respondent, the Court considered this issue on principle, in practice, and in light of statutory provisions. The Court noted that *“(o)nce a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction.”* The Court referred to Halsbury’s Laws of England, which reiterated that *“sentencing is indeed a difficult and complex question. Every Court must be conscious and mindful of the proportion between an offence committed and penalty imposed as also its impact on society in general and the victim of the crime in particular.”*

Further, it observed adherence to the doctrine of proportionality in prescribing sentences

according to culpability of criminal conduct, and noted that though, in principle judges agreed that sentence must be commensurate with the crime, in practice, sentences are determined on other relevant and germane considerations. This is because sentencing is a delicate task, which requires skill, talent and consideration of several factors, including the nature of offence, circumstances in which it was committed, prior criminal record of the offender, age and background with reference to education, home life, social adjustment, emotional and mental condition, prospects of his reformation and rehabilitation.

The Court stressed the need to treat offences against women with exemplary strictness and affirmed precedent holding that *“(s)exual violence apart from being a dehumanizing act is also an unlawful intrusion of the right to privacy and sanctity of a female”*. The Court relied on its opinion in *Dinesh vs. State of Rajasthan* (2006 ③ SCC 771) to reaffirm that a person convicted for the offence of rape, should be treated with a heavy hand as awarding inadequate sentences in such cases would encourage ‘potential criminals’.

On reviewing relevant statutory provisions and amendments, the Court considered the 84th Report of the Law Commission of India, where sexual offences were analysed. Consequently, Parliament amended Sections 375 and 376, IPC by the Criminal Law (Amendment) Act, 1983 (Act 43 of 1983). As a result, sub-Section ① of Section 376 prescribed a minimum sentence of rigorous imprisonment of seven years on the person convicted under Section 376①. The proviso to sub-Section ① of Section 376 provided for reducing the minimum sentence of the rape offender only on

the basis of special and adequate reasons. The Court noted in this regard that “*Recording of reasons is, therefore, sine qua non for imposing a sentence less than the minimum required by law.*” The reasons must be both ‘adequate’ and ‘special’, which could be determined only on a case-to-case basis.

The Court noted that in the instant case, the High Court committed a grave illegality in considering reasons such as the Respondent being an illiterate agriculturist from a rural area on whom a fine of INR 2,500 was imposed to be ‘special and adequate’. Moreover, it acknowledged the Appellant-State’s contention that the Judge of the High Court was in the habit of passing such orders by reducing the sentence to the period ‘already undergone’ in serious offences punishable under the IPC. The Court restored the order of the trial court in terms of conviction as sentence.



Directorate of Revenue & Anr. vs. Mohammed Nisar Hoila

(2007) 12 SCR 906,
(2008) 2 SCC 370

2007

Surveillance, Search and Seizure

The Supreme Court considered the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) relating to procedural safeguards for search, seizure and arrest of persons. The Court clarified that a hotel room cannot be considered as a public place, and a person residing in such a place is entitled to the protection of their right to privacy.

**Constitutional
Provision(s)**

Article 21

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice S.B. Sinha on behalf of
Justice H.S. Bedi and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“ ..the place which is required to be searched is not open to [the] public although situated in a public place as, for example, room of a hotel, whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission. Subject to the ordinary activities in regard to maintenance and/or house keeping of the room, the guest is entitled to maintain his privacy. The very fact that the Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones. What would be reasonable restrictions would depend upon the nature of the statute and the extent of the right sought to be protected.”

Case Brief

In this case, the Supreme Court considered the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act”) relating to procedural safeguards for search, seizure and arrest of persons. The revenue authorities (the Appellants in this case) conducted a search on the Accused while he was staying in a hotel room, and registered a case against him for trading in drugs. The trial court convicted and sentenced the Accused but the High Court reversed the order on the ground that the authorities did not comply with the mandatory requirements contemplated under Section 42 of the NDPS Act.

The Court observed that the NDPS Act had several harsh consequences contemplated in terms of punishments, and therefore, ‘due process’ under Article 21 had to be followed to ensure balance between the need for enforcement of the law on one hand, and protection of citizens’ rights on the other hand. The Court also clarified that a hotel room could not be considered as a public place, and a person residing in such a place was entitled to the protection of their right to privacy. The Court recognised that the right to be let alone formed part of the right to life and liberty under Article 21 of the Constitution, and that the *“(r)ight to privacy deals with persons and not places”*.

The Court observed that it was their duty to oversee that the right to privacy was not unnecessarily infringed by the authorities empowered to give orders for search and seizure. Further, the Court noted that the documentary evidence produced by the Appellant against the accused was illegible and therefore not admissible. The Court therefore upheld the decision of the High Court noting that the procedural safeguards mentioned in the NDPS Act had to be strictly complied with in order to establish the guilt of the accused.

Case Summary

Facts

The Directorate of Revenue, the Appellant, received information that the Respondent was staying at a hotel in Mumbai and was in possession of a fax copy of a consignment

note under which Mandrex tablets were being transported from Delhi to Mumbai. This information was allegedly passed on to a Senior Intelligence Officer. The officers visited the hotel room of the Respondent, and asked two of the hotel employees to be witnesses. The Respondent was allegedly given the option to

get himself searched in the presence of a Gazetted Officer or a Magistrate, of which he opted for the former. On conducting the search of the Respondent, a sum of INR 4,25,000/- in cash and a fax copy showing the consignment of medicine was found in his room. The officers retained a photocopy of this fax message.

The Respondent was convicted by the trial court under Sections 8(c), 22 and 29 of the NDPS Act and was sentenced to ten years in prison, along with a fine of INR 1,00,000. The Respondent appealed before the High Court of Maharashtra, which struck down the order of the trial court on the ground that the statutory requirement of reducing the information received to writing, prior to conducting the search was not complied with by the officers, as contemplated under Section 42 of the NDPS Act. Dissatisfied with this order, the Appellant preferred an appeal before the Supreme Court.

Issue

Whether the High Court's decision to overturn the conviction of the Accused was valid on the grounds that Section 42① of the NDPS Act was not complied with.

Arguments

The Appellant argued that a hotel was a public place within the meaning of the Section 43 of the NDPS Act and therefore it was not necessary to comply with the provisions of Section 42 of the NDPS Act.

The Respondent supported the order passed by the High Court holding the Appellant accountable for not following the statuto-

ry requirements under section 42 of the NDPS Act.

Decision

The Court observed that the High Court had relied on the Supreme Court's judgement in *State of Punjab vs. Balbir Singh* (1994 SCC ③ 299) and several other authorities, and held that the provisions of Section 42 were mandatory in nature. Noting that the NDPS Act was a penal statute which invaded the rights of the accused, the Court discussed the power of search and seizure under the NDPS Act, and referred to its opinion in *Balbir Singh*, where it was held that the provisions of Code of Criminal Procedure, 1974, (CrPC) namely Section 100 and Section 165 would be applicable to any arrest and search under Section 41, Section 42, Section 43 and Section 51 of the NDPS Act.

The Court further noted that the NDPS Act had certain embargoes and safeguards embedded in Sections 41 and 42 to ensure that innocent people were not harassed, such as permitting only competent Magistrates and officers of high rank to issue warrant for arrest or search, where they had 'reason to believe' that an offence had been committed and after reducing the information received, if any, in writing. The Court observed that power to make searches, seizures and arrests was founded upon and subject to satisfaction of the officer. Such belief may be based on personal information or secret information acquired by an informant. Given that the provisions of the NDPS Act may have harsh consequences for the accused, 'due process' as contemplated under Article 21 of the Constitution must be strictly followed.

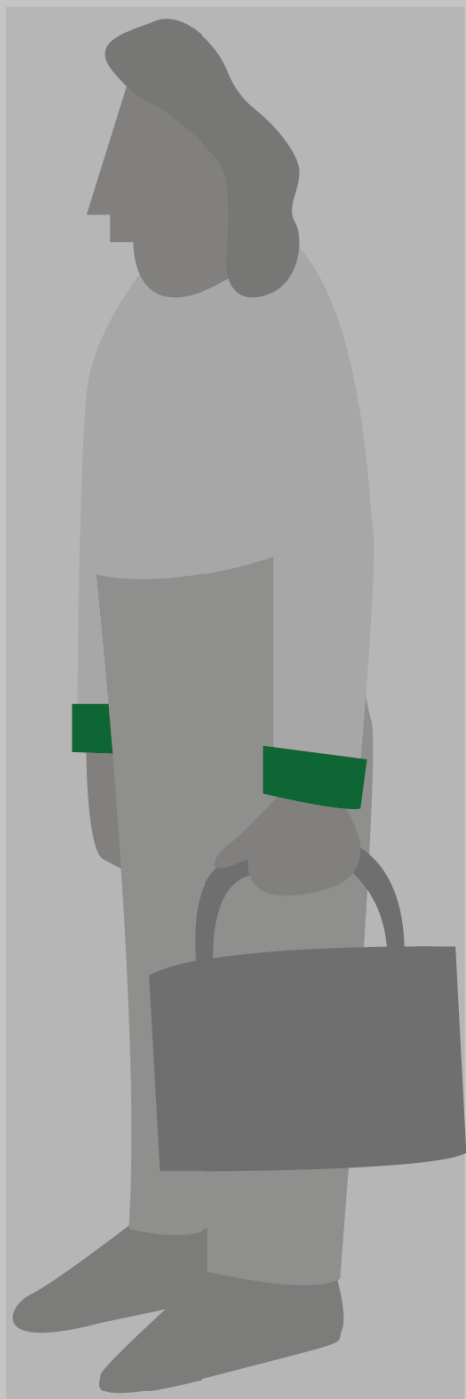
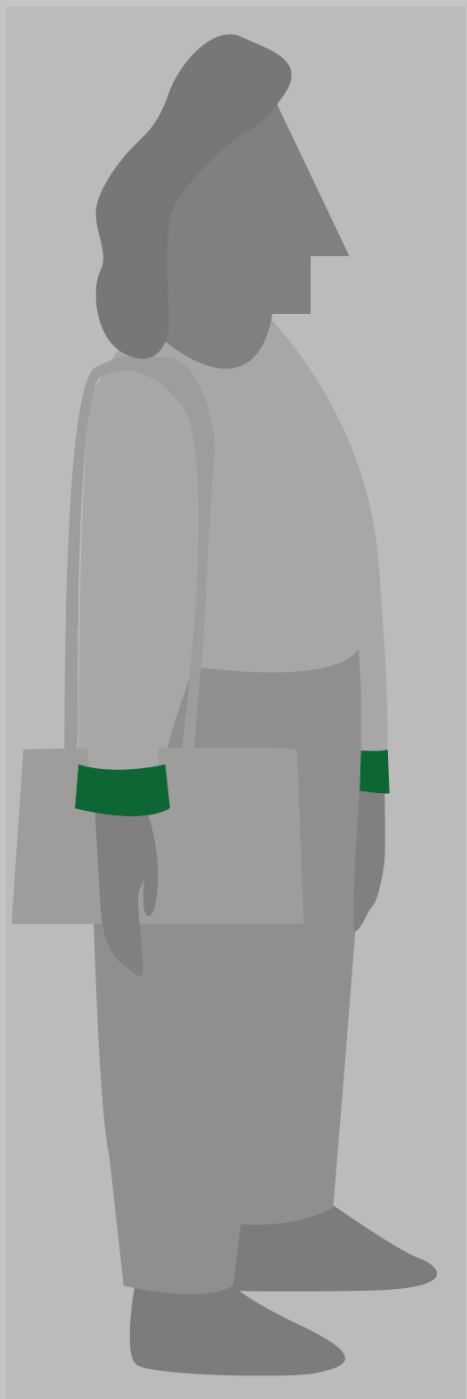
Further, the Court analysed the possibility of bypassing the rigours of Section 42 in cases contemplated under Section 43, and noted that the subjective satisfaction on the part of the authority under Section 42 need not be complied with, where the purpose of making the search and seizure would be defeated if strict compliance of the Act is insisted upon, or when the search is required to be undertaken in a public space accessible to general public. However, where the authorities had prior information and sufficient time to acquire permission from their superiors and reduce the information in writing, and the place to be searched was not accessible to the public this exception would not be available.

The Court clarified that a person in the hotel room was “*entitled to his right of privacy. Nobody, even the staff of the hotel, can walk into his room without his permission*”. Further, it noted that “*An authority cannot be given an untrammelled power to infringe the right of privacy of any person. Even if a statute confers such power upon an authority to make search and seizure of a person at all hours and at all places, the same may be held to be ultra vires unless the restrictions imposed are reasonable ones*”, where reasonable restrictions would vary depending on the nature of the statute and the extent of the right sought to be protected.

This Court reaffirmed the importance of recording of reasons before search was conducted as required by Section 42, as this would be the earliest version available to courts as well as to the accused. The Court also referred to Chapter IV of the NDPS Act, which provided for “*certain checks on exercise of the powers*

of the concerned authority which otherwise would have been arbitrarily or indiscriminately exercised”. The Court observed that the “*statute mandates that the prosecution must prove compliance of the said provisions. If no evidence is led by the prosecution, the Court will be entitled to draw the presumption that the procedure had not been complied with.*”

Moreover, it noted that in this case, “*the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing*” and the fax produced by the Appellant was illegible, and therefore its contents were not proved per Sections 66 and 67 of the NDPS Act. To comply with those sections, for evidence to be admissible, the contents of the documents produced should be decipherable, and have to be proved. Based on the factors above, the Court did not find any infirmity in the decision of the High Court and dismissed the appeal.



Anuj Garg & Ors. vs. Hotel Association of India & Ors.

(2008) 3 SCC 1,
AIR 2008 SC 663

2007

Autonomy

This case deals with issues relating to legislative provisions furthering protective discrimination and gender equality under Articles 14 and 15 of the Constitution. The Court employed the strict scrutiny standard, and the doctrine of proportionality and incompatibility to review the impugned Act, and struck down the provision for perpetrating sexual differences and restricting a citizen's right to be considered for employment, which is a facet of the right to livelihood.

**Constitutional
Provision(s)**

Articles 14, 15, 19 and 21

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice S.B. Sinha on behalf of
Justice H.S. Bedi and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship. At the same time we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without state protection as by the loss of freedom because of [the] impugned Act. The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by [the] state for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.”

Case Brief

This case deals with issues relating to legislative provisions furthering protective discrimination, and gender equality under Articles 14 and 15 of the Constitution. The appeal under discussion challenged the constitutional validity of Section 30 of the Punjab Excise Act, 1914 (“the Act”) which prohibited the employment of any man under the age of twenty-five years or any woman in any part of an establishment in which liquor or any other intoxicating drugs were consumed by the public. The Court *prima facie* observed that the challenged provision was a pre-constitution law, and had to be reviewed in view of the changed societal conditions and against the touchstones of Articles 14 and 15 of the Constitution. The Court employed the strict scrutiny standard, and the doctrine of proportionality and incompatibility to review the Act and struck down the provision as it perpetrated sexual differences and restricted a citizen’s right to be considered for employment, which was a facet of the right to livelihood.

In reaching this conclusion, the Court discussed the individual rights of women in international jurisprudence to analyse and adopt relevant principles. It elaborated on the interplay of the doctrines of self-determination and an individual interest, as well as the fundamental tension between autonomy and security. It noted that in feminist thought, security and protection are as much a part of gender justice discourse as the right to self-determination. However, the State must not translate protection into censorship, and held that legislations which impinged on individual autonomy and privacy by giving expression to oppressive cultural norms, must attract judicial scrutiny

Case Summary

Facts

The Respondent, the Hotel Association of India, along with four others filed a writ petition before the Delhi High Court questioning the validity of the Section 30 of the Act which prohibited the employment of ‘any woman’ or ‘any man under the age of twenty five years’ in any part of premises where liquor or intoxicating drugs were consumed by the

public. The members associated with the Respondent carried on business in hotels, which served liquor not only in the bar but also in the restaurant and as part of the room service.

The High Court declared Section 30 of the Act to be *ultra vires* Articles 19①(g), 14 and 15 of the Constitution insofar as it prohibited employment of any woman in any part of such premises, in which liquor or intoxicating

drugs were consumed by the public. The Respondent filed an appeal to question that part of the order whereby restrictions had been put on employment of any man below the age of twenty five years.

Issue

Whether the Delhi High Court judgment which declared Section 30 of the Act to be *ultra vires* Articles 19①(g), 14 and 15 of the Constitution to the extent it prohibited employment of any woman in any part of such premises in which liquor or intoxicating drugs were consumed

Arguments

The Appellants, a few citizens of Delhi, contended that there did not exist any fundamental right to deal in liquor. Moreover, the State had the right to make a law or continue an old law imposing reasonable restrictions on the nature of employment therein.

The Respondent supported the impugned judgment of the High Court.

Decision

The Court, at the outset, observed that the Act was a pre-constitutional legislation, saved by Article 372 of the Constitution, and its validity could be challenged on grounds of Articles 14, 15 and 19. It also pointed out the possibility of declaring a valid legislation invalid, in view of the “*changed social psyche and expectations, (which) are important factors to be considered in the upkeep of law*”, and giving “*(p)rimacy to such transformation in constitutional rights analysis would not be out of place*”.

The Court analysed the role of international feminist jurisprudence in developing the laws

in India by reviewing its own decisions. It cited *Githa Hariharan vs. Reserve Bank of India* ((AIR 1999, 2. SCC 228)) which dealt with the issue of inequality on grounds of sex, where the rights of a mother, as a natural guardian of the minor were cognizable only ‘after’ the father. The Court relied upon the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) and the Beijing Declaration, and held that “*domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them*”. Further in *Randhir Singh vs. Union of India and Ors.* (1982 AIR 879), the Court held that “*non-observance of the principle of ‘equal pay for equal work’ for both men and women under Article 39(d) of the Constitution amounted to violation of Article 14 and 16, (and) recognized that the principle was expressly recognized by all socialist systems of law including the Preamble to the Constitution of the International Labour Organization.*”

While examining the impugned provision on the touchstone of equality, the Court noted that “*(w)hen the original Act was enacted, the concept of equality between two sexes was unknown*”. However, the Constitution makers framed Articles 14 and 15 with an intention to apply equality amongst men and women in all spheres of life. Therefore, when the validity of a legislation was tested on the anvil of equality clauses contained in Articles 14 and 15, the burden would be on the State to prove that the legislation provides for equality between the genders. The Court referred to a judgment of the South African Constitutional Court in *Bhe and Ors. vs. The Magistrate, Khayelisha and Ors.* ((2004) 18 BHR 52), where official rules

of customary law of succession did not evolve with the pace of changing societal conditions and values, and caused hardship.

The Court further discussed ground realities, particularly in the development of the hospitality industry. It noted that the *“impugned provision provides for wide restrictions”* and as *“liquor is permitted to be served even in rooms, the restriction would also operate in any of the services including housekeeping where a woman has to enter into a room”*; moreover, a *“logical corollary of such a wide restriction would be that even if service of liquor is made permissible in the flight, the employment of women as air-hostesses may be held to be prohibited”*. In view of this, the Court pointed out the impact of the impugned provision on the men and women taking hotel management graduation courses. It noted that the provision would deprive such men and women of their right to employment - which, although may not be a fundamental right in itself - both Articles 14 and 16 give each person similarly situated, a fundamental right to be considered for employment. Any discrimination or an exception made in this regard, has to be founded on rational criteria appropriate to current societal values. The Court found it to be unjust to deprive a large section of trained women and men from obtaining a job. It accordingly held that the State can neither invoke the doctrine of *‘res extra commercium’* in the matter of appointment of eligible persons nor justify the impugned provision by applying *parens patriae* power.

The Court noted that while the case revolved around individual rights of women, the important jurisprudential tenet involved in the matter was not the prioritization of rights

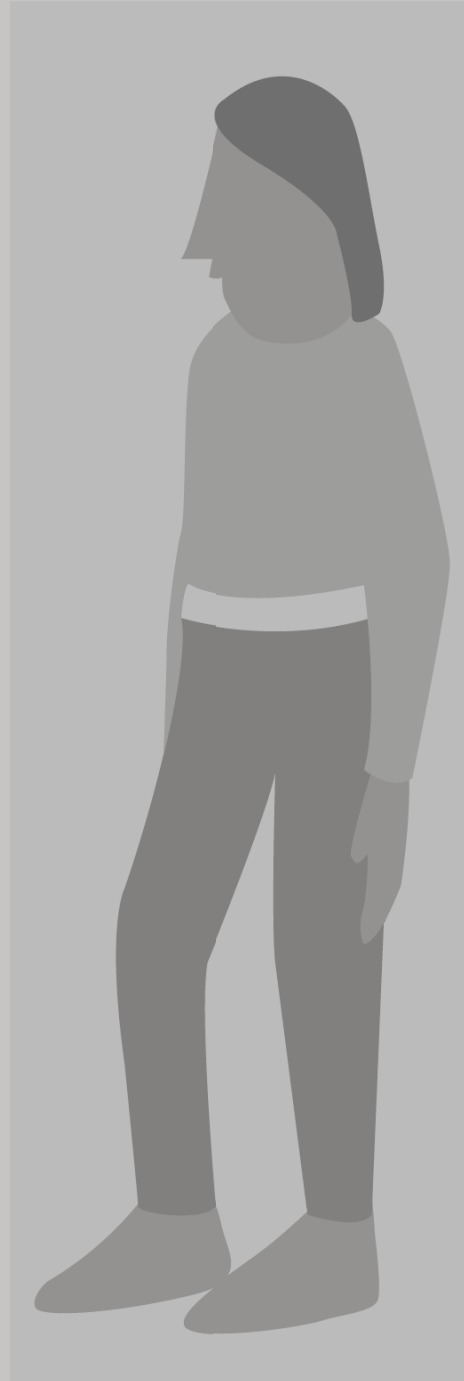
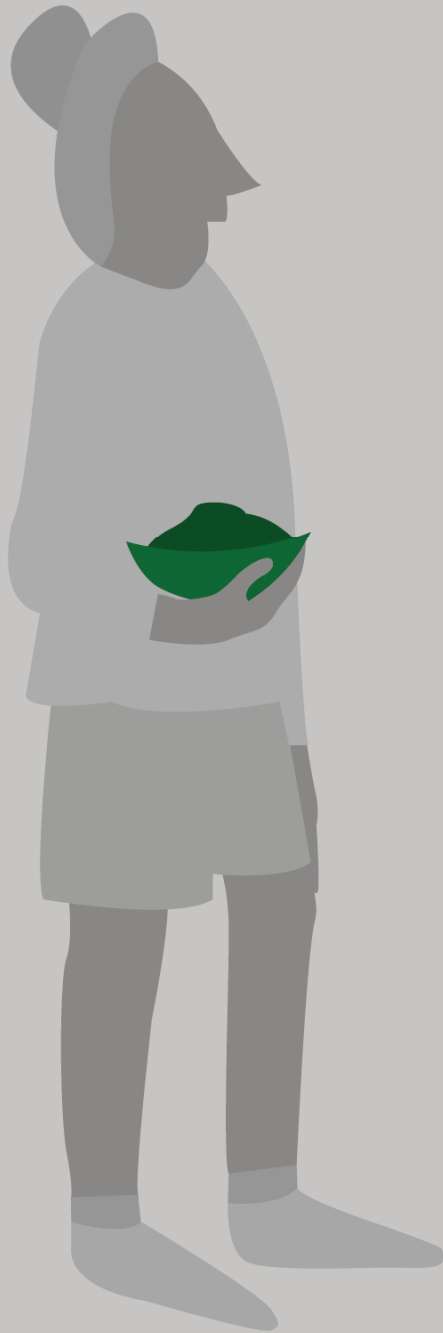
inter se but practical implementation issues (relating to enforcement and security) competing with a right. The Court discussed the complexity involved in resolving the fundamental tension between autonomy and security and explained that although the right to self determination would form part of the right to privacy and is recognised as an important offshoot of gender justice discourse, it requires security and protection to carry out such choice or option. However, the Court noted that the impugned provision *“ends up victimizing its subject in the name of protection”*. It held that legislative interference designed to offer protection should be proportionate to the legitimate aims claimed to be served, and the standard for judging proportionality should be a standard capable of being called reasonable in a modern democratic society.

The Court referred to the paper *‘The Equality Crisis: Some Reflections on Culture, Courts, and Feminism’* published by Professor Williams in ((1982) 7 W RTS. L. Rep. 175), which noted that legislations that give expression to societal conditions, where biological differences between sexes have been pronounced due to oppressive cultural norms, deserve deeper judicial scrutiny. The Court noted that *“(i)nstead of prohibiting women employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is state’s duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the privacy rights.”*

Further, the Court referred to the notion of “romantic paternalism” by the US Supreme Court in *Frontiero vs. Richardson* (411 U.S. 677). This case dealt with a gender discriminatory statute, where a female military service member had to ‘demonstrate’ her spouse’s dependency for claiming additional benefits, whereas the male counterpart was automatically entitled to such benefits. The Court maintained the strict scrutiny standard for review and repelled the administrative convenience argument holding that “*by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment*”.

The Court emphasised the use of ‘strict scrutiny test’ as a norm, while assessing the legislations with pronounced ‘protective discrimination’ because they potentially serve as double-edged swords. The test to review ‘protective discrimination’ would require satisfaction of two prongs, first to determine whether the legislative interference is justified in principle, and second to assess the proportionality of the measures. Noting that the “*impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role*”, the Court applied the test to determine if such measures aligned with the “*well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al*”, and whether there exists a “*reasonable relationship of proportionality between the means used and aim pursued*”. The Court also referred to the doctrine of proportionality and incompatibility, used by the European Court of Human Rights (ECtHR) to deal with matters of competing public interests.

The Court, in its analysis, found that the “*end result is an invidious discrimination perpetrating sexual differences*”. Moreover, it places restrictions on a “*citizen’s right to be considered for employment, which is a facet of the right to livelihood*”. Consequently, it struck down the impugned provision.



Hinsa Virodhak Sangh vs. Mirzapur Moti Kuresh Jamat & Ors.

(2008) 5 SCC 33,
AIR 2008 SC 1892

2008

Autonomy

The Supreme Court upheld the validity of two resolutions restricting the operation of municipal slaughterhouses during the Jain festival Paryushan. The Court also noted that one's dietary habits were covered under the right to privacy.

**Constitutional
Provision(s)**

Articles 14, 19 and 21

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice M. Katju on behalf of
Justice H.K. Seema and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“... a large number of people are non-vegetarian and they cannot be compelled to become vegetarian for a long period. What one eats is one’s personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court.”

Case Brief

In this case, the Supreme Court adjudged the validity of two resolutions restricting the operation of municipal slaughterhouses during the Jain festival Paryushan. In deciding that the resolutions were valid, the Court set aside an order of the High Court of Gujarat, which had found the resolutions to be constitutionally invalid. Citing several case laws along with historical and social-cultural references, the Supreme Court reasoned that in a multicultural country like India, a short period of restriction out of respect for the sentiments of the Jain community did not impinge upon the constitutionally guaranteed freedom to carry out trade of the Petitioners. Justice M. Katju also noted in the *obiter dicta* of this case that individuals had the right to exercise discretion in their dietary choices under Article 21, and this freedom would be part of their right to privacy and autonomy. A longer restriction compelling a change in the diet of affected persons would, therefore, not be valid.

Case Summary

Facts

This appeal by special leave was filed against an order by a Division Bench of the High Court of Gujarat, which found two resolutions passed by the Ahmedabad State Corporation (“Corporation”) and the State Government of Gujarat to be constitutionally invalid. These resolutions dealt with closure of municipal slaughterhouses during Paryushan, a religious festival of the Jain community. The Petitioners in this case, representing those engaged in the trade of mutton in the city of Ahmedabad, alleged that these resolutions had the impact of restricting their right to carry on trade and business in livestock, mutton, etc. under Article 19①(g), which in turn would curtail the right to choice of food (as part of the right to life) under Article 21 for non-vegetarians.

The High Court observed that these restrictions could not be regarded as reasonable if they were not imposed in public interest, and found the resolutions to be arbitrary and discriminatory. They stated “*no restriction can be placed on the slaughtering or eating of meat merely because it may hurt the sentiments or the religious feelings of a particular community or a society*”. The Court held the resolutions to be violative of Article 14 along with Article 19①(g) while relying on the decision of a five-judge bench of the Supreme Court in *Mohd. Faruk vs. State of Madhya Pradesh* ([1970] 1 SCR 156), which had also noted that the sentiments of a particular section of the people are irrelevant in imposing a prohibition. Aggrieved by the decision of the High Court, the Appellant, Hinsa Virodhak Sangh, filed this

SLP to represent the cause of the Jain community.

Issues

- A. Whether a short-term restriction on the production of meat would have the effect of violating the right to trade under Article 19①(g) for merchants engaged in that business, without such restriction being valid under Article 19⑥; and
- B. Whether this restriction would impact the right to life under Article 21 of persons who consume meat regularly.

Arguments

The Appellants had submitted (in the petition before the High Court) that the closure of the municipal slaughterhouses for a few days could neither be considered an unreasonable restriction nor arbitrary. It was also not violative of Article 14 or Article 19①(g). The Appellants argued that the right to eat non-vegetarian food could not be treated as part of the right to life under Article 21 of the Constitution, and that the resolutions did not compel the non-vegetarians to become vegetarians as they could source the meat from other cities or states during the ban. The appellants placed reliance on *Municipal Corporation vs. Jan Mohammed* (AIR 1986 SC 1205), where closure of the municipal slaughterhouses by the Corporation for seven days i.e. during Janmasthami, Mahatma Gandhi’s Birthday, Martyr’s Day, Mahavir Jayanti, Ram Navami, etc. was held to be valid by a Constitutional Bench.

On the other hand, the Respondents had a common grievance that the restrictions im-

posed by the Corporation resulted in serious violation of their fundamental rights and freedoms. They submitted that the closure of municipal slaughterhouses during Paryushan should be declared an unreasonable restriction on their right to carry on trade and business in livestock and meat etc., guaranteed under Article 19①(g) as the restriction was not based on any public interest, but to assuage the feelings of the Jain community. They argued that Ahmedabad had a large section of non-vegetarians, whose right to life under Article 21 would be violated, because the resolutions would have the effect of compelling them to become vegetarians and curtailing their right to choice of food.

Decision

The Supreme Court observed that the High Court had relied on the decision of the five Judge Constitution Bench of the Supreme Court in *Mohd Faruk's* case, which had been implicitly overruled by the seven-judge bench of the Supreme Court in *State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and Ors.* (AIR 2006 SC 212). The Court also observed that while referring to *Mohd Faruk's* case, the High Court referred to another decision of the Supreme Court mentioned therein, *Mohd. Hanif Qureshi vs. State of Bihar* ([1959] 1 SCR 629), which held a total ban on slaughter of cows to be reasonable and valid, and that this case had also been partially overruled by the *Mirzapur Moti* case. The Court noted the observations in *Mohd Faruk's* case and *Mohd. Hanif's* case were in contradiction with the *Mirzapur Moti* case, which stated, “*The concept of compassion for living creatures enshrined in Article 51A(g) is based on the background of the rich cultural heritage of India the land of Mahatma Gandhi, Vinobha, Mahaveer,*

Buddha, Nanak and Ors.” The Supreme Court thus set aside the order of the High Court of Gujarat and held the resolutions of the Corporation to be valid and not violative of Articles 14, 19①(g), and 21.

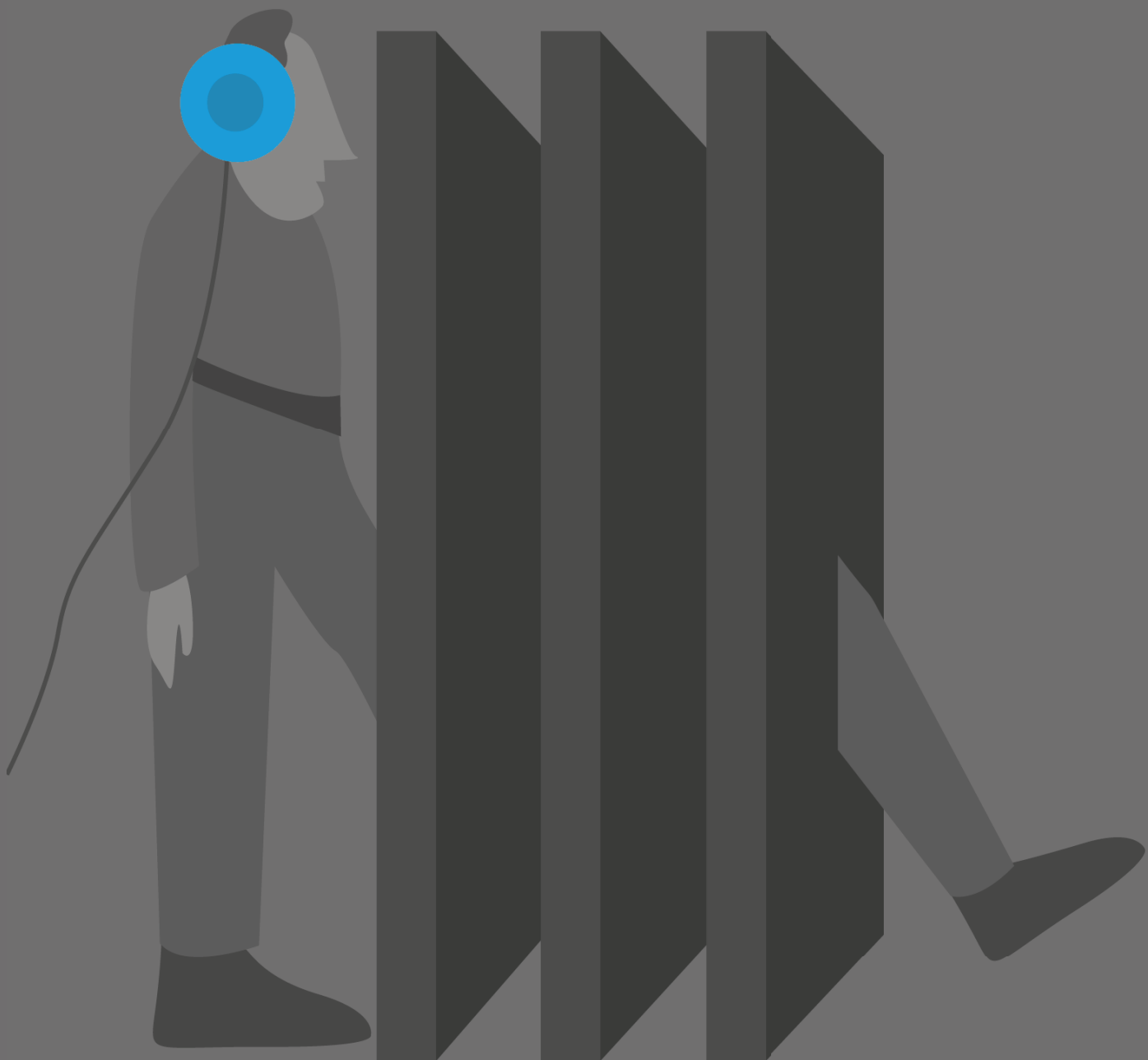
Having stated the above, the Court accepted the contention of the Appellants that the nine-day restriction on slaughterhouses and non-vegetarians was a partial restriction for a limited time period and therefore, could not be seen as disproportionate or unreasonable. The Court found this to be a balanced view in light of the fact that the states of Rajasthan and Gujarat had large Jain populations, who believed in the ideology of *Ahinsa* or non-violence, and for whom Paryushan was an important festival for penance. Further, the Court observed that the curtailment of fundamental rights was in line with Article 19⑥, which allowed imposition of reasonable restrictions on the right to freedom of trade and occupation under Article 19①(g).

To examine the reasonableness of the resolutions, the Court considered the case of *State of Madras vs. V.G. Row* (1952 SCR 597), which had observed that while determining whether the restriction is reasonable, the Court should consider not only the factors of the restriction such as the duration and the extent but also the circumstances and the manner in which the imposition has been authorized. Judging the resolutions of the Corporation against the *V.G Row* benchmark, the Court found the resolutions to be neither unreasonable nor disproportionate. Moreover, it stated that the resolutions were not excessive, as such restrictions had been observed in Ahmedabad for many years. In this context, the Court referred to *Om Prakash & Ors. vs. State of U.P. & Ors* (AIR

2004 SC 1896), which held a municipal bye-law prohibiting sale of meat, fish and egg in Rishikesh was valid, considering the fact that most people in Rishikesh came for religious purposes and members of several communities were strictly vegetarian.

The Court thus held the resolutions were constitutionally valid beyond reasonable doubt. It referred to the secular character of the Constitution, which gave equal respect to all communities, sects, lingual and ethnic groups, etc. in the country, and also made several socio-cultural and historical references to highlight that *“India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and respect for all communities and sects.”*

However, the Supreme Court noted that imposing restrictions on the slaughterhouses for a considerable period of time would have made the resolutions excessive and invalid, for it would have rendered many people associated with the slaughterhouses unemployed as well as compelled the large number of non-vegetarians living in Ahmedabad to become vegetarian. In the context of dietary preferences, the Court stated, *“What one eats is one’s personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution”*, and referred to *R. Rajagopal vs. State of Tamil Nadu (AIR 1995 SC 264)*, which held that right to privacy is a ‘right to be let alone’.



State of Maharashtra vs. Bharat Shanti Lal Shah & Ors.

(2008) 13 SCC 5,
2008 (12) SCALE
167

September 1,
2008

Phone Tapping

Surveillance, Search and Seizure

The interception of a conversation constitutes an invasion of an individual's right to privacy but the right can be curtailed via procedure established by law.

**Constitutional
Provision(s)**

Articles 14 and 21

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

3

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice M. Sharma on behalf of
Chief Justice K.G. Balakrishnan,
Justice R.V. Raveendran, and himself.

“The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the court is required to see is that the procedure itself must be fair, just and reasonable and non arbitrary, fanciful or oppressive.”

Case Brief

This case adjudicated the constitutional validity of the Maharashtra Control of Organised Crime Act, 1999 (“MCOCA”). MCOCA was challenged on the grounds that the State Legislature did not have the legislative competence to enact such a law, and that certain provisions violated Article 14 and Article 21 of the Constitution.

The challenge was first brought before the Bombay High Court, which upheld the constitutional validity of Sections 2(d), (e) and (f), Section 3, and Section 4 but struck down Section 13 and Section 16 as being beyond the legislative competence of the State Legislature. Section 21⁵ was also struck down as being violative of Article 14. The State of Maharashtra then brought the case in appeal to the Supreme Court. The Court partly upheld the initial order of the Bombay High Court insofar as it related to Sections 2(d), (e) and (f), 3 and 4 and Section 21⁵ of the MCOCA. While analysing the question of legislative competence, the Court observed that incidental encroachment on the Union list, as in the case of MCOCA, would not invalidate its provisions, because the main purpose of the MCOCA lay within the purview of the State Legislature. In making its decision, the Court surveyed relevant provisions contained in Chapter 1 of Part XI of the Constitution and applied the rule of interpreting on the side of constitutionality, as well as the doctrine of pith and substance.

Further, with regard to Sections 13 to 16 which authorised interception of

communication, the Bench referred to two cases on phone tapping vis-à-vis the right to privacy, *PUCI vs. Union of India & Anr.* ((1997) 1 SCC 301) and *R.M. Malkani vs. State of Maharashtra* (1973 SCR @ 417), to reiterate that the right to privacy could be curtailed by a procedure established by law, which was just, fair, reasonable and non-arbitrary. The Court noted that there were sufficient procedural safeguards embedded in the provisions under challenge, and upheld the constitutional validity of Sections 13 to 16.

Case Summary

Facts

The Respondents were arrested under the provisions of the Maharashtra Control of Organised Crime Act, 1999 (“MCOCA”). Being aggrieved by their arrests, they filed writ petitions before the Bombay High Court challenging the constitutional validity of the MCOCA, particularly the provisions of Sections 2(d), (e) and (f), Section 3, Section 4, Sections 13 to 16, and Section 21⁵ of the MCOCA. Sections 2, 3, and 4 relate to the definition of ‘organised crime’ and the punishments to be awarded for the same. Sections 13 to 16 facilitate the detection and investigation of the offence of organised crime. These provisions allow the State Government to appoint a competent authority for authorizing interception of any wire, oral or written communication, review every order authorising interception, and restrict the disclosure of such interception. Section 21⁵ denies bail to an accused if he was on bail for an offence under the MCOCA Act or any other act at the time of the commission of the alleged offence.

The Bombay High Court upheld the validity of Sections 2(d), (e), and (f), Section 3, and

Section 4. It struck down Sections 13 to 16 as well as Section 21⁵ for being unconstitutional. It noted that their passage was beyond the legislative competence of the State Legislature, and violated Article 14, respectively. Aggrieved by this decision, the Appellant i.e., the State of Maharashtra, filed an appeal in the Supreme Court.

Issues

- A. Whether the State Legislature had the legislative competence to enact the MCOCA; and
- B. Whether the provisions of the MCOCA were violative of Article 14 and Article 21 of the Constitution.

Arguments

The Appellant argued that the provisions of MCOCA create and define the new offence of organised crime and to aid detection and investigation of such offences, interception of wire, electronic, and oral communication was necessary. The Appellant further submitted that the grounds for interception of communication under MCOCA were different from the grounds covered under the Indian Telegraph Act, 1885 (Telegraph Act). It also submitted

that the provisions of the MCOCA were legal and valid as they were covered under Entries 1 and 2 of List II of the Seventh Schedule and Entries 1, 2, and 3 of the List III of the Seventh Schedule of the Constitution and that entries under Lists I, II, III should be given a broad and liberal construction.

The Respondents argued that Sections 13 to 16 were *ultra vires* Article 246 of the Constitution, as the area and subjects dealt with by MCOCA were covered exclusively by Entry 31 of List I, and Parliament alone has competence to legislate on them. The Respondents also argued that the provisions of MCOCA had the effect of violating Articles 14 and 21 of the Constitution.

Decision

The Supreme Court in their decision upheld the order of the High Court insofar as it ruled Sections 2(d), (e) and (f), Section 3 and Section 4 as constitutional. With respect to Section 21⑤, it upheld the High Court's order striking down the words "*or under any other Act*" as they had the effect of restricting the right of a person to seek bail if they were out on bail on any offence, not only one similar to the offence they had been arrested for under MCOCA. The Court believed that to permit restriction of bail when a suspect had not committed a similar offence would create an unreasonable classification and would therefore violate Articles 14 and 21.

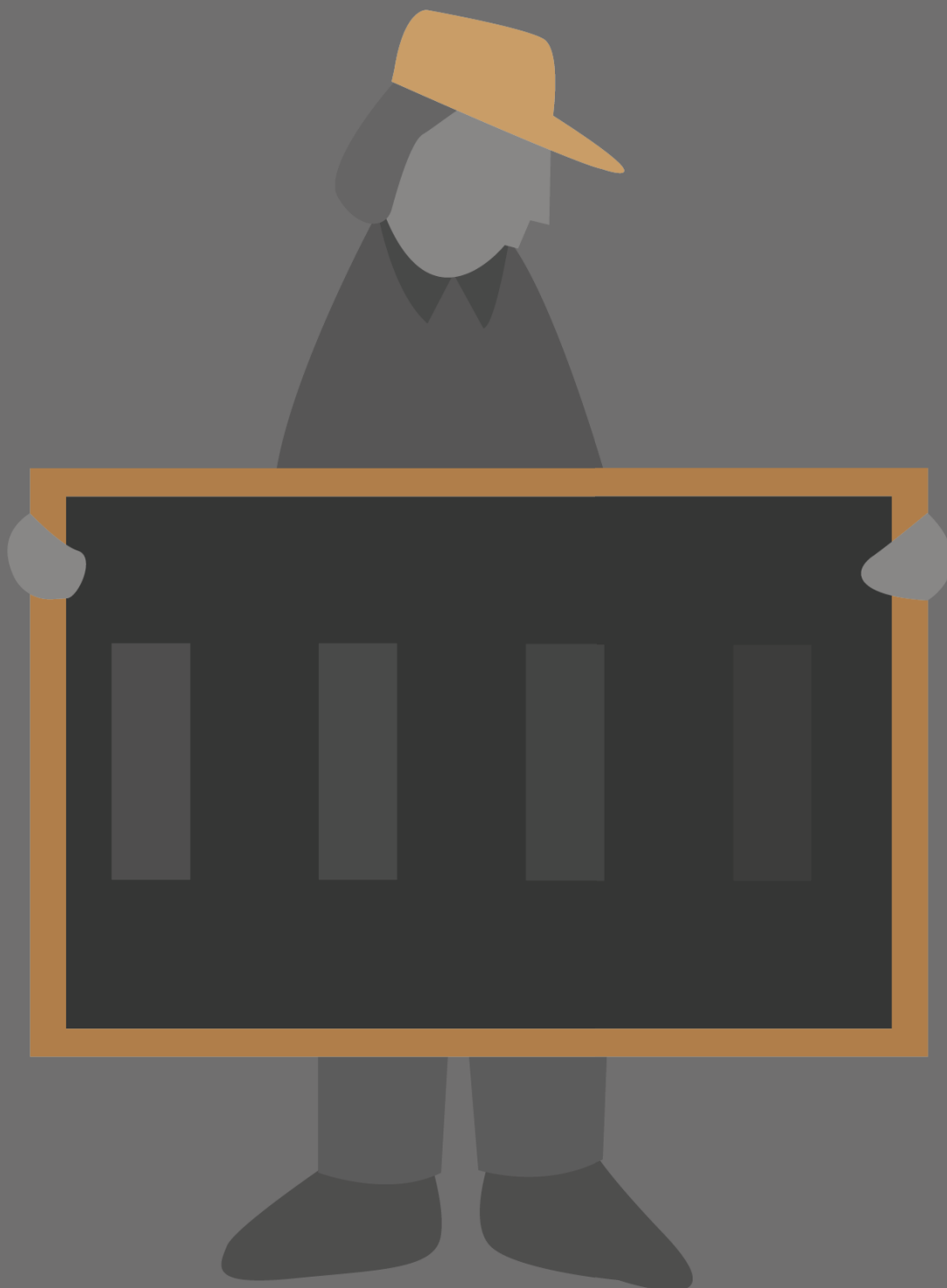
In considering the validity of Sections 13 to 16 of MCOCA, the Court surveyed provisions relating to the subject of distribution of legislative powers between Centre and States under Chapter 1 of Part XI of the Constitution

to ascertain the legislative competence of the State Legislature while passing the MCOCA. The Court further noted the settled rule of interpretation, according to which, entries in the lists "*must receive liberal construction inspired by a broad and generous spirit*" and that "*there shall always be a presumption of constitutionality in favour of a statute*". The doctrine of pith and substance was also applied while examining the area and subject of the MCOCA to understand whether it was covered within the Constitutional scheme relating to legislative competence, and whether it covered the same ground as the Telegraph Act, 1885.

Taking these factors into account, the Court concluded that "*the grounds for interception of the communication under MCOCA are distinct and different from the ground covered by Section 5② of the Telegraph Act. A comparative reading of the provisions of the Telegraph Act as also of the MCOCA would establish that both the Acts deal with the subjects and areas which cannot be said to be identical and common.*" Further, it was noted that though there was an incidental encroachment on matters covered under the Union list, the main purpose of the MCOCA was within the purview of the State Legislature and so it could not be considered invalid.

With regard to Sections 13 to 16, the Court analysed whether these provisions violated the right to privacy under Article 21. It referred to the ratio laid down in two seminal cases on telephone tapping, *People's Union for Civil Liberties (PUCL) vs. Union of India* (1997) 1 SCC 301 and *R.M. Malkani vs. State of Maharashtra* (1973 SCR @ 417), to hold that "*The interception of conversation though constitutes an invasion of*

an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable and non arbitrary, fanciful or oppressive." The Court considered that these provisions create a 'procedure established by law' and have sufficient procedural safeguards embedded to save them from being unfair or arbitrary, since Section 16 provides punishments for an unauthorized user for information acquired by interception of wire, electronic or oral communication. The Court therefore upheld the constitutional validity of Sections 13 to 16, noting that they could not be said to be violative of Article 21.



Jamiruddin Ahmed vs. State of West Bengal

Criminal Appeal
No. 1535 of 2008

March 26, 2009

Surveillance, Search and Seizure

Any authority vested with the power to conduct search and seizure, or the power to arrest without warrant, must comply with the procedural safeguards before exercising such power. Conducting a search of a place without recording reasons violates a person's privacy.

**Constitutional
Provision(s)**

**No Specific Constitutional
Provision Referenced**

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice S.B. Sinha on behalf of
Justice M. Sharma and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“The raiding party had sufficient time to record reasons. Why the requirement contained in the proviso appended to Section 42 of the NDPS Act could not be complied with, has not been explained. The search of a place without recording such reasons may violate somebody’s right to privacy.”

Case Brief

The Supreme Court, in this criminal appeal, assessed the legality of a raid conducted without complying with Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act”). Section 42 authorizes an officer to enter any location, search it, seize goods and arrest persons without a warrant if they have reason to believe that the persons or goods present are connected with an offence under the NDPS Act. However, the Section requires the officer to record the reasons why he believes that obtaining a warrant or authorisation would impede the investigation. The Court held that noncompliance with this requirement was not permissible because it would vitiate the safeguards put in place to mitigate the risks of allowing forceful search and seizure.

In reaching this conclusion, the Court held that conducting a search of a place without recording reasons violates a person’s privacy. It noted that when any authority has been vested with the power to conduct search and seizure, or the power to arrest without warrant, the conditions for the exercise of such power must be adhered to. Accordingly, the appeal was allowed and the search conducted was held to be illegal.

Case Summary

Facts

The Appellant, Jamiruddin Ahmed, preferred an appeal to the Supreme Court against a judgment of the High Court of Calcutta upholding the legality of a raid conducted at his house in a remote village at midnight.

Issue

Whether a raid conducted under Section 42 of the NDPS Act without recording reasons was legal.

Arguments

The Appellant submitted that since no reasons were recorded for conducting the search at his house without a warrant, as required by Section 42 of the NDPS Act, the search was illegal.

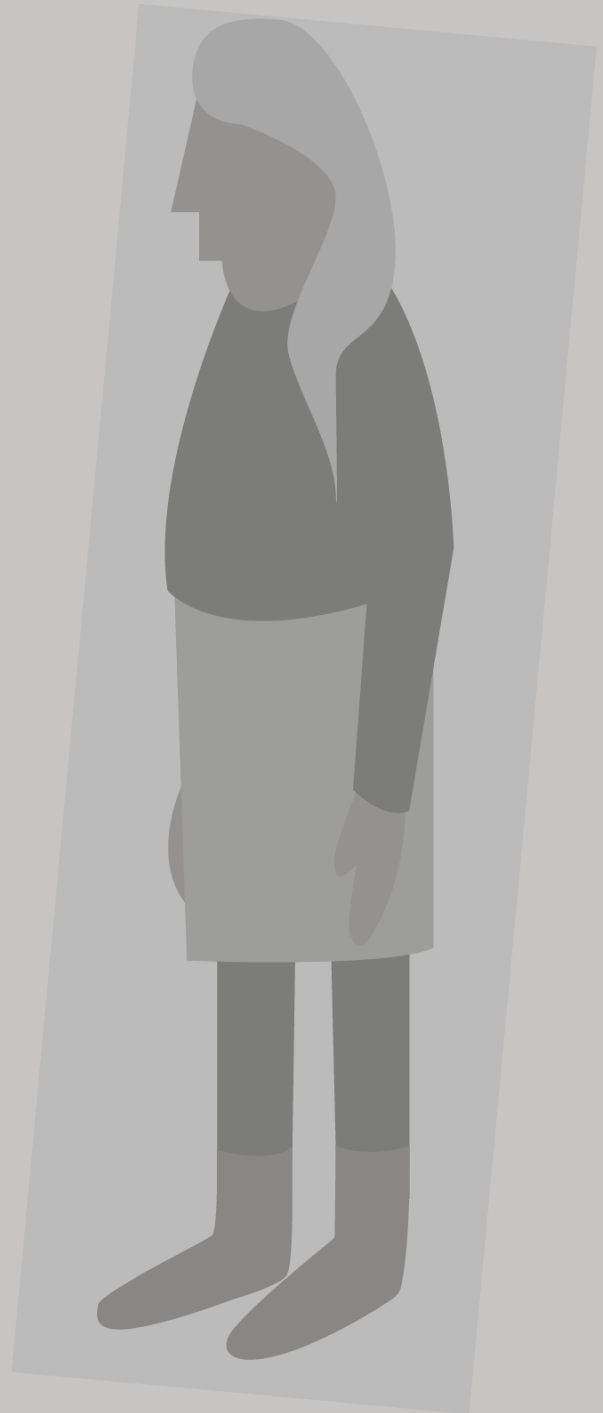
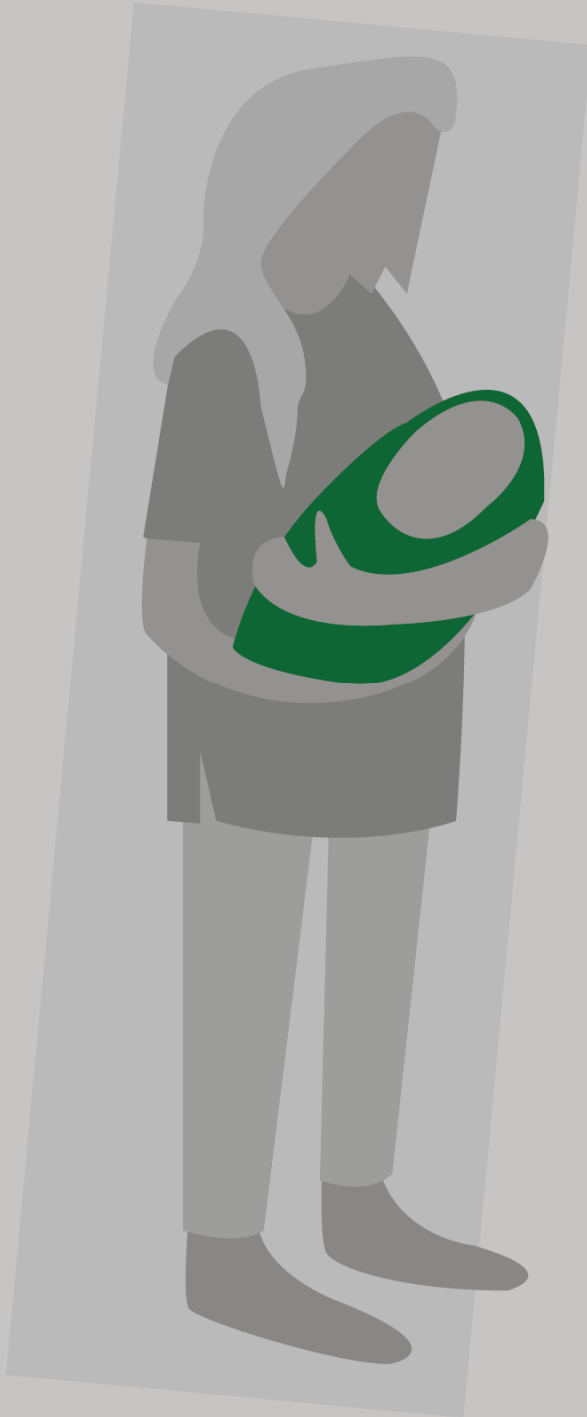
The Respondent, State of West Bengal, argued that in this particular case, the officials believed that taking prior permission for the search would render the search and seizure futile, and explained that the raiding party was accompanied by senior officials at the rank of Additional Superintendent of Police.

Decision

The Supreme Court observed that the NDPS Act lays down stringent punishments for non-compliance and thus, all safeguards provided for in the NDPS Act must be strictly adhered to. If any procedure is merely directory, it would be specified. Section 42 of the NDPS Act provides that when any officer authorized under the Act has reason to believe that any punishable narcotic drug or psychotropic substance or evidentiary document has been

concealed in a building, they may search such place and seize any material liable to be confiscated under the NDPS Act. They may also detain, search and arrest any person who they believe has committed an offence under the NDPS Act. However, the proviso says that where such officer has reason to believe that a search or arrest warrant for such a place or person cannot be obtained without allowing for concealment of evidence or escape of an offender, the officer must record reasons for such belief and only then proceed with the search.

In the present case, the fact that the officer conducted the raid at the Appellant's house without recording reasons for failing to obtain a warrant means that the officer did not comply with Section 42 of the NDPS Act and *"search of a place without recording such reasons may violate somebody's right to privacy"*. The Court noted that the officer had sufficient time to record reasons, and failure to do the same rendered the search wholly illegal. The Court allowed the appeal, set aside the impugned judgment and directed the Appellant, who was in jail, be set free.



Suchitra Srivastava & Ors. vs. Chandigarh Administration

(2009) 14 SCR 989,
(2009) 9 SCC 1

2009

Autonomy Bodily Integrity

A woman's right to make reproductive choices is part of 'personal liberty' under Article 21 of the Constitution. It is important to respect a woman's right to privacy, dignity and bodily integrity and recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating.

**Constitutional
Provision(s)**

Article 21

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

3

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Chief Justice K.G. Balakrishnan

on behalf of

Justice P. Sathasivam,

Justice H.K. Seema, and himself.

“There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.”

Case Brief

A three-judge bench of the Supreme Court considered this case, where an orphaned woman suffering from a mental retardation, was impregnated as a result of rape. The Punjab & Haryana High Court determined, without the woman’s consent, that it was in her best interests that the fetus should be aborted under Section 3 of the Medical Termination of Pregnancy Act, 1971 (“MTP Act”) as she did not have the capacity to take care of a child, nor did she have a parent or guardian to look after her.

The Supreme Court stayed the order of the Punjab & Haryana High Court, and held that the right to reproductive choice flows from the

right to liberty under Article 21 of the Constitution. It noted that taking away a woman's choice regarding her own body would amount to infringement of her right to privacy. It further distinguished between mental illness and mental retardation and considered that the woman's mental retardation did not take away her right to make a decision regarding her reproductive choices. Therefore, it held that a termination of her pregnancy without her consent could not be ordered.

Case Summary

Facts

An orphaned woman living in a government run welfare institution in Chandigarh, who had the mental capacity of a nine year old, was raped, and subsequently became pregnant while she was living in that institution. The institution's staff discovered her pregnancy when she was at nine weeks gestation. Upon this discovery, the Respondent, the Chandigarh Administration, filed a criminal case under Sections 376 and 120B of the Indian Penal Code, 1860, and constituted a medical board to evaluate the mental status of the woman. The medical board opined that the woman had an intellectual disability and was suffering from 'mild mental retardation'. Another Respondent-constituted medical board opined that the woman's pregnancy should be terminated. The Respondent then filed a petition with the High Court of Punjab and Haryana requesting permission to terminate the pregnancy.

The High Court established an independent expert body of medical experts and judges to investigate the facts of the case and to provide an opinion regarding the 'best interests' of the

woman in question to the High Court. The expert body noted that, even though the victim was unable to appreciate or understand the consequences of bearing a child upon her own future and that of the child, her condition did not necessarily warrant termination of pregnancy and her mental retardation did not indicate abnormal risks in the pregnancy. She was also noted to be unlikely to be able to raise a child in the absence of sufficient social support. The expert body further considered that she had no notable emotions regarding the conception of the baby as a result of rape. Furthermore, the expert body found that the woman wanted to continue the pregnancy. Nonetheless, the High Court granted the Respondent permission to terminate the pregnancy. The Appellant approached the Supreme Court challenging the decision of the High Court.

At the time of the appeal, the Appellant was 19 weeks pregnant, and the statutory limit in India permitted abortion up to 20 weeks gestation under Section 3 of the MTP Act. Section 3 of the MTP Act permits access to abortion under certain conditions including the woman's consent, the stage of the pregnancy, and the woman's mental

and physical health, as well as the health of the fetus.

Issues

- Whether the High Court could grant
- A. permission to terminate pregnancy without the woman's consent; and
 - B. What are the appropriate standards for a Court to exercise '*parens patriae*' jurisdiction.

Decision

The Court examined Section 3 of the MTP Act, which highlights the importance of a woman's consent in case of termination, and the right to liberty in Article 21 to determine that forcible termination would violate the Appellant's right to liberty and reproductive choice. The Court noted that reproductive rights were a dimension of a woman's human rights, and as such her rights to "*privacy, dignity and bodily integrity*" should be respected. The Court further stated that reproductive rights included the right to complete a pregnancy to full term.

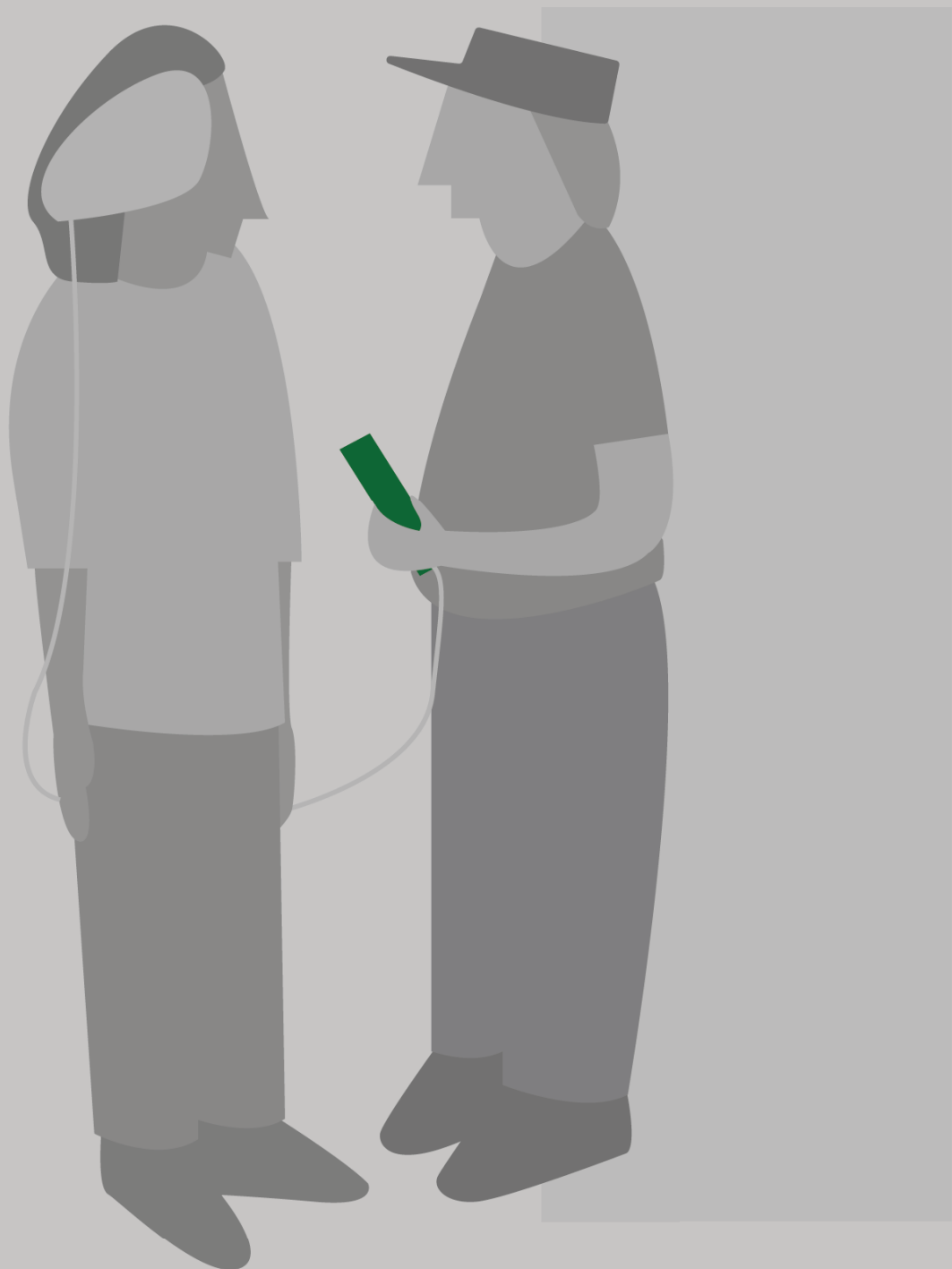
The Court held that the MTP Act "*clearly respects the personal autonomy of mentally retarded persons who are above the age of majority*". After examining legislation on mental disability, the Court identified a legal difference between mental retardation and mental illness. Under Section 3@ (a) of the MTP Act, a guardian can make decisions on behalf of a person with mental illness, but not on behalf of a person with mental retardation, such as the Appellant. The Court held that since consent of the pregnant woman is an essential requirement under the MTP Act, its dilution

could not be allowed as that would "*amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim*." In light of these findings, the Court determined that Appellant's consent was required for the termination of her pregnancy, absent which the termination procedure could not take place.

On the nature and scope of women's reproductive rights, the Court held that though a woman had full right over her body, she only had a "*qualified 'right to abortion'*". According to the Court, this right is qualified since there is a "*compelling state interest*" in protecting the life of the prospective child. The MTP Act embodies the qualifications or reasonable restrictions on the exercise of the right. The Court also referred to the right to equality as outlined in the United Nations Declaration on the Rights of Mentally Retarded Persons (1971) to support personal autonomy in the context of intellectual disabilities and the MTP Act. The Court stated that India, as a party to the Convention on the Rights of Persons with Disabilities, 2007, has the obligation to respect the rights affirmed therein.

The Court disagreed with the High Court's application of a 'substituted judgment' test under the common law doctrine of *parens patriae*. In light of the expert body's findings, the Court applied the 'best interests' test and determined that the High Court's decision granting the termination was not in the Appellant's best interest. The Court reasoned that forced termination of the pregnancy would be high risk since the pregnancy was in its 19th week, and could create severe emotional stress for the Appellant because she had not consented to the procedure. The Court also noted

that since the Appellant had only ‘mild to moderate’ developmental delay, she may be able to perform maternal duties outside an institutional setting with some assistance. Accordingly, the Court issued a stay on the High Court’s judgment, effectively denying the termination.



Selvi & Ors. vs. State of Karnataka

AIR 2010 SC 1974,
(2010) 7 SCC 263

2010

Autonomy

Neuro-scientific methods constitute testimonial compulsion and violate an accused person's right against self-incrimination under Article 20③, and their right to life and personal liberty under Article 21 of the Constitution. Drug induced revelations and responses are an intrusion into the mental privacy of the subject and forcible extraction of testimonial responses was not provided for under any statute and could not be a reasonable exercise of policing functions.

Constitutional Provision(s)

Article 21

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

3

Number of Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice K.G. Balakrishnan on behalf of
Chief Justice R.V. Raveendran,
Justice J.M. Panchal, and himself.

“We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual’s decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.”

Case Brief

The Supreme Court in this case considered the constitutionality of various evidence gathering techniques including narcoanalysis, BEAP (“Brain Electrical Activation Profile”) or ‘brain mapping’, and polygraph tests. The Court ruled that the use of such neuroscientific investigative techniques constituted testimonial compulsion and violated an accused person’s right against self-incrimination under Article 20③, and their right to life and personal liberty under Article 21 of the Constitution.

The Court held that the protection against self-incrimination under Article 20③ of the Constitution would have to be read considering the multiple dimensions of personal liberty under Article 21 such as the right to a fair trial and substantive due process. It also held that this would be applicable to the accused, suspects and witnesses, and would not be confined to the courtroom, but would be applicable in all cases where the charge may end in a prosecution.

The Court, after tracing the jurisprudence of the right to privacy in India discussed the importance of mental privacy and the choice to speak or stay silent, as well as their intersection with personal autonomy as aspects of the right to privacy. The Court observed that the right to privacy under Article 21 should account for interaction with Article

20③, the right against self-incrimination. The Court further held that drug induced revelations and measurement of physiological responses would amount to an intrusion into the mental privacy of the subject and that forcible extraction of testimonial responses was not provided for under any statute and could not be a reasonable exercise of policing functions. The Court therefore ordered that these tests could not be administered without the valid consent of the accused.

Case Summary

Facts

In this case, the Supreme Court allowed a special leave petition in the context of cases where objections were raised where the accused, suspects and witnesses in the investigation were subjected to neuro-scientific tests without their consent. The Court considered the constitutionality of the usage of neuro-scientific tests to gather evidence, including narcoanalysis, BEAP or 'brain mapping', and polygraph tests. The polygraph test measures the physiological responses including respiration, blood pressure, pulse and galvanic skin resistance to measure lying or deception. The narcoanalysis test involves the intravenous administration of the drug sodium pentothal, which causes a hypnotic trance allowing a subject to become less inhibited. The BEAP measures activity in the brain in response to selected stimuli, to determine if the subject is familiar with certain information.

Issues

- A. Whether the involuntary administration of the impugned techniques violated the 'right against self-incrimination'

enumerated in Article 20③ of the Constitution; and

- B. Whether the involuntary administration of the impugned techniques was a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution.

Arguments

The Petitioners submitted that the involuntary administration of neuro-scientific techniques violated the 'right against self-incrimination' under Article 20③ for those compelled to use them. The Petitioners raised arguments invoking the guarantee of 'substantive due process' as an extension of 'personal liberty' protected by Article 21. The Petitioners also argued that the ambit of Article 21 includes a right against cruel, inhuman or degrading treatment, and that the involuntary administration of the impugned techniques would violate such rights. Finally, they also raised the issue of the test subjects' right to both physical and mental privacy, and argued that the techniques in question would violate the same.

In relation to the tests themselves, the Peti-

tioners argued that the tests were not scientifically valid but were only confirmatory and that evidence gathered through them could not be relied upon. They placed reliance on empirical studies which cast doubt on the reliability of evidence obtained through these mechanisms.

The Respondents argued that usage of such tests was important for extracting information which could help the investigating agencies prevent criminal activities and gather evidence. They also argued that administering the tests did not cause any bodily harm and that the information was used only for investigation and not as evidence during the trial stage.

Decision

The Court first assessed in detail the evolution and specific uses of the impugned techniques, including their usage within the criminal justice system, foreign jurisprudence regarding their usage, and the limitations of these techniques.

The Court then analysed the right against self-incrimination, and held that the compulsory administration of neuroscientific tests amounted to testimonial compulsion and violated the rule against self-incrimination guaranteed under Article 20③. The Court held that in addition to the standard under Article 20③, the compulsory administration of such neuroscientific tests would also have to meet the standard of ‘substantive due process’ for placing restraints on personal liberty. The Court noted that the purpose of the right against self incrimination was to ensure that testimony considered during trial was reliable,

since involuntary statements were more likely to be inaccurate, while also violating the dignity and integrity of the person.

The Court stated that “(t)he interrelationship between the ‘right against self- incrimination’ and the ‘right to fair trial’ has been recognised in most jurisdictions as well as international human rights instruments”. In India, *Maneka Gandhi vs. Union of India* ((1978) 1 SCC 248) held while considering Article 20③, that the right against self-incrimination should be construed with due regard for the inter-relationship between rights, namely the various dimensions of the right to personal liberty under Article 21, such as the right to fair trial and substantive due process.

The Court also reaffirmed the decision of *M.P. Sharma vs. Satish Chandra* ((1954] SCR 1077), in holding that the right against testimonial compulsion under Article 20③ was not confined to the courtroom, but would apply to all persons against whom a charge, which could end in prosecution, had been leveled. It clarified that the right against self-incrimination protects persons who have been formally accused, those who are examined as suspects in criminal cases, and witnesses who apprehend that their answers could expose them to criminal charges in an ongoing investigation or even in cases other than the one being investigated.

The Court further noted from the *M.P. Sharma* case that the act of being a witness was not restricted only to cases of oral testimony but all volitional acts. The Court also considered the test laid down in *State of Bombay vs. Kathi Kalu Oghad & Others*, ([1962] 3 SCR 10) which suggested that “imparting knowledge

in respect of relevant fact by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation” would touch the right under Article 20③. The Court finally held that the results of involuntary usage of neuroscientific techniques would amount to testimonial responses for the purpose of invoking the right under Article 20③.

In the context of privacy specifically, the Court held that while laws of evidence could be used for interference with physical privacy, they could not form the basis for compelling a person *“to impart personal knowledge about a relevant fact”*. The Court looked into the interrelationship of rights to read the right against self-incrimination as a component of ‘personal liberty’ under Article 21. It consequently observed that the right to privacy would also intersect with Article 20③, especially in respect to a person’s autonomy to choose between speaking or remaining silent. The Court opined that the use of such techniques in an involuntary manner would violate the individual privacy.

The Court traced the history of the right to privacy, starting from the case of *MP Sharma*, which noted that the Indian Constitution did not explicitly include a ‘right to privacy’ in a manner akin to the Fourth Amendment of the U.S. Constitution and thus upheld the validity of search warrants, which were issued for documents in a case of misappropriation and embezzlement. Similar issues were discussed in the case of *Kharak Singh vs. State of Uttar Pradesh* (AIR 1963 SC 1295), where the Court considered the validity of police regulations authorizing the police to maintain lists of

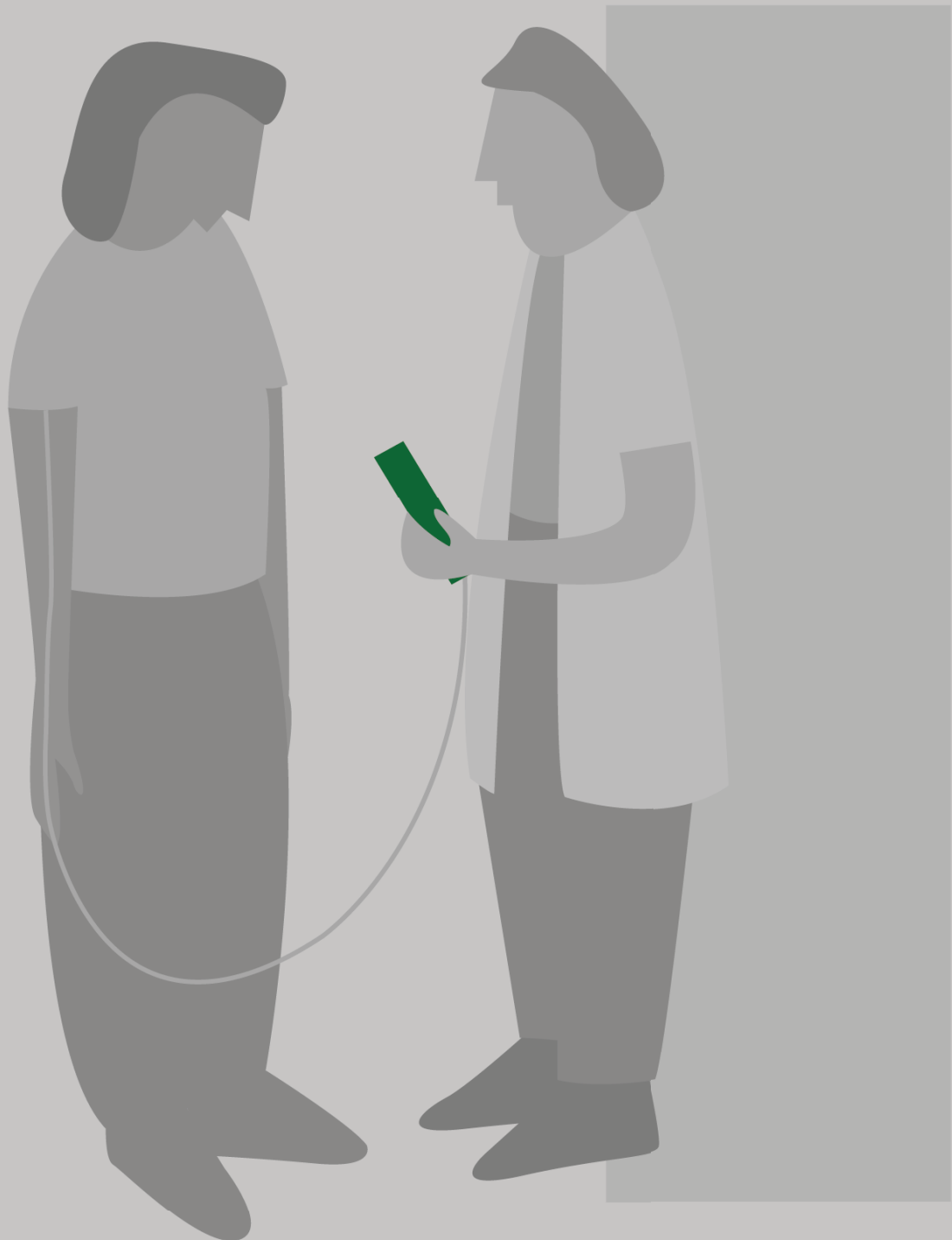
‘history-sheeters’ and conduct surveillance on them. While the majority opinion held that these regulations did not violate personal liberty, except for those which permitted domiciliary visits, Justice S. Rao in his minority opinion held that the right to privacy *“is an essential ingredient of personal 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”. The Court also reviewed other seminal cases developing the right to privacy, including *Govind vs. State of Madhya Pradesh* ((1975) 2 SCC 148), *R. Raj Gopal vs. State of Tamil Nadu* ((1994) 6 SCC 632) and *People’s Union for Civil Liberties vs. Union of India* (AIR 1997 SC 568).

In examining the right to privacy, the Court made reference to the case of *Sharda vs. Dharampal* ((2003) 4 SCC 493). In this case, a civil court was allowed to mandate a medical test which was considered necessary for ascertaining the mental condition of one of the parties. The case of *Sharda vs. Dharampal* also surveyed the cases mentioned above, holding that a person’s right to privacy could be curtailed in light of competing interests. The Court however differentiated this from the present facts, focusing on the distinction between testimonial acts and physical evidence; being a civil case, *Sharda vs. Dharampal* did not discuss Article 20③ of the Constitution.

The Court held that while the understanding of privacy was primarily based on the protection of the body and physical spaces from intrusive

actions by the State, the right to privacy should account for its intersection with Article 20③. Subjecting a person to the impugned techniques was held to be a violation of the prescribed boundaries of privacy. It further held that even in a case where the individual does not face criminal charges, such tests being involuntarily administered would still violate a person's right to liberty under Article 21, as such administration would constitute cruel, inhuman and degrading treatment.

The Court therefore ordered that no tests could be administered unless by consent of the accused, obtained before a Judicial Magistrate in the presence of their lawyer. The statement made would also have the status of a statement made to the police and not a confessional statement. The test would be conducted by an independent agency, in the presence of a lawyer, and would be duly recorded.



Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women & Ors.

(2010) 8 SCC 633,
(2010) 9 SCR 457

2010

Autonomy

Dignity

With regard to DNA testing, the Court should use its discretion only after balancing the interests of the parties, and after considering the 'eminent need' and weighing the pros and cons of ordering a DNA test, especially when there is a conflict between the right to privacy of a person, who is being compelled to take the test and duty of the court to reach the truth.

**Constitutional
Provision(s)**

Article 21

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice R.M. Lodha on behalf of
Justice A. Alam and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. 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 is eminently needed.”

Case Brief

This case was concerned with the issue of when it is appropriate for a court to order a paternity test. The Supreme Court (“Court”) had to determine whether the High Court of Orissa and the State Commission for Women (Orissa) were justified in ordering a DNA test of a child and the Appellant, Bhabhani Prasad, who was the putative father.

The Court reviewed the provisions of the Orissa (State) Commission for Women Act, 1993 (“the Act”) empowering the Commission and observed that the Commission was not the competent authority to pass such orders. Regarding the High Court’s competence to pass an order for DNA testing, the Supreme Court analysed the facts of this case in light of precedents including *Goutam Kundu vs. State of West Bengal* ((1993) 3 SCC 418) and *Sharda vs. Dharampal* ((2003) 4 SCC 493). It observed that the High Court had exceeded its jurisdiction in passing this order because no prima facie case for DNA testing was made out, and because matrimonial proceedings were still pending before the District Judge. However, should the parties raise the issue of paternity before the matrimonial court, it would be competent to pass an order for DNA test.

The Court noted the sensitivities involved with the issue of ordering a DNA test, and therefore held that the court should use its discretion only after balancing the interests of the parties. It ruled that a court should consider the ‘eminent need’ and weigh the pros and cons of ordering a DNA test, especially when there is a conflict between the right to privacy of a person who is being compelled to take the test and the duty of the court to reach the truth.

Case Summary

Facts

The Appellant, Bhabani Prasad Jena, and Suvashree Naik, the Respondent No. 2 were married in 2007. In less than three months, the Appellant initiated matrimonial proceedings before the District Judge for a declaration that the marriage was null and void as it had not been consummated.

In 2008, the Respondent No. 2 filed a complaint before the Orissa State Commission for Women contending that she and the Appellant-Husband had separated due to torture meted out to her by the Appellant and his family. She also claimed that she was pregnant with the Appellant’s child and had no source of income. The State Commission, apart from ordering maintenance, compensation, and delivery expenses to be borne by the Appellant,

ordered a DNA test of the child and the Appellant for the purpose of confirming paternity. The Appellant challenged this order through a writ petition before the High Court of Orissa claiming that he had not fathered the unborn child. The High Court ordered DNA testing of the Appellant as well as the unborn child. Aggrieved by this order, the Appellant appealed before the Supreme Court.

Issues

- A. What are the extent of powers of the State Commission for Women (the Commission) constituted under Section 3 of the Act; and
- B. Whether the High Court of Orissa was justified in ordering a DNA test of the child and his alleged father.

Arguments

The Appellant argued that the marriage between him and Respondent No. 2 was a nullity. It was further submitted that the marriage had not been consummated, and he had not fathered the child in the womb of Respondent No. 2.

Respondent No. 2 argued that the Commission had the power to receive complaints including matters concerning the deprivation of women of their rights. It was further argued that Section 10³ of the Act conferred the Commission with all the powers of a civil court trying a suit and they would accordingly have the power to order a DNA test.

Decision

In deciding the first issue, the Court reviewed Section 10 of the Act, which sets out the func-

tions of the Commission. It noted that the Commission was only empowered to take up complaints received by them with the concerned authorities for appropriate remedial measures. The Court further noted that the Commission was not a tribunal discharging functions of a judicial character and it could not determine the rights of parties. Moreover, the Commission had the powers of a civil court only with regard to matters specified in Clauses (a) to (f) of Section 10 of the Act, and therefore, it had no competence to pass an order directing conduct of a DNA test of the child and the Appellant. The Court declared that such an order would be void.

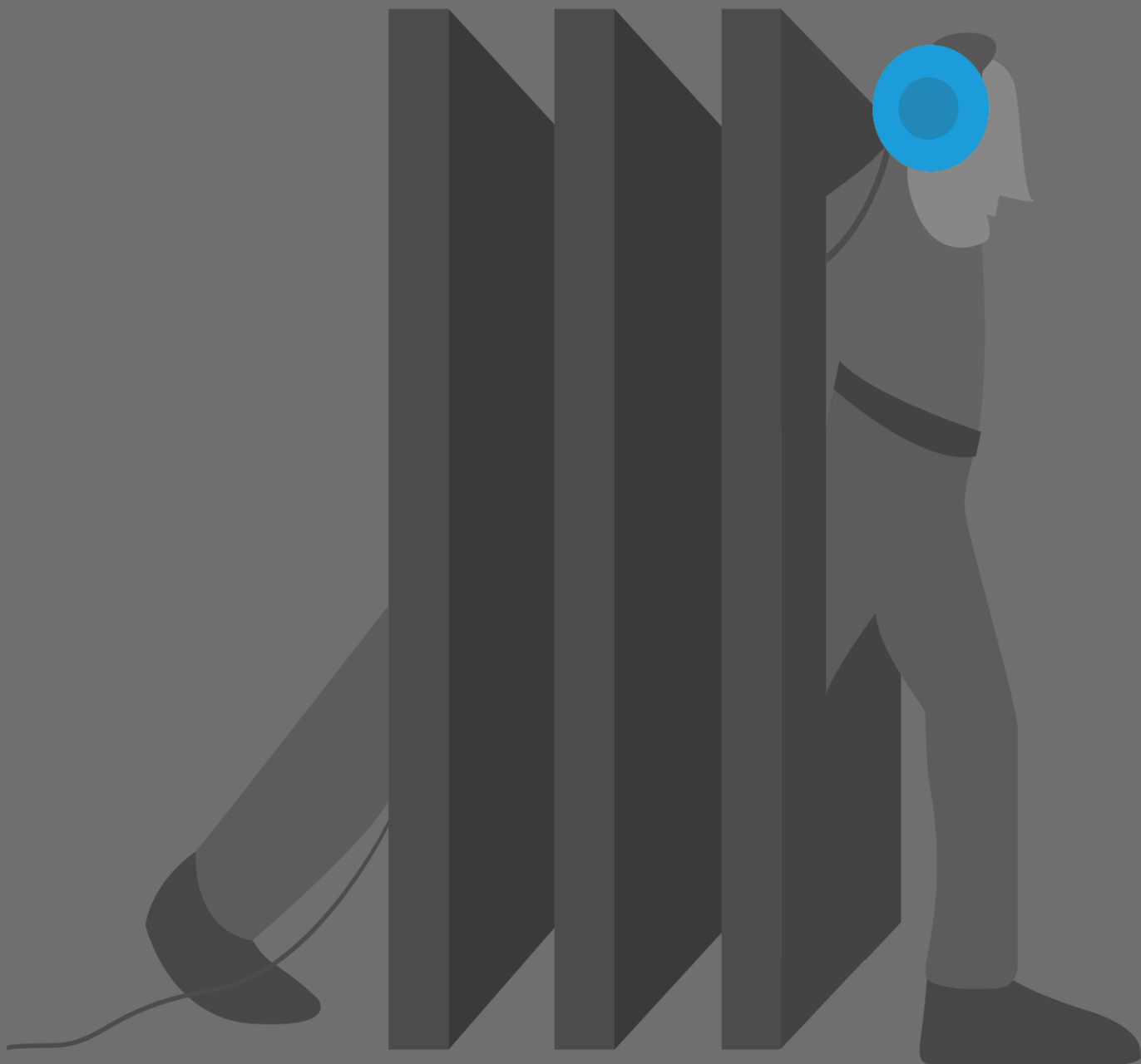
The Court then examined whether the High Court could give a direction for holding a DNA test, and analysed seminal cases on this subject, such as *Goutam Kundu vs. State of West Bengal* ((1993) 3 SCC 418) and *Sharda vs. Dharampal* ((2003) 4 SCC 493) as well as several other authorities. It noted that “*in a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect.*” The Court noted the conflict that may arise between usage of scientific advances and the potential invasion of a person’s privacy. Further, a DNA test might not only be prejudicial to the rights of the parties but may have a devastating effect on the child involved who may then be ‘bastardised’.

According to the Court, “*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 is eminently needed.*”

DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test."

In discussing the precedents before it, the Court observed that there was no conflict between the cases of *Goutam Kundu* and *Sharda*. Both stress the need for a strong *prima facie* case and that no one can be compelled to give a blood sample. *Goutam Kundu* laid down that courts in India could not order blood tests as a matter of course or as a roving inquiry, and the consequences of ordering a blood test must be carefully examined. *Sharda* concluded that a matrimonial court has the power to order a person to undergo a medical test, and it would not be violative of a person's right to personal liberty under Article 21, but should the person refuse to submit to such a test, the court would be entitled only to draw an adverse inference.

Noting that "*any order for DNA can be given by the court only if a strong prima facie case is made out for such a course*", the Court analysed the nature of proceedings with which the High Court was concerned, and held that the High Court exceeded its jurisdiction in passing the impugned order. However, it clarified that, given the pending matrimonial proceedings, "*(s)hould an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law.*"



Amar Singh vs. Union of India & Ors.

(2011) 7 SCC 69,
2011 (5) SCALE 606

May 11,, 2011

Phone Tapping

Informational Privacy

Surveillance, Search and Seizure

Telecom service providers must verify the authenticity of requests for interception of communication to prevent misuse. Unlawful interception of communication amounts to gross violation of the right to privacy.

Constitutional Provision(s)

Articles 21 and 32

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice G.S. Singhvi on behalf of
Justice A.K. Ganguly and himself.

“Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution, as has been held by this Court.”

Case Brief

This case dealt with the constitutionality of phone tapping. The case arose when the Petitioner came to be informed that his telephone conversations were being recorded by his telecom service provider at the behest of the Government of NCT of Delhi. He believed that the wiretapping was being done because of the political positions he held. Following this, he approached the Supreme Court to declare the wiretapping unconstitutional and an infringement upon his right to privacy.

During the course of the case, the request received by the telecom service provider from the Government was found to be falsified. The Court observed that such unlawful interception of phone conversations amounted to a gross violation of the right to privacy. Given the importance of the issue, the Court observed that telecom service providers, though bound by the requests of the Government, are also under a duty to ensure that the request is authentic. The Court directed the Government to frame statutory guidelines in this regard. However, as the Court believed the Petitioner had not approached them with clean hands, it declined to give any relief in the matter.

Case Summary

Facts

On 22nd October 2005, a request was allegedly issued from the office of the Joint Commissioner of Police, New Delhi to the Nodal Officer, Reliance Infocom Ltd., Delhi, to intercept all calls made to and from the Petitioner, Amar Singh's telephone number. This was followed by an official authorization of the request from the Principal Secretary (Home) of the Government of NCT of Delhi.

Issue

Whether tapping the Petitioner's phone violated his right to privacy under Article 21 of the Constitution.

Arguments

The Petitioner submitted that his right to privacy was violated by the interception, monitoring and recording of his phone conversations. The Petitioner referred to similar instances of interception of other political figures by the Government, in pursuance of political ill will. Being a prominent member of the Samajwadi Party during the erstwhile Congress rule, the Petitioner alleged that the violation was politically motivated at the behest of the latter. Accordingly, he prayed to the Court to declare the orders for interception unconstitutional as they infringed upon his right to privacy, disclose details of the orders made, frame guidelines for the interception of phone conversations, and to initiate a judicial inquiry into the issuance of such orders and award damages.

The Government submitted through affidavit that the impugned request for interception

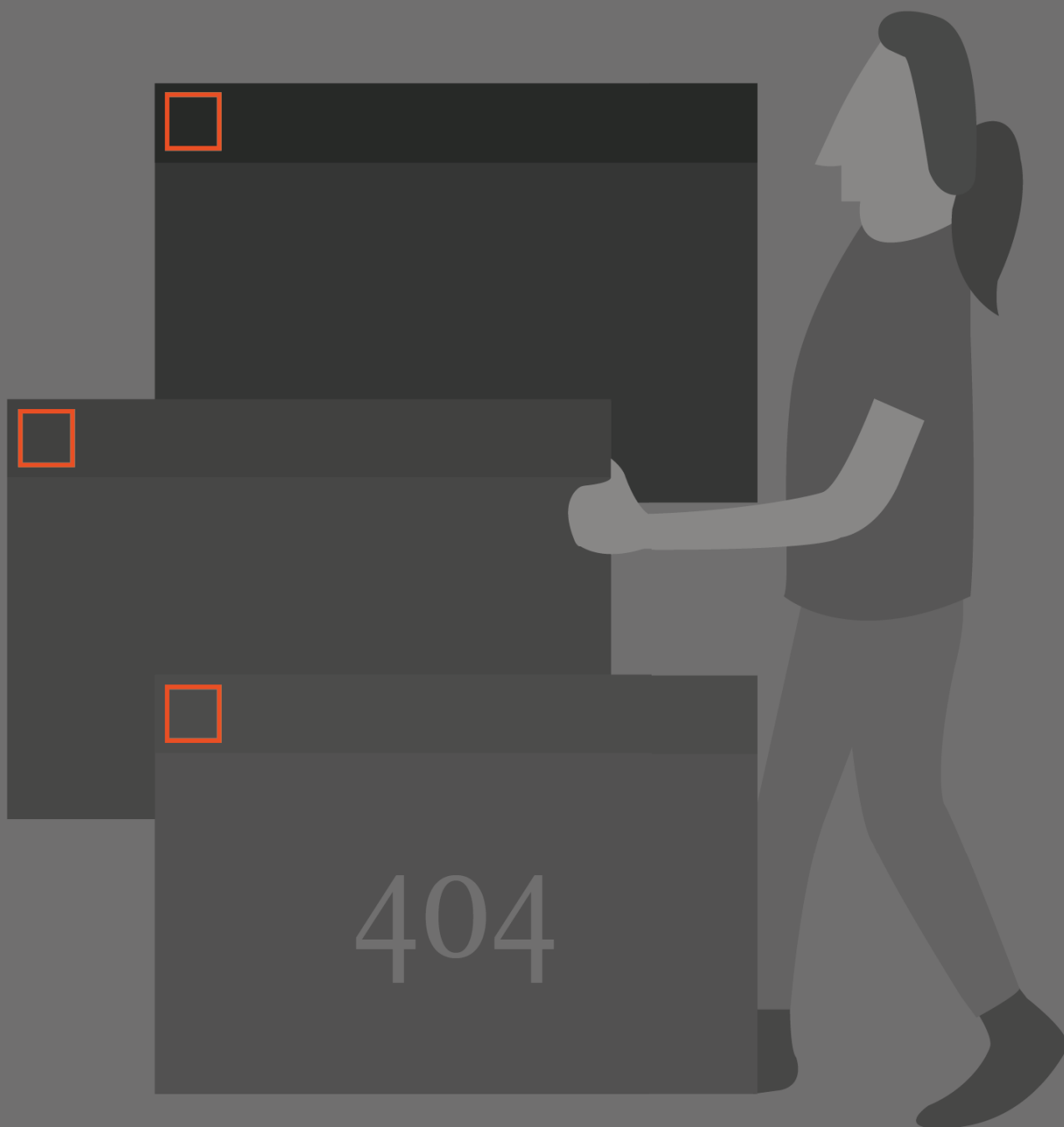
and subsequent authorization had forged signatures and were completely fabricated. A criminal case for forgery had been initiated and the Petitioner had averred that he was satisfied by the investigation ongoing therein. No request for the Petitioner's telephone number and interception was submitted by the Joint Commissioner of Police, and in the absence of the same no such request could have been suo moto instituted by the Home Department. It was shown that the specific request was fraught with gross errors and mistakes, which indicated its inauthenticity

Decision

On the facts of the case, the Court observed that while service providers were rightly under the duty to act promptly on a request received from Government agencies for interception, they were 'equally duty bound to immediately verify the authenticity of such communication'. The Court noted that given the public element involved in the service of the telecom provider, it was required to be vigilant about fake requests. The Court noted that interception of phone calls was an invasion of the right to privacy, which had been recognized by the Court as a fundamental right, and interception could only be resorted to in the furtherance of public interest based on genuine, official requests, based on a procedure established by law. The telecom service provider's failure to verify the authenticity of a request that appeared on the face of it suspicious meant that it had failed in its public duty.

The Court however took note of the casual manner in which the Petitioner preferred the current application. He did not adhere to the

procedural requirements regarding submission of affidavits under Order XIX Rule 3 of the Code of Civil Procedure, 1908 by failing to disclose the sources of his information therein, or Order XI of the Supreme Court Rules, 1966. The Court concluded that when invoking extraordinary jurisdiction under Article 32, it was the Petitioner's duty to follow the same. The Court also observed that the Petitioner had constantly shifted his stance as against Respondent No. 7, i.e. the Indian National Congress and had suppressed facts including his reliance on the accused in a criminal case for information, both of which were indicative of unclean hands. Thus, despite the aforementioned observations, the Court dismissed the petition for being frivolous and speculative in character. However, the Court gave liberty to the Petitioner to seek appropriate legal remedy against the telecom service provider for unauthorized interception, and also directed the Central Government to frame guidelines regarding interception of phone conversations.



Ram Jethmalani & Ors vs. Union of India & Ors

(2011) 8 SCR 725,
(2011) 8 SCC 1

2011

Informational Privacy

Revealing bank account details of individuals without establishing prima facie grounds to accuse them of wrongdoing violates their right to privacy.

**Constitutional
Provision(s)**

Article 21

Case Type

Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by
**Justice B.S. Reddy and
Justice S.S. Nijjar.**

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. (...) The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values. The rights of citizens, to effectively seek the protection of fundamental rights, under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21.”

Case Brief

This case dealt with the issue of State failures in tackling corruption, offshore storage of funds and tax evasion. The Petitioners, a group of noted professionals, brought to the Court's attention several media reports that mentioned siphoning off of unaccounted monies by nationals and legal entities of India to tax havens with strong secrecy laws. The Petitioners sought accountability from the Government for failure to adequately prosecute such cases, including specifically the cases of Hassan Ali Khan, and Kashinath and Chandrika Tapuria. The Court acknowledged the Government's failures in effective investigation, and passed several directions including the constitution of a high-level Special Investigation Team ("SIT").

Further, the Petitioners had sought disclosure of various documents including names and bank particulars of bank accounts held by Indian citizens in Liechtenstein. However, acknowledging the right to privacy as an integral part of the right to life under Article 21, the Court noted the importance of keeping individuals free from public scrutiny unless they act in an unlawful manner. The Court observed that creating exceptions on the fly and violating the right to privacy of law-abiding citizens could not be permitted to facilitate investigations and prosecutions, noting that the exercise of rights under Article 32 would need to be balanced with rights provided for under Article 21. Therefore, the Court exempted the Respondent from revealing the names of those individuals against whom investigations or proceedings remained pending and directed disclosure of details of those individuals against whom investigation had been concluded and proceedings initiated.

Case Summary

Facts

This petition was filed by a group of well-known professionals, social activists, and former bureaucrats, who belong to an organisation called Citizen India that aimed to better the quality of governance and functioning of the public institutions in the country. Referring to a slew of media reports and scholarly publications, the Petitioners alleged that large sums of monies generated through unlawful activities had been secreted away in foreign banks, especially in tax havens with strong secrecy laws, such as Liechtenstein, by nationals and legal entities in the country. Further, despite having knowledge about the monies in certain bank accounts, the Respondent had not launched a proper investigation. The Petitioners highlighted specific incidents and patterns of dereliction of duty by the Respondent; in the case of Hassan Ali

Khan, and Kashinath and Chandrika Tarapuria, the Respondent had not initiated any investigation or prosecution, despite issuing show cause notices.

The Petitioners alleged that failure to control such activities revealed the incapacity of the State to control tax evasion and crime prevention and could have serious connotations for the security and integrity of India. They sought directions for the constitution of an SIT headed by former judges of the Supreme Court to ensure proper investigation in these matters. The Petitioners also sought disclosure of certain documents held by the Respondent, which contained names and bank particulars of Indians holding offshore bank accounts, particularly in Liechtenstein.

Issues

- A. Whether the Government had lapsed in its duty to conduct a proper investigation,

and further whether there was a need to constitute an SIT to supervise the investigation; and

- B. Whether the disclosure of names and bank particulars of individuals alleged to have stored black money offshore violated their right to privacy.

Arguments

The Petitioners argued that there was a need to constitute a SIT, given the inefficient manner of conducting the investigation by the Government. The Petitioners further argued that despite the Respondent being aware of a large number of names of the individuals holding unaccounted monies in foreign banks accounts, the Respondent had been lax in carrying out an investigation. They alleged that documents received from Germany included the names of prominent and powerful Indians and the Government was using Double Taxation Agreements (“DTA”) as an excuse to conceal this information from the public.

The Respondent-State submitted that they had formed a High Level Committee (“HCL”) to coordinate the investigation in these cases and that there was no need to constitute a SIT. The Respondent agreed that they received the names and particulars of bank accounts in Liechtenstein from Germany under the DTA. It relied on the confidentiality and secrecy clause in DTA to submit that these agreements barred the Respondent from disclosing the information to the Petitioners, even during the ongoing court proceedings.

It argued that disclosure of names of individuals with bank accounts, and other related information would violate the right to priva-

cy of the individuals, who had deposited the monies in a lawful manner. It submitted that disclosure could be made only with respect to those individuals with regard to whom the investigations were completed and proceedings initiated and claimed exemption from providing information about those individuals against whom investigation or proceedings remained pending.

Decision

In light of the unsatisfactory status reports filed by the Respondent and several lapses in their actions, even after forming a HLC, the Court ordered the appointment of an SIT, headed by two former Judges of the Supreme Court, to monitor the investigations and prosecution related to storage of unaccounted monies in foreign bank accounts by the Indians, and especially all matters concerning Hassan Ali Khan and the Tarapurias.

With regard to disclosure of names and particulars of Liechtenstein account holders, the Court analysed the relevant portions of the DTA and observed that there was no absolute bar of secrecy, and that the DTA specifically accounted for disclosure in public court proceedings. The Bench further noted that in proceedings under Article 32, *“both the Petitioner and the State have to necessarily be the eyes and ears of the Court”* and that the State, in general, has the duty to reveal all the facts and information in its possession to the Court as well as to the Petitioner.

However, the Court further observed that holding a bank account in a foreign jurisdiction was not unlawful and could not be a ground for revealing an individual’s bank ac-

count details. Acknowledging the possibility of abuse involved in disclosing bank details of individuals, the Court held that unless the State had established *prima facie* grounds to accuse the individuals of wrongdoing through properly conducted investigations, it could not reveal bank account details to the public at large. The Court noted that Article 32^① sought to protect the freedom of speech and expression under Article 19^①(a), and the State could not withhold the information from the Petitioner unless it fell within the scope of exceptions under Article 19^②.

However, the right of individuals to seek protection of fundamental rights under Article 32^① had to be balanced with the individual's right to privacy under Article 21, and a solution for the problem of abrogation of one zone of constitutional values could not be the creation of another zone of abrogation of constitutional values. Further, the Court noted that the right to privacy was an integral part of the right to life and it was important that individuals were kept free from public scrutiny unless they acted in an unlawful manner and that exceptions to this right could not be created in haste.

The Court therefore exempted the Respondent from revealing the names of those individuals against whom any investigation or proceeding remained pending and directed disclosure of details of those individuals against whom investigation had been concluded and proceedings initiated.



Sanjoy Narayan Editor in Chief Hindustan & Ors. vs. Hon. High Court of Allahabad Thr. R.G.

(2011) 13 SCC 155,
2011 (9) SCALE 532

2011

Press Freedom

Press freedom must be carefully regulated and reconciled with a fundamental right to privacy.

**Constitutional
Provision(s)**

Article 19

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by
**Justice M. Sharma and
Justice Anil R. Dave.**

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person’s fundamental right to privacy.”

Case Brief

In this case, the Supreme Court recognized the need to reconcile the right to freedom of speech and freedom of the press with individual privacy. The case arose on account of a newspaper report about the then-Chief Justice of the High Court of Allahabad, which was found to be inadequately fact-based. Upon the Appellants tendering an unqualified apology, the Court ordered closure of contempt proceedings initiated against the Appellants and disposed of the appeal.

In deciding the case, the Court observed that the freedom of the press and media needed to be adequately regulated in order to prevent infringement of individual privacy and harm to reputation. It further observed that even though the right to information and freedom of media were fundamental democratic values, they could be restricted on grounds including those mentioned in Article 19(2), as well on the basis of the right to privacy.

Case Summary

Facts

The Appellants, the Hindustan Times, published a newspaper report in September 2010 that referred to the then-Chief Justice of the Allahabad High Court. The Allahabad High Court found the report was untrue and based on biased allegations and conjecture, and was sufficiently defamatory in nature that it tarnished the reputation of the Chief Justice. The Chief Justice thus initiated contempt proceedings against the Appellants for damaging his and the institution's reputation. Subsequently, the Appellants tendered an apology for the publication of the article in question. The same was rejected by the Allahabad High Court, against which the present appeal was filed.

Issue

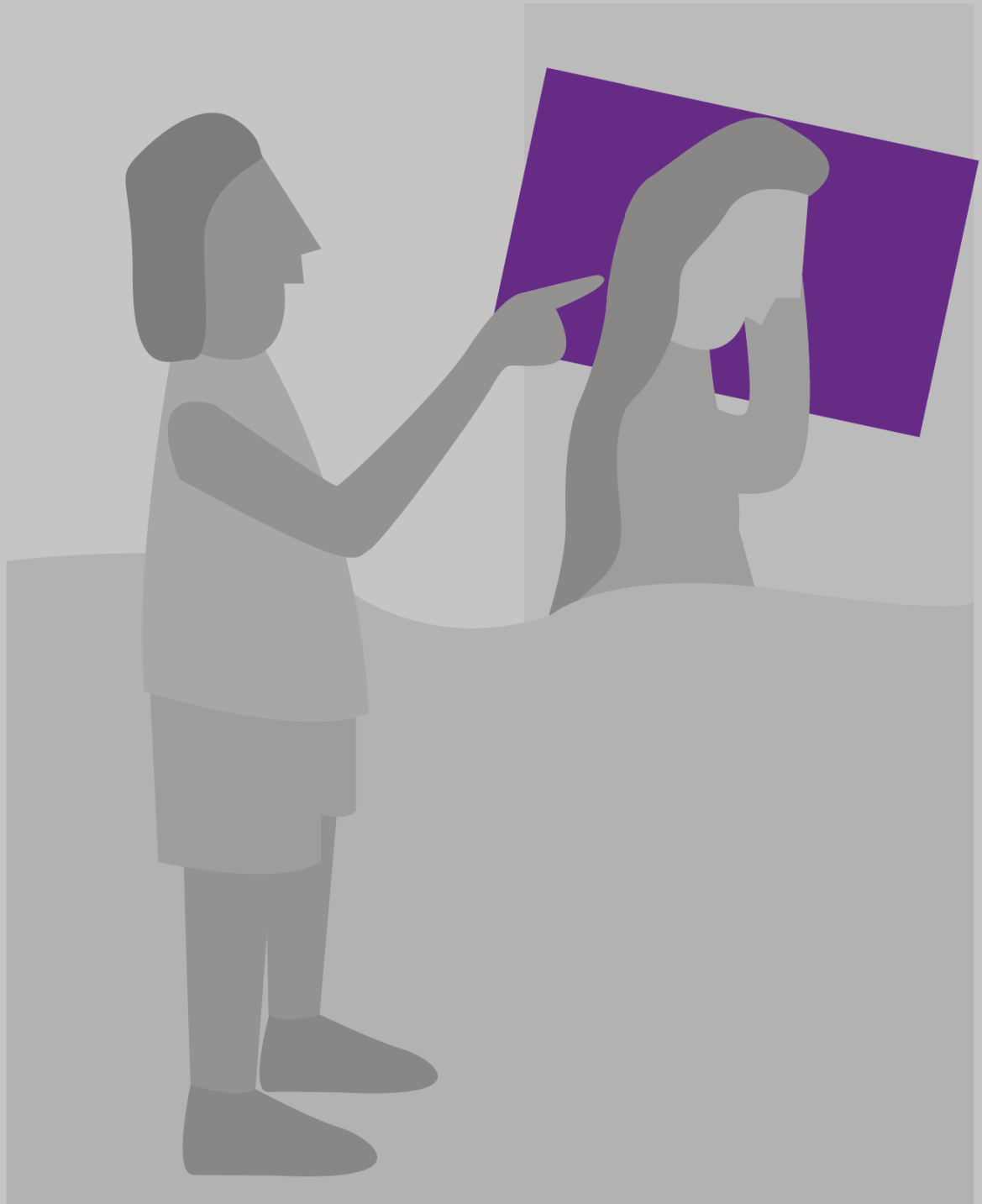
Whether the right to free speech and press freedom under Article 19 held by the Appellants was reasonably restricted under Article 19②.

Decision

In discussing whether the appeal should be allowed, the Court observed that while the media, as the *“fourth pillar of democracy”*, was responsible for shaping public opinion, maintaining State accountability and ensuring individual participation in governance, it had a great responsibility in discharging that duty faithfully. The right to free speech under Article 19①(a) of the Constitution was limited by State and public interest under Article 19②, as well as by contempt of courts and defamation. The Court further observed that the power of the media needed checks and balances in

order to ensure that it did not infringe upon individuals' privacy. The Court held that the right to information facilitated by the media needed to be balanced, including by the right to privacy, which could be adversely affected by the publication of incorrect and biased information. The Court thus connected the right to reputation with that of privacy.

The Court then noted that the only reason for the rejection of the Appellants' apology to the Chief Justice and the Allahabad High Court was that it was not unqualified. Since the Appellants had filed an affidavit tendering an unqualified apology subsequently, the Court held that it was reasonable to accept the same and thus ordered closure of the contempt proceedings initiated against them.



In Re: Ramlila Maidan Incident

(2012) 5 SCC 1,
2012 AIR SCW
3660

2012

Dignity

The right to life envisages the right to sleep peacefully, and any unjustified intrusion would amount to an invasion of privacy, which was recognized to be an essential facet of the right to life and human dignity.

**Constitutional
Provision(s)**

Articles 19 and 21

Case Type

Suo Moto Criminal Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice S. Kumar and

1 concurring opinion by

Justice B.S. Chauhan.

**Number of
Opinion(s)**

2/0

OPINIONS DISSENT

“(I)t is evident that (the) right of privacy and the right to sleep have always been treated to be a fundamental right like a right to breathe, to eat, to drink, to blink, etc.”

Case Brief

The case was taken up by the Supreme Court suo moto, when the Government imposed Section 144 of the Code of Criminal Procedure, 1973 (“CrPC”) and attempted to suppress a peaceful crowd of sleeping protesters in the Ramlila Maidan. This was followed by an evacuation of the protest ground, at 12:30 am, using water guns, tear gas etc. which resulted in many injuries and one death.

The Court discussed the imposition of Section 144 of the CrPC, and examined the procedural safeguards which would have to be followed. It held that in order to pass an order under Section 144, there must be co-existence of material facts, an imminent threat and the requirement for immediate preventive steps in order to prevent harm. The Court reaffirmed that passing an order under Section 144 was not violative of the freedom of speech and expression under Article 19① of the Constitution. It also held that taking prior police permission for holding protests would not infringe the fundamental rights enshrined under Articles 19①(a) and 19①(b). This would fall within the ambit of reasonable restrictions, contemplated under Articles 19② and 19③.

In the present case, the Court held that there was no imminent need to intervene, and therefore the restriction placed by the imposition of Section 144 was unreasonable, and was unwarrantedly executed. The Court accordingly ordered for criminal cases to be instituted against both the police and the members of the protest who indulged in destruction of property. It also ordered disciplinary action against those police personnel who resorted to excessive use of force, and who did not help in the evacuation of the people from the ground.

Justice Chauhan in his concurring opinion held that the acts amounted

to brutal use of force that were wholly unjustified under Articles 19 and 21. He also opined that the actions of the police infringed upon the right to privacy. He observed that the right to life envisaged the right to sleep peacefully as well, and any unjustified intrusion would amount to an invasion of privacy, which he recognized to be an essential facet of the right to life and human dignity.

Case Summary

Facts

The Supreme Court took *suo moto* cognizance of this case, based on the facts below. On 27th February, 2011, Baba Ramdev led an anti-corruption Rally at the Ramlila Maidan in New Delhi, which was attended by over 1 lakh people. A few months later, the Bharat Swabhiman Trust, New Delhi was granted permission to rent the Maidan to hold a Yoga Training Camp from 1st – 20th June 2011. Further, in May, Baba Ramdev announced his intention to go on a fast to protest the Government's inaction against black money, and obtained permission to hold a demonstration at Jantar Mantar on 4th June 2011, with not more than 200 people.

On the 4th, instead of conducting the Yoga Training Camp, Baba Ramdev staged a protest in the Ramlila Maidan, including a hunger strike which was attended by over 50,000 people. At about 11.30 p.m., a team of police personnel led by the Joint Commissioner of Police, met Baba Ramdev and informed him that the permission to hold the camp had been withdrawn and that he would be detained. Thereafter, the Delhi Police, Central

Reserve Police Force and the Rapid Action force were deployed at 12:30 am to break up the protest and arrest Baba Ramdev. The forces used water cannons, tear gas and batons on the protestors, to dispel the protest.

Issue

Whether the imposition of Section 144 of the CrPC at the rally violated the right to free speech and expression, the right to assembly and the right to life, as protected under Article 19 and Article 21.

Arguments

The *Amicus Curiae* in this case submitted that the late withdrawal of permission to hold a demonstration in the Ramlila Maidan and Jantar Mantar, as well as the imposition of Section 144 of the CrPC was without good cause, and was based on political and *mala fide* reasons. He submitted that the aforementioned actions were to quell peaceful protests and that the Government had used undue force by resorting to tear gas and lathi charge on sleeping people. He argued that a change in the number of people attending did not constitute a valid ground for apprehension of violence by the police.

Bharat Swabhiman Trust, the fourth Respondent i.e. Baba Ramdev's organization submitted that Ramdev and his followers were law-abiding citizens with no intention of disturbing law and order in any way. They further submitted that they had obtained a no-objection certificate from the Commissioner of Police, Delhi in furtherance of their application to hold the event on the Ramlila Maidan.

In its affidavit, the Delhi Police clarified that the permission was given with respect to holding a yoga camp at the Ramlila Maidan, and not a hunger strike as part of a protest. The order imposing Section 144 was made keeping in mind potential security concerns, stemming from the number of people who could have joined the protest the next day, as well as the communally charged atmosphere of the neighbourhood where the protest took place. The use of force undertaken by the force was in response to incidents of violence breaking out among the protestors, which injured several officers.

Decision

The Court considered the purpose and reasonableness of the restrictions imposed in the present case, and whether they were permissible under Article 19②. The Court held that the legislative determination of restrictions were final and conclusive, as they were not open to judicial review. It relied upon the case *State of Madras vs. V.G. Row* (AIR 1952 SC 196) to hold that there could be no general pattern of reasonableness which was applicable to all cases, and that it would have to be determined individually. This could be based upon factors such as the duration and extent of the restrictions, the circumstances under which and the manner in which that im-

sition had been authorized, the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at the time, as was held by Court in the case of *Chintamanrao and Anr. vs. State of Madhya Pradesh* (AIR 1951 SC 118).

The Court also discussed the distinction between restriction and prohibition of a right, where the latter standard could only be applied in cases where no lesser alternative would be adequate. Any restriction imposed under Section 144 would have to be reasonable, and it could not be arbitrary or excessive, and it must possess a direct and proximate nexus with the object sought to be achieved. It examined the distinction between 'public order' and 'law and order', wherein restrictions imposed for maintaining 'law and order' would be less intrusive while 'public order' may qualify for a greater degree of restriction. Relying upon the decision in the case of *Babulal Parate vs. State of Maharashtra* ((1961) 3 SCR 423), the Court reaffirmed that passing an order in anticipation by a Magistrate was permissible under Section 144 and was not violative of clauses ② and ③ of Article 19.

In discussing the relationship between the imposition of Section 144 of the CrPC and the urgency of the situation, the Court held that urgency was an essential component under Section 144, and related to the perception of a real threat. As stated in the case of *Madhu Limaye vs. Sub Divisional Magistrate and Ors.* (AIR 1971 SC 2481), Section 144 was dependent upon the urgency of the situation and the likelihood of being able to prevent some harmful occurrences. The Court observed

that in the ordinary course of events passing an order under Section 144 of the CrPC was not an encroachment of the freedom granted under Articles 19①(a) and 19①(b) of the Constitution and could not be regarded as an unreasonable restriction. However, such an order must serve the larger interest, which at the relevant time had an imminent threat of being disturbed.

As Section 144 was intended to serve public purpose and protect public order, an order under this provision could only be invoked after the satisfaction of the authority that there was need for immediate prevention or that speedy remedy was desirable and the restrictions were necessary to protect the interest of others, prevent danger to human life, health, safety or disturbance of public tranquility. These features had to co-exist in order to enable the authority to pass an order under Section 144. The Court held that an order under Section 144 should be in writing and be based upon the material facts of the case. The Court would also not act as an appellate authority over such orders, and usually would not interfere.

The Court relied upon the case of *Gulam Abbas vs. State of Uttar Pradesh* (AIR 1981 SC 2198), which stated that the preservation of public peace and tranquility was the primary function of the Government and that in a given situation, a private right must give in to public interest. While the exercise of such power would by itself not be unreasonable, in the present case, the order passed under Section 144 did not give any material facts or compelling circumstances that would justify the passing of the order at that hour.

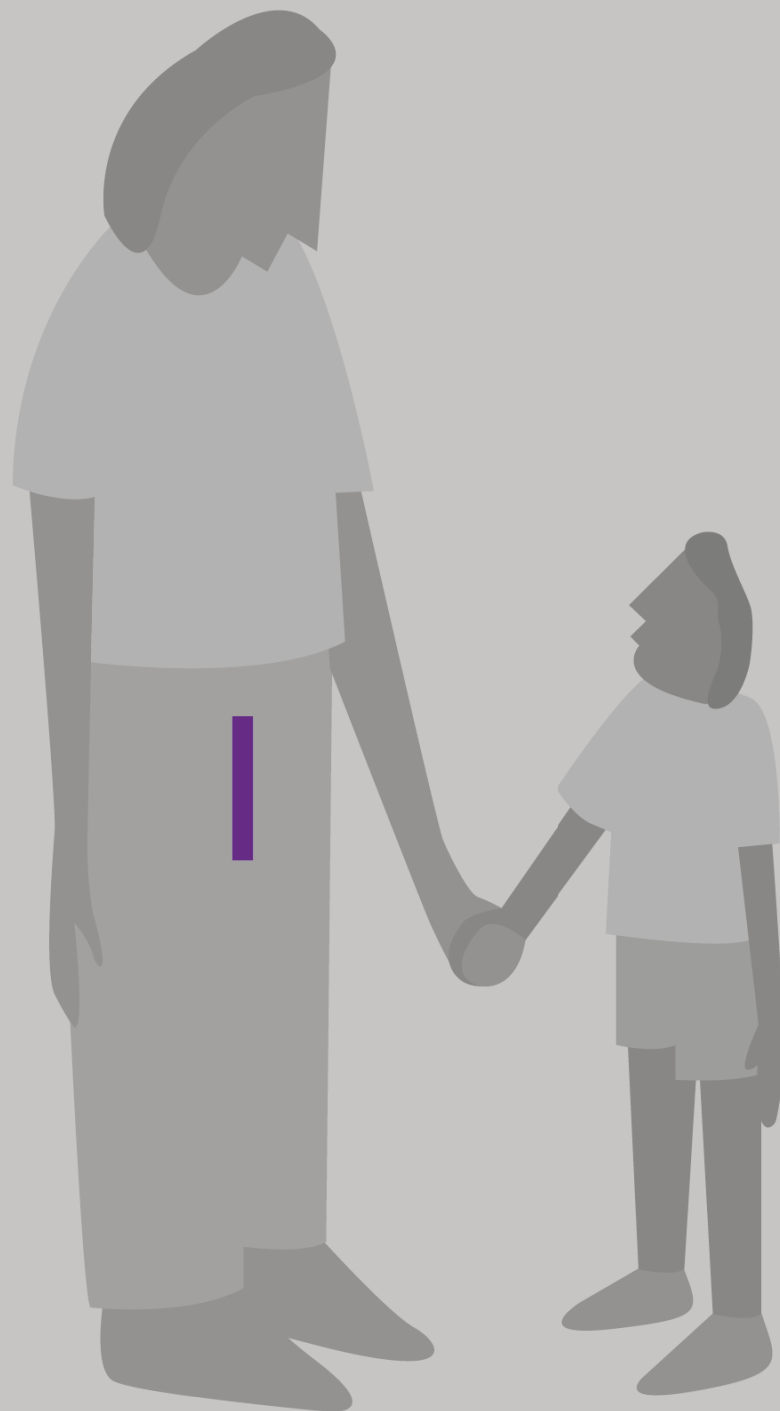
The Court also examined the question of ‘discretion’, that was exercisable with regard to the ‘threat perception’, for passing an order under Section 144 of the CrPC. In order to determine threat, the intent or the expected threat should be imminent, and some element of certainty should be present in the facts recorded and the necessity for taking such preventive measures. It also called for an objective application of mind to ensure that the constitutional rights were not defeated by subjective and arbitrary exercise of power.

The Court also discussed the importance of providing reasonable notice to the public before imposing such an order, to allow the public to leave the site. The Court held that the facts did not explain why it was necessary to impose Section 144 in the late hours of the night and that it was possible and desirable that the Police should have granted reasonable time for eviction.

Justice B.S. Chauhan, in his concurring opinion, commented on the right to privacy held by the sleeping individuals, and discussed that it would be protected under the Constitution. Noting that sleep was one of the basic essentials of life, he held it to be so essential that its deprivation would be considered physical and mental torture. To take away a person’s right to sleep would be a violation of their human rights and any disturbance caused intentionally, unlawfully and for no justification would amount to a violation of fundamental rights. He then discussed the right to privacy, which is an integral part of Article 21 of the Constitution, and that there could be no illegitimate intrusion into the privacy of a person. The right of privacy and the right to sleep are fundamental rights like a right to breathe, to eat,

to drink, to blink etc. In this case, it could be established that the people in the ground had not been served adequate notice or asked to leave the place. The act of the Police in ordering evacuation at a time when most people were asleep was unlawful and violated the basic human rights of the crowd to sleep, which was also a constitutional freedom, under Article 21.

Justice Chauhan further observed that the right to privacy and the right to sleep were both fundamental rights. Relying upon the judgment in *Ram Jethmalani & Ors. vs. Union of India* ((2011) 8 SCC 1), he noted that the State was obligated to protect the right to privacy of the sleeping persons from intrusion, against the actions of others in society. He also observed that privacy was not, however, absolute and may be limited in extreme circumstances.



Narayan Dutt Tiwari vs. Rohit Shekhar & Anr.

(2012) 12 SCC 554

2012

Dignity
Autonomy

The Supreme Court upheld the Delhi High Court's reasoning on paternity tests which was that the right to privacy exists; however, it is subject to lawful action taken to protect others.

Constitutional
Provision(s)

Article 21

Case Type

Special Leave Petition (Civil)

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice D. Verma and

Justice S.J. Mukhopadhaya.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak ‘adverse inference’.”

Case Brief

In this case, Rohit Shekhar, the Respondent, had filed a suit with the High Court of Delhi, seeking a declaration of paternity from prominent politician Narayan Dutt Tiwari, the Petitioner. In appeal, the Supreme Court considered an order passed by a Division Bench of the High Court of Delhi upholding an order by a Single Judge of the Delhi High Court in an interim application filed by the Petitioner. The order of the single Judge directed the Petitioner to permit a DNA test to be conducted on him.

The Supreme Court, while affirming the order of the Division Bench passed certain directions to ensure the confidentiality of the Petitioner. The orders before the Division Bench of the High Court dealt with the issues of implementability and enforceability of the Single Judge’s order directing a DNA test and addressed the main impediments to the enforceability of such order. These impediments included the potential violation of the right to privacy of the Petitioner, if compelled to take the DNA test. However, on balance, the High Court, considered the Respondent’s right to know his paternity would take primacy.

The Single Judge noted the decisions of the Supreme Court in *Sharda vs. Dharmpal* ((2004) 4 SCC 493) and *Bhabani Prasad Jena*

vs. Convenor Secretary, Orissa State Commission for Women and Anr ((2010) 8 SCC 633), observing that there was no violation to the right to life or privacy in directing a DNA test to be undergone by a person. However, this decision should be exercised after weighing all pros and cons and satisfying the test of eminent need.

However, while the Single Judge suggested that a DNA test could not be compelled and the Court was only entitled to draw an adverse inference from a failure to take such a test, the Division Bench differed from this opinion. They suggested that in light of the fact that the privacy rights of an individual were subject to checks and balances, and that technological advances required a harmonious reading of statutory provisions, a DNA test could be compelled. The Division Bench therefore directed 'use of reasonable force' against the Petitioner to ensure compliance with the Single Judge's order, as it felt that primacy needed to be given to the Respondent's right to know his paternity over the Petitioner's right to privacy.

Case Summary

Facts

Rohit Shekhar, the Respondent, had filed a suit with the High Court of Delhi, seeking a paternity declaration along with a perpetual injunction restraining the Petitioner from denying in public or otherwise the fact that he was the father of the Respondent. Further, the Respondent also filed an interim application requesting the High Court to direct the Petitioner to submit himself for a DNA test or any other test required to determine the paternity of the Respondent. The Single Judge allowed the Respondent's application and directed the parties to appear before the Joint Registrar for the purpose of DNA testing. Aggrieved by this order, the Petitioner filed an appeal

before the Division Bench of the High Court, contending that he should not be compelled or forced against his will, to provide blood or other tissue samples for DNA testing.

The Division Bench dismissed the Petitioner's appeal, after which he filed this Special Leave Petition ("SLP").

Issue

Whether a court order directing DNA testing was an enforceable and implementable order.

Decision

The Supreme Court made minor modifications (by providing additional confidentiality safeguards to the Petitioner) to the order of the High Court which analysed the impugned

order of the Single Judge. However, the Court largely affirmed the order of the Division Bench of the High Court. The High Court discussed the fact that the Single Judge placed reliance on *Sharda vs. Dharmpal* ((2003) 4 SCC 493), to hold that although a matrimonial court had the implicit and inherent power to order a person to submit himself to a medical test, if the person refused to comply with the court's order, the only consequence of that would be to draw an adverse inference.

The Division Bench noted on the aspect of enforceability and implementability of the impugned order that the same was not the subject matter of *Sharda* or other judgments like *Goutam Kundu vs. State of West Bengal* ((1993) 3 SCC 418), and *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Anr* ((2010) 8 SCC 633), which the Single Judge had relied upon in his judgment.

Further, the Division Bench referred to *H.M Kamaluddin Ansari & Co. vs. Union of India* ((1983) 4 SCC 417) and *Attorney General vs. Guardian Newspapers Ltd.* ((1987) 1 WLR 1248) which held that orders of the court were to be complied with and the court would not pass an order which would be ineffective. It also referred to *K.A. Ansari vs. Indian Airlines Ltd* ((2009) 2 SCC 164) wherein it was held that difficulty in implementation of an order passed by the court, could not be an excuse for its non-implementation. Moreover, the Court noticed in *M.V.S. Manikayala Rao vs. Narasimhaswami* (AIR 1966 SC 470) that under Section 36 of the Code of Civil Procedure, 1908, the provisions relating to execution of decree also applied to the execution of orders. The Division Bench noted that the Single

Judge had held the impugned order unimplementable and unenforceable for the reason that it would be violative of Article 21, because mandating a medical test for an unwilling individual would entail an element of violence and intrusion into an individual's privacy, which was impermissible under Article 21, and therefore the impugned order allowed the Petitioner liberty to comply with or disregard its order. The Single Judge also observed that confining a person to forcibly draw blood or other bodily substances was not envisaged in any statutory provisions governing civil legislation. In this regard, the High Court referred to *Selvi vs. State of Karnataka* ((2010) 7 SCC 263) which held that compelled extraction of blood samples in the course of a medical test did not amount to conduct that shocks the conscience and use of reasonable force, where necessary, was mandated by law.

Further, the Division Bench analysed the impugned order on the aspect of privacy and noted that the impugned order had held that DNA testing was not violative of Article 21, while stating that the level of privacy protection was contextual and human rights law justified ordering a person to submit himself to medical tests that may be invasive as the right to privacy was not an absolute right and could be reasonably curtailed. In stating this, the Single Judge had contradicted himself as he had held the same factors to be an impediment to the implementability and enforceability of his order. The Division Bench noted this and thus held, "*what is not an impediment to the making of the order, cannot become an impediment to the enforceability of the order and would tantamount to saying that the court order is violative of the rights of the litigant*".

The Division Bench found it improper to allow the Petitioner to subdue a valuable right of the Respondent, by agreeing to be satisfied with a comparatively weak 'adverse inference', and thus directed the Single Judge to take police assistance as well as allowed use of reasonable force, to ensure compliance with the impugned order. Broadly speaking, the Division Bench of the High Court did not interfere with the impugned order as it noticed that the Single Judge directed a medical test upon *prima facie* evidence that satisfied the eminent need test, but modified the impugned order to ensure its compliance and corrected the inherent contradiction of the impugned order.



Girish Ramchandra Deshpande vs. Central Information Commissioner & Ors.

(2013) 1 SCC 212,
(2012) 8 SCR 1097

2012

Informational Privacy

Right to Know and Access Information

Press freedom must be carefully regulated and reconciled with a a
fundamental right to privacy.

**Constitutional
Provision(s)**

Article 21

Case Type

Special Leave Petition (Civil)

Case Status

Not Overruled

Bench Strength

2

1 opinion by

**Justice K.S. P. Radhakrishnan and
Justice D. Misra.**

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“The performance of an employee/officer in an organization 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 would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the Petitioner cannot claim those details as a matter of right.”

Case Brief

This case was a Special Leave Petition (“SLP”) filed before the Supreme Court regarding the right to privacy with respect to information about public servants, in the context of Section 8①(j) of the Right To Information Act, 2005 (“RTI Act”). Section 8①(j) exempts disclosure of certain information that might impinge on the right to privacy of the person about whom information is sought.

The case arose when the Petitioner sought several types of information relating to an officer of the State of Madhya Pradesh through an RTI application. The concerned office refused to furnish several particulars under the exception included in Section 8①(j). This refusal was broadly upheld by the Chief Information Commissioner (“CIC”), and by a Single Judge and a Division Bench of the High Court. The Supreme Court through this SLP, interpreted Section 8①(j), as well as clauses 8①(e) and 8①(g) of the RTI Act, and upheld the order of the CIC as acceding to the Petitioner’s request would violate the privacy of the public servant. The Court was of the opinion that the information requested was mostly of a nature that would find a place in the income tax returns of the officer, and in absence of *bona fide* public interest, such a disclosure would be exempted as it would cause an unwarranted invasion of privacy within the meaning of Section 8①(j) of the RTI Act.

Case Summary

Facts

The Petitioner had filed an RTI application with the Regional Provident Fund Commissioner (“RPFC”), which was part of the Ministry of Labour, Government of India seeking various pieces of information about an officer working at the RPFC office. These details were related, *inter alia*, to his appointment order, salary, documents relating to disciplinary inquiries initiated against him (such as the memo, show cause notice, and censure), a charge sheet against him, details regarding his investments, item wise and value wise details of the gifts received by him, his movable and immovable properties, and income tax returns of his assets and liabilities.

The request for these details was denied by the RPFC Office, as well as by the CIC, on the basis of Section 8①(j) of the RTI Act. Section 8①(j) exempted “*information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual*” from being disclosed by State offices. The Petitioner, aggrieved by this order of the CIC, filed a writ petition before the High Court, where the Single Judge dismissed the petition and upheld the decision of the CIC. Following this, the Petitioner filed an appeal before the Division Bench and the same was dismissed. Thereafter, the Petitioner approached the Supreme Court through the present Special Leave Petition.

Issue

Whether the CIC was right in denying information pertaining to the Respondent's service career, assets, liabilities and movable and immovable assets on the grounds that the information sought was personal information exempted from disclosure under Section 8①(j).

Arguments

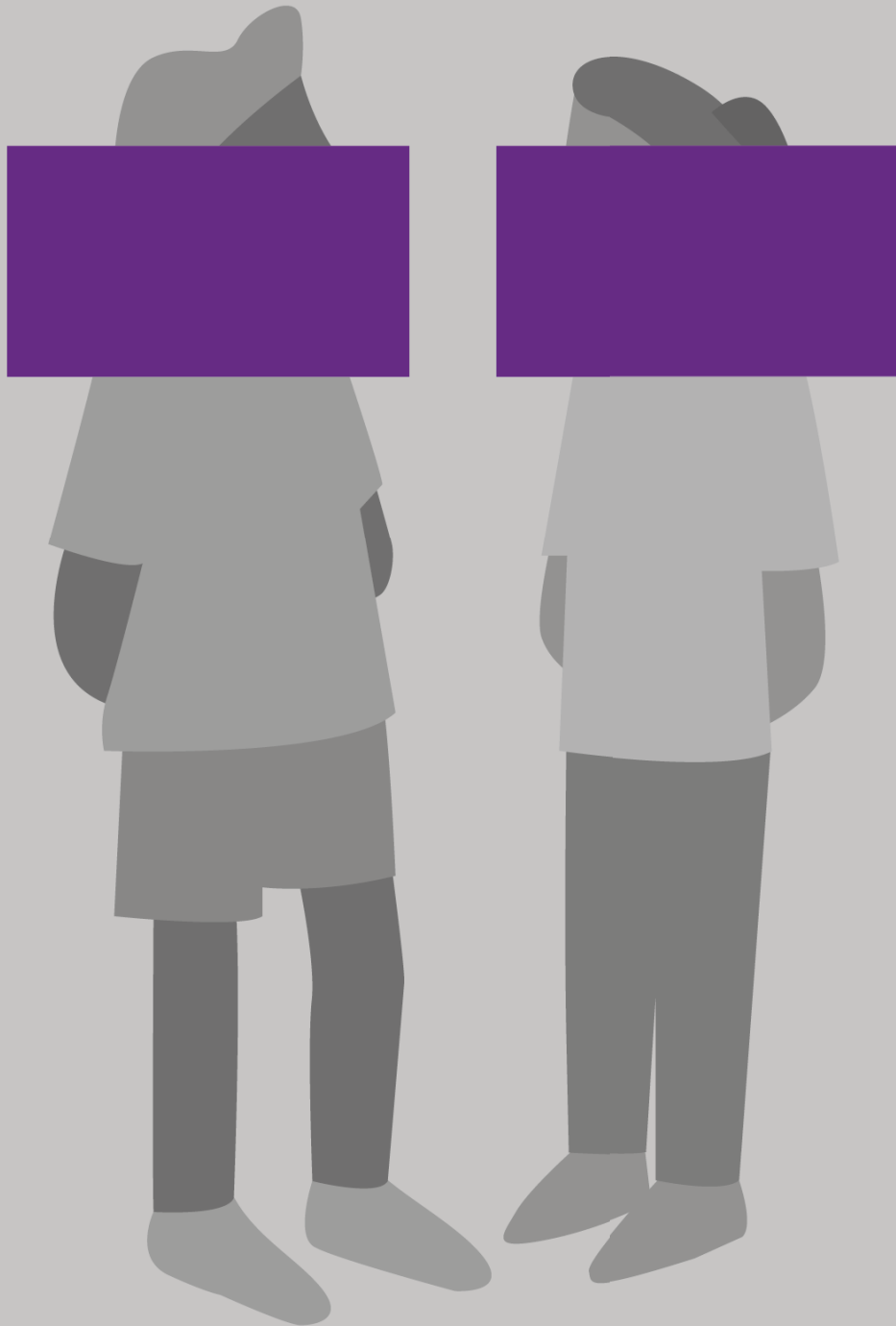
The CIC's as well as the RPFC's orders put forth the argument that the information sought by the Petitioner fell under two heads: (i) relating to the personal matters pertaining to his service career; and (ii) his assets and liabilities, movable and immovable properties and other financial aspects. Therefore, such information, in the opinion of the CIC and RPFC would clearly fall under the exception of "personal information" under Section 8①(j) and would not be liable to disclosure, as there was no relation of such information to public interest and such disclosure would cause unwarranted breach of privacy of the individual.

The Petitioner argued that documents pertaining to employment of a person holding the post of enforcement officer should be treated as documents having a relationship to public activity and interest. Therefore, the intrusion of privacy of the public officer would be warranted. He also argued that disclosure of some pieces of information sought, for instance, details relating to appointment and promotion, documents pertaining to disciplinary actions initiated against the officer and details of gifts and liabilities received by the officer would not cause any intrusion of privacy to the officer in the first place.

Decision

The Court held that the nature of information that was sought would mostly find a place in the income tax returns of the third Respondent. The Court agreed with the CIC that the details called for by the Petitioner i.e. copies of all memos issued to the third Respondent, show cause notices and orders of censure/punishment, etc. were qualified to be personal information as defined in Section 8①(j) of the RTI Act. The Bench was of the opinion that the performance of an employee in an organization was primarily a matter between the employee and the employer and normally those aspects would fall under the expression 'personal information', the disclosure of which had no relationship to any public activity or public interest. On the other hand, it held that such disclosure would cause unwarranted intrusion upon the right to privacy of that individual.

However, it added the qualification that in a given case, if the authorities were satisfied that the larger public interest justified the disclosure of such information, then the potential breach of privacy of the public servant could be weighed against the larger public interest and the decision to disclose information thereof would justify the breach of privacy. In the instant case the Petitioner was unable to demonstrate a *bona fide* public interest in seeking information, and thus the Court dismissed the petition.



Jitendra Singh & Ors. vs. State of U.P.

2013 (9) SCALE 18,
JT 2013 (11) SC 152

2013

Dignity

It is important to shield the right to privacy and confidentiality of the juvenile in conflict with law, and so the identity of the juvenile must not be disclosed at any stage of the proceeding.

**Constitutional
Provision(s)**

**No Specific Constitutional
Provision Referenced**

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by
Justice M. B. Lokur and
1 concurring opinion by
Justice T.S. Thakur.

Number of
Opinion(s)

2/0

OPINIONS DISSENT

“The right to privacy and confidentiality of a juvenile is required to be protected by all means and through all the stages of the proceedings, and this is one of the reasons why the identity of a juvenile in conflict with law is not disclosed.”

Case Brief

The background to this case was a situation where a woman, Asha Devi, was burned to death in an apparent case of dowry killing. Two persons, being the husband and father-in-law of the woman were convicted, but the father-in-law died during the pendency of proceedings. This case was brought in appeal to the Allahabad High Court and subsequently to the Supreme Court by the husband of Asha Devi, who claimed to be a juvenile of fourteen years at the time of the alleged killing.

The Supreme Court agreed that the Appellant was a juvenile at the time of commission of the offence. Although the Supreme Court upheld the conviction of the Appellant by the lower courts, in line with past precedent that upheld juvenile convictions while setting aside their carceral sentences, the Court decided that in such situations the matter should be remitted to the jurisdiction of a Juvenile Justice Board under the Juvenile Justice (Care and Protection of Children) Act, 2000, (“Juvenile Justice Act”). It further noted the importance of concealing the identity of the juvenile at all stages of the proceedings to protect his right to privacy and confidentiality.

The Court applied the principle of best interest of a juvenile to note that the traditional objectives of criminal justice, retribution and repression, should give way to rehabilitative and restorative objectives of juvenile justice, in order to help the juvenile rebuild his dignity and self-worth. Further, in light of India’s international obligations, the objectives of the Juvenile Justice Act and constitutional principles, the Court laid down certain safeguards and standards to avoid recurrence of such cases.

Case Summary

Facts

Asha Devi was allegedly set on fire by her husband and in-laws as she failed to meet their demands for dowry. The trial court convicted the Appellants, the husband and father-in-law of Asha Devi, under Section 304-B and Section 498-A of the Indian Penal Code, 1860 ("IPC"). The Appellants appealed before the Allahabad High Court. This appeal was dismissed, and the matter came before the Supreme Court, during the pendency of which the father-in-law of Asha Devi died. While the appeal before the Supreme Court was ongoing, the Appellant-husband filed a petition raising an additional ground that on the date of commission of the offence, the Appellant was fourteen years old, and was a child / juvenile within the meaning of that expression under Section 2(k) of the Juvenile Justice Act. The lower court had looked into the issue of the Appellant's age but had not decided it conclusively.

Issue

Whether the Appellant was a juvenile / child as defined by Section 2(k) of the Juvenile Justice Act and if so, would his conviction be justified.

Arguments

The Appellant argued that since he was a juvenile / child at the time of occurrence of the offence, he should not have been subjected to trial by a regular court. He submitted that his wife had been about five years older than him and that it was a norm in their community for a wife to be older than the husband.

The Respondent argued that the documents pertaining to the education of the Appellant were produced after a great delay and thus could not be relied upon. They also submitted that it was improbable that a girl of about fifteen years of age would get married to a boy of nine years of age.

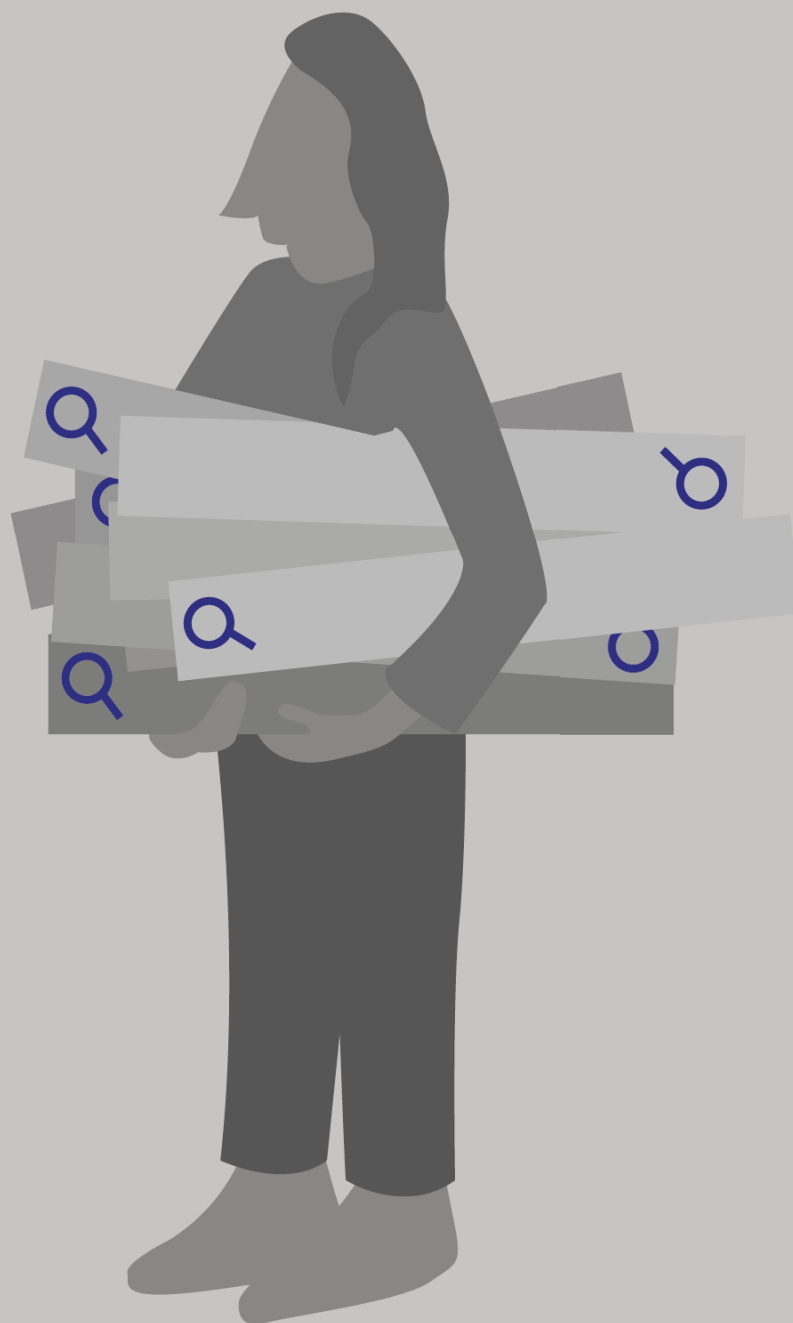
Decision

The Court, after analysing the findings of the trial court and the High Court, upheld their judgment convicting and sentencing the Appellant, but found that the Appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Juvenile Justice Act. In determining the sentence to be awarded to a convict who was a juvenile, the Court observed that there were differing viewpoints. After analyzing a slew of cases, it followed the precedent of *Ashwani Kumar Saxena vs. State of MP (2012 @ SCC 750)*, which held that in case a juvenile was found guilty after deciding the case on merit, he should not go unpunished. However, for determining the award of the sentence, the matter should be remitted to the jurisdiction of a Juvenile Justice Board constituted under the Juvenile Justice Act, as required by Section 20 of the Act.

While considering a solution for avoiding such recurrences in the future, the Court held that the best interest of a juvenile should be of prime consideration in cases involving them. Elaborating on the principle, the Court observed that the traditional objectives of criminal justice, retribution and repression, should give way to the rehabilitative and restorative objectives of juvenile justice. The process of rehabilitation and social reintegration should

aim to help children in restoring their dignity and self-worth. It was important to shield the right to privacy and confidentiality of the juvenile at all times, and so the identity of the juvenile must not be disclosed at any stage of the proceeding.

Further, in view of India's international obligations, the objectives of the Juvenile Justice Act and our constitutional principles, the Court discussed certain safeguards and standards that ought to be undertaken to avoid recurrences that would serve the best interests of the juvenile as well facilitate better administration of criminal justice. The Court noted that it was the duty of a Magistrate to prima facie record their opinion regarding the juvenility of the accused at the earliest possible time. This would ensure that a juvenile was not subject to ordinary criminal procedure and that a trial of a juvenile was not required to be set aside such that a guilty juvenile went 'unpunished'. Moreover, a juvenile could not be presumed to know the law, especially in light of socio-economic factors often impacting young offenders. He could not therefore be expected to raise a claim for juvenility in the first instance; the onus lay with the Magistrate. A guardian or a legal parent should be involved in the legal process concerning a juvenile.



Union of India vs. Namit Sharma

(2013) 10 SCC 359,
AIR 2014 SC 122

2013

Right to Know and Access Information
Informational Privacy

Information Commissions under the RTI Act are required to balance competing rights such as the right to privacy and the right to information since both have constitutional underpinnings.

Constitutional
Provision(s)

Articles 19 and 21

Case Type

Civil Review Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A.K. Patnaik on behalf of
Justice A.K. Sikri and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“...under the Act, a citizen has the right to information held or under the control of public authority and hence Information Commissioners are to ensure that the right to privacy of person protected under Article 21 of the Constitution is not affected by furnishing any particular information.”

Case Brief

Through this review petition, the Supreme Court recalled its earlier order and removed the requirement of a judicial mind from the eligibility criteria for appointment of Central and State Information Commissioners under Sections 12⑤, 12⑥, 15⑤, and 15⑥ of the Right to Information Act, 2005 (“RTI Act”). The Court, in a judgment passed by Justice S. Kumar and Justice A.K. Patnaik in *Namit Sharma vs. Union of India* ((2013) 1 SCC 745), had ‘read into’ these provisions the requirement of a judicial mind to enhance the functioning of the Information Commission, and had directed the Legislature to frame rules within a stipulated time period. In arriving at this view, the Court had considered the powers of the Information Commissions, including the requirement of balancing the right to information and the right to privacy, and concluded that they exercised the functions of a civil court. However, upon review, the present Bench of the Supreme Court held this to be an error of law apparent on the face of the record.

The Court examined various provisions of the RTI Act as well as several authorities in this context to conclude that the Information Commission did not perform judicial functions, as it did not decide a dispute between two or more parties concerning their legal rights, other than their right to get information in possession of a public authority, which was an administrative function. Moreover, reading words into these provisions would amount to encroachment into the field of the Legislature, and the Court was wrong in ordering the Legislature to amend or reword the provisions as it did not have the power to correct any deficiencies

or omissions in the language of the statute.

The Court however expressed concerns about the inefficient functioning of the Information Commission with regard to balancing conflicting interests, such as the right to information vis-à-vis the right to privacy. It noted that this might be due to lack of required mind needed for such tasks, but left it to the Legislature to decide whether it needs to incorporate a requirement of persons with judicial background, training, and experience. The Court directed instead that persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12⁵ and 15⁵ of the RTI Act be considered for appointment as Information Commissioner and Chief Information Commissioner.

Case Summary

Facts

This was a review petition filed by the Union of India, the Appellant. The original Writ Petition © No. 210 of 2012 dated 13.09.2012 (judgment under review) questioned the constitutional validity of Sections 12⁵, 12⁶, 15⁵, and 15⁶ of the RTI Act, which laid down the eligibility criteria for appointment of Central and State Information Commissioners, on the basis that these provisions had insufficient nexus with the object of the RTI Act and were vague and violative of Article 14 of the Constitution.

The Supreme Court in the original writ petition (*Namit Sharma vs. Union of India* ((2013) 1 SCC 745)) held that “*the Information Commission is a Tribunal discharging quasi-judicial functions*” which “*possesses the essential attributes and trappings of a Court*”. It reasoned that its adjudicatory, supervisory and penal functions were to be performed in conso-

nance with the principles of natural justice and the orders passed had to be non-arbitrary and reasoned. Further, it considered the fact that the Information Commission had been vested with powers to decline requests for information under certain circumstances, although access to information was a statutory right, subject to certain constitutional and statutory limitations including the right to privacy. The Court accordingly ‘read into’ the provisions a requirement for a judicial mind. The Court advised the Legislature to ‘reword or amend’ these provisions at the earliest, in addition to laying down extensive guidelines to avoid any ambiguity or impracticability and to make them in consonance with the constitutional mandates.

The Government filed a review petition challenging several parts of the judgment, arguing that the Court had committed a “*patent error of law*”.

Issues

Whether the reasoning and directions in the judgment under review were at variance with the language employed in the different provisions of the RTI Act; and

- B. Whether the judgment under review suffered from manifest errors of law apparent on the face of the record.

Arguments

The Union of India relied on the Court's judgment in *P. Ramachandra Rao vs. State of Karnataka* ((2002) 4 SCC 578) to argue that only the Legislature had the power to make and amend any law under the Constitution and the Court could not encroach upon the field of legislation in exercise of its judicial power. They also cited the decision of the three-judge bench in *Union of India and Anr. vs. Deoki Nandan Aggarwal* (1992 Supp. ① SCC 323) which held that courts could not rewrite, recast or reframe legislation. It argued that the view taken by the Court in the judgment under review that the persons eligible for appointment as Information Commissioners should preferably have some judicial background and possess judicial acumen, was a patent error of law.

It was also submitted that Direction No. 9 of the judgment under review - i.e. the appointment of judicial members as Information Commissioners should be 'in consultation' with the Chief Justice of India and the Chief Justices of the High Court of respective states, should be deleted. It also submitted, relying on *Mallikarjuna Rao and Ors. vs. State of Andhra Pradesh and Ors.* ((1990) 2 SCC 707) that Direction No. 5 of the judgment under re-

view stipulating a time period of six months to frame new rules, was a patent error and required to be corrected in this review.

The Respondent supported the directions passed by the Court in the judgment under review as the Information Commission decided issues relating to the fundamental rights of citizens, including right to privacy and therefore it was important that a judicial mind was applied to such questions.

Decision

The Supreme Court noted at the outset that the review of the judgment in *Namit Sharma's* case would be "*confined to only errors apparent on the face of the record*". In order to conclude whether there was a requirement of a judicial mind in Sections 12⑤ and 15⑤ of the RTI Act, the Court examined the bare provisions of the Act, namely Sections 18, 19 and 20, which dealt with the power and function to receive and inquire into a complaint from any person who was not able to secure information from a public authority, deciding appeals and imposing penalty.

It observed that the functions of the Information Commissioner were limited to ensuring that a person's right to information from a public authority was not denied except in accordance with the provisions of the RTI Act. It noted that "*While deciding whether a citizen should or should not get a particular information 'which is held by or under the control of any public authority', the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority*" and held that "*this function obviously is not a judi-*

cial function, but an administrative function". It clarified that the same conclusion applied to situations where it had to decide whether it should provide the information sought or withhold it in the public interest or any other interest protected by the RTI Act, as well as situations where the rights of a third party, such as right to privacy were affected.

However, the Court mentioned that *"the Information Commissions are required to act in a fair and just manner following the procedure laid down in Sections 18, 19 and 20 of the Act. But this does not mean that the Information Commissioners are like Judges or Justices who must have judicial experience, training and acumen"*. Moreover, any direction for *"appointment of persons with judicial experience, training and acumen ...would amount to encroachment in the field of legislation"*.

The Court further observed that the judgment under review had read *"missing' words"* into the provisions of Sections 12⁵ and 15⁵ of the RTI Act. However, it noted that including *"words which Parliament has not intended is contrary to the principles of statutory interpretation recognised by this Court"*. It referred to the case of *Union of India and Anr. vs. Deoki Nandan Aggarwal (1992 Supp. ① SCC 323)*, which held that the court could not correct or make up for any deficiencies or omissions in the language of the statute. However, the Court suggested that in order to comply with Article 14, the persons to be considered for appointment as Information Commissioners should be from different fields named in the sections and not just from one field.

Further, to ensure that Sections 12⁶ and 15⁶ did not offend the equality clause in Article 14,

and aligned with the object of the Act, these provisions should be interpreted to mean that once appointed, the person could not continue holding political office instead of being understood to mean that such persons would be ineligible to be considered for appointment. Such an interpretation would not be discriminatory and against Article 14.

With regard to directing rules to be framed within a six-month time period, the Court examined Sections 27 and 28 of the Act, and noted that the *"use of word 'may' in Sections 27 and 28 of the Act make it clear that Parliament has left it to the discretion of the rule making authority to make rules to carry out the provisions of the Act. Hence, no mandamus can be issued to the rule making authority to make the rules either within a specific time or in a particular manner."*

However, the Court expressed dismay with regard to the experience of the functioning of the Information Commission as the individuals appointed had not been able to harmonise the conflicting interests including the right to information and the right to privacy. It pointed out that it was for this reason that the Court had given directions to include judicial members in the judgment under review. However, for the reasons set out above, the Court held the judgment under review had errors apparent on the face of the record and allowed the review, recalling the directions passed in the judgment under review.



Bihar Public Service Commission vs. Saiyed Hussain Abbas Rizvi & Ors.

(2012) 13 SCC 61,
2012 (12) SCALE
525

2013

Right to Know and Access Information
Informational Privacy

Information Commission is not bound to disclose information which may cause unwarranted invasion of privacy, and has no larger public interest. The right to information is not an uncontrolled right and has constitutional limitations emerging from right to life under Article 21.

Constitutional Provision(s)

Article 21

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice S. Kumar on behalf of
Justice S.J. Mukhopadhaya and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“The satisfaction has to be arrived at by the authorities objectively and the consequences of such disclosure have to be weighed with regard to circumstances of a given case. The decision has to be based on objective satisfaction recorded for ensuring that larger public interest outweighs unwarranted invasion of privacy or other factors stated in the provision. (...) there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy.”

Case Brief

In this case, the Appellant, the Bihar Public Service Commission denied information sought by Saiyed Hussain Abbas Rizwi, the Respondent, by invoking Section 8①(g) of the Right to Information Act, 2005 (“RTI Act”). The Appellant had advertised vacancies in certain posts of the Bihar Government. On receiving a limited number of applications, it selected the candidates on the basis of an interview alone. The Respondent filed an RTI application seeking various details relating to the examination as well as details of the members of the interview board. Before the matter reached the Supreme Court, most details requested by the Respondent had been released to him, except for those relating to the interview board members, on the ground that the interviewers’ details fell under the exceptions provided in Section 8 of the RTI Act.

In determining whether the Respondent was entitled to such details, the Court analysed the general scheme of the RTI Act, as well as of Section 8, which provided exceptions to the general rule of obligation to furnish information. The Court noted that the right to information was not an uncontrolled right, and was subject to inbuilt restrictions (in the form of exemptions in the public interest) and constitutional limitations emerging from the right to life under Article 21.

In view of this, the Court held that the disclosure of details of the members of the interview board could endanger their lives or their physical safety and thus infringe on their rights under Article 21, in addition to hampering the effective discharge of their duties as interviewers. The Court further discussed the potential impact of disclosure on the right to privacy of the interviewers and the need to balance the two rights in the larger public interest. It concluded that no larger public purpose would be addressed by disclosure in this case. Accordingly, the Court held that the Appellant was not bound to reveal the information requested by the Respondent.

Case Summary

Facts

The Appellant, the Bihar Public Service Commission published an advertisement to fill

up vacancies for the post of ‘State Examiner of Questioned Documents’. A written examination would have been conducted if there were a large number of applicants, but since the Appellant did not receive enough appli-

cations, it decided against holding a written examination. The Appellant completed the process of selecting candidates and recommended the group of selected candidates to the State.

The Respondent, Saiyed Hussain Abbas Rizwi, claiming to be a public-spirited citizen, filed an application before the Appellant, seeking information regarding various matters concerning the interviews held. These queries related to the names, designation, and addresses of the subject experts present in the interview board, names and addresses of the candidates who appeared, the interview statement with certified photocopies of the marks of all the candidates, criteria for selection of the candidates, a tabulated statement containing average marks allotted to the candidates on their education during the selection process with the signatures of the members/officers and a certified copy of the merit list. The application remained pending with the Public Information Officer (“PIO”) of the Commission for a considerable time, and therefore, the Respondent filed an appeal before the State Information Commission (“State Commission”). The State Commission directed the PIO to provide the information to the Respondent. The Appellant furnished information to most of the Respondent’s queries, and mentioned that it had not conducted the written test and that the name, designation, and addresses of the members of the interview board could not be furnished as they were not required to be supplied in accordance with the provisions of Section 8①(g) of the RTI Act. This provision provides that the public authority is not obliged to furnish any such information, the disclosure of which would endanger the life or physical safety of

any person, or identify the source of information or assistance given in confidence for law enforcement and security purposes.

Aggrieved by the order of the State Commission, the Respondent filed a writ petition before the Patna High Court. The Single Judge dismissed the petition. The Respondent challenged the order of the Single Judge before the Division Bench of the High Court. The Division Bench set aside the order of the Single Judge and directed the Appellant to communicate the information sought by the Respondent. The matter came before the Supreme Court.

Issues

- A. Whether the Commission was duty bound to disclose the names of the members of the interview board to any person including the examinee; and
- B. Whether the Commission could refuse to release information on the grounds of the exceptions contemplated under Section 8 of the RTI Act.

Arguments

The Appellant relied on Sections 8①(j) and 11 of the RTI Act to argue that disclosure of the names would endanger the life of the members of the interview board and would cause unwarranted invasion into their privacy. They also argued that this information related to third party interests defined under Section 2(n), and was entitled to exemption under Section 8①(j) of the RTI Act. The Appellant also submitted that it was entitled to exemptions under Section 8①(e) and Section 8①(g) of the RTI Act read together.

The Respondent argued that he was entitled to receive the information sought as it was not exempted under any of the provisions of Section 8 of the RTI Act.

Decision

The Court first considered whether the Appellant was a public authority falling under the ambit of the RTI Act. Given that the Appellant was established under Article 315 of the Constitution, it was held to be a public authority in terms of Section 2(h)(a) of the RTI Act.

The Court then examined the purpose and scheme of the RTI Act which was to provide free access to information under the control of public authorities, to ensure greater transparency and accountability in governance. It noted that Section 8 was one of the most important provisions of the RTI Act as it provided exceptions to the general rule of obligation to furnish information. There were in-built exceptions to some of these exemptions, where despite falling under an exemption, the Commission could call upon the authority to furnish the information in the larger public interest. The Court however noted that the right to information was subject to dual checks through the inbuilt statutory restrictions as well as through the right to privacy enshrined in Article 21 of the Constitution.

Further, the Court noted that the “*right sought to be exercised and information asked for should fall within the scope of ‘information’ and ‘right to information’ as defined under the Act*”. If the information called for fell under any of the categories specified under Section 8, the public authority could decline to furnish

such information and where the information asked for related to a third party, the Commission was required to follow the procedure prescribed under Section 11 of the RTI Act.

The Court noted that Section 8①(e) provided an exemption from furnishing of information if the information was available to a person as part of a fiduciary relationship unless the competent authority was satisfied that larger public interest warranted the disclosure of such information. In interpreting this aspect, the Court relied on its decision in *Central Board of Secondary Examination (CBSE) vs. Aditya Bandopadhyaya* ((2011) 8 SCC 497) and opined that the Commission had no fiduciary relationship with the interviewers or candidates interviewed, but an agent-principal relationship. This relationship per se was not relatable to any of the exemption clauses.

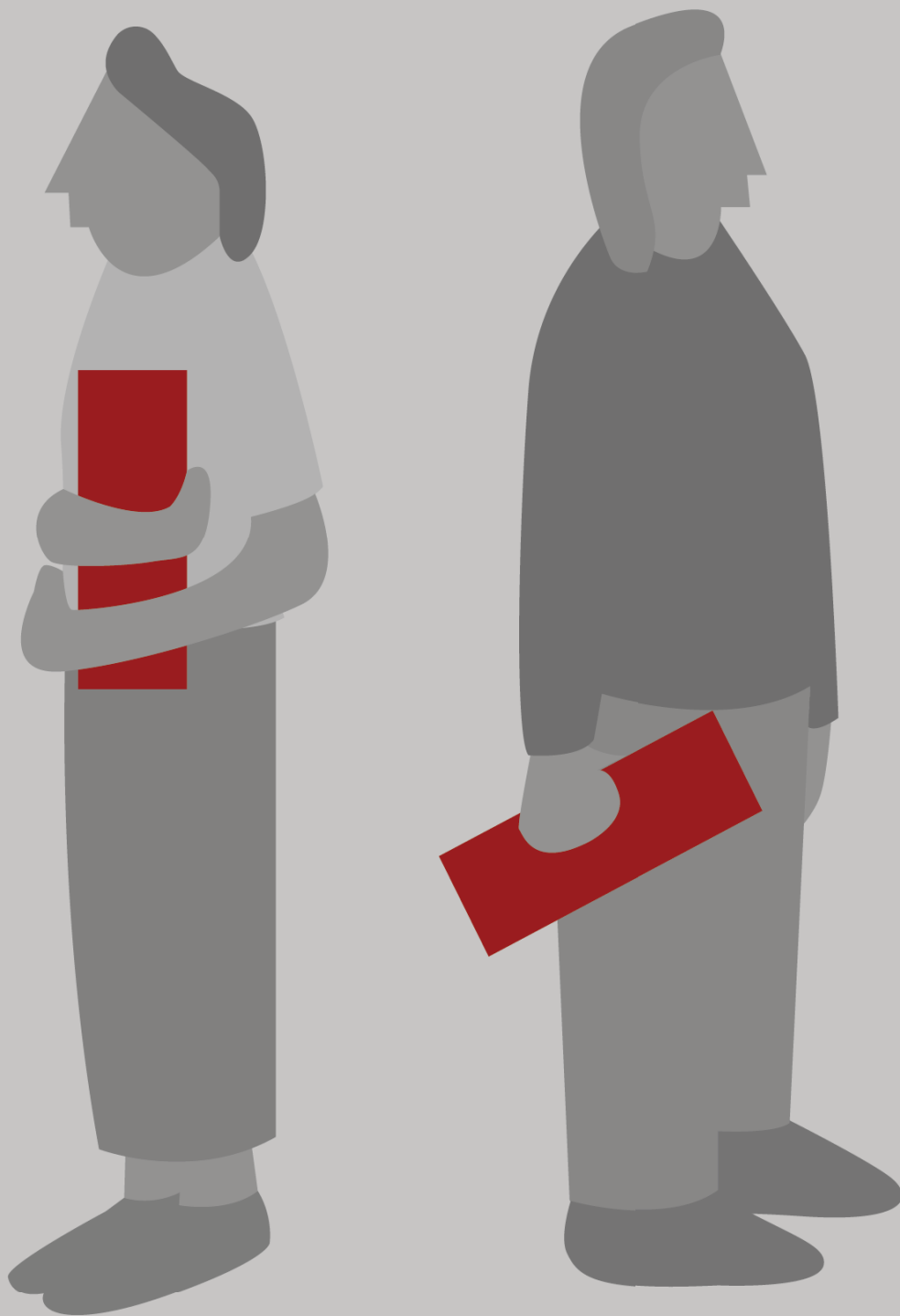
Further, with respect to Section 8①(g), the Court noted that it could come into play with any kind of relationship, where the disclosure of the information would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes. The Court noted that the High Court was wrong in rejecting the application of this Section on the ground that it applied only with regard to law enforcement or security purposes and did not have general application. Section 8①(g) has several clauses in itself.

The Court examined the provisions of Section 8①(g) and laid emphasis on the expressions that were relevant to this case. The Court noted that the expression ‘physical safety’ had a

restricted meaning but 'life' had a wide interpretation and had to be construed liberally. It included *"reputation of an individual as well as the right to live with freedom. The expression 'life' also appears in Article 21 of the Constitution and has been provided a wide meaning so as to inter alia include within its ambit the right to live with dignity, right to shelter, right to basic needs and even the right to reputation. The expression 'life' under Section 8①(g) of the RTI Act, thus, has to be understood in somewhat similar dimensions."*

The Court applied the above interpretation of Section 8①(g) along with the reasoning of the CBSE case. It observed that disclosure of details of the members of the interview board would ex facie endanger their lives or physical safety. It would also hamper the effective performance of their duties. Moreover, the *"possibility of a failed candidate attempting to take revenge from such persons cannot be ruled out. On the one hand, it is likely to expose the members of the Interview Board to harm and, on the other, such disclosure would serve no fruitful much less any public purpose."*

The Supreme Court set aside the judgment of the High Court and held that the Appellant was not bound to furnish the details of the members of the interview board.



Lillu & Ors. vs. State of Haryana

(2013) 2 SCR 774,
(2013) 14 SCC 643

2013

Bodily Integrity
Dignity

In rape cases, the two-finger test and its interpretation violates the rape survivor's right to privacy, physical and mental integrity and dignity. Even if the test report is affirmative, it cannot ipso facto give rise to presumption of consent.

Constitutional Provision(s)

Article 21

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by
Justice B.S. Chauhan and
Justice F.M. Kalifulla.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“...undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.”

Case Brief

In this case, the Supreme Court analysed the medical and legal procedures commonly adopted in the case of rape survivors. The Appellant was convicted for rape by a lower court and the High Court of Punjab & Haryana and preferred this appeal on the basis of the testimony of a medical examiner who stated that there was a possibility of the rape victim being habituated to sexual intercourse after conducting the ‘two-finger test’. The Court analysed the two-finger test, which was used as a standard for conducting and interpreting the forensic examination of the rape survivors, and found that it was violative of a woman’s fundamental right to dignity and privacy. Moreover, a positive test result, could not give rise to the presumption of consent by itself, especially in this case where the victim was a minor at the time of the commission of the act. Further, even if a person was habituated to sexual intercourse, it could not be a determinative question in assessing evidence for a rape conviction, as such a person would still be entitled to refuse consent.

The Court observed that the rape victims were entitled to legal recourse that did not re-traumatize them or interfere with their physical or mental integrity and dignity, and medical procedures should be conducted in a manner that respected their right to consent and their right to privacy.

Case Summary

Facts

The Appellant was convicted by the Additional Sessions Judge, Jind, for committing the offences of rape and criminal intimidation under Sections 376 and 506 of the Indian Penal Code, 1860 (“IPC”). The Prosecutrix in the case was under fourteen years of age on the date of the offence being committed according to the findings of the trial court. The Appellant and his co-accused challenged their conviction before the High Court of Punjab & Haryana and the same was dismissed. Two of his co-accused did not prefer an appeal while one died during the course of proceedings. Aggrieved by the decision of the High Court, the Appellant filed an appeal before the Supreme Court.

Issue

- A. Whether habituation to sexual intercourse was a relevant question for a rape trial; and
- B. Whether the ‘two-finger’ test was violative of the rights of a rape victim under Article 21 of the Constitution

Arguments

The Appellant argued that the Prosecutrix had given her consent and was not a minor at the time of the incident, and that the prosecution had also not been able to prove otherwise. He submitted that the statement of the Prosecutrix was not corroborated by any of the witnesses or by any medical evidence. Moreover, as per the testimony of the medical examiner, the Prosecutrix was found to be habituated to sexual intercourse on the basis of

the two-finger test.

No counsel appeared before the Court on behalf of the Respondent.

Decision

The Court observed that the trial court had examined the issue of the age of the Prosecutrix and concluded that the Prosecutrix was 13 years 9 months and 2 days old on the date of the incident. This was affirmed by the High Court. In this backdrop, the Court noted that it was immaterial whether the Prosecutrix gave her consent or not.

The Court extensively analysed the two-finger test, which was used as a standard for conducting and interpreting the forensic examination of rape survivors. It referred to *Narayanamma (Kum) vs. State of Karnataka & Ors* ((1994) 5 SCC 728), which held that “*the factum of admission of two fingers could not be held adverse to the prosecutrix*”, and the test did not indicate clearly whether prosecutrix was habituated to sexual intercourse, and *State of Uttar Pradesh vs. Munshi* (AIR 2009 SC 370) which held that even if the victim of rape was habitual to sexual intercourse, it could not be the determinative question, and a “*prosecutrix stands on a higher pedestal than an injured witness for the reason that an injured witness gets the injury on the physical form, while the prosecutrix suffers psychologically and emotionally.*” This opinion was also echoed in the judgment of *Narender Kumar vs. State* (NCT of Delhi) (AIR 2012 SC 2281).

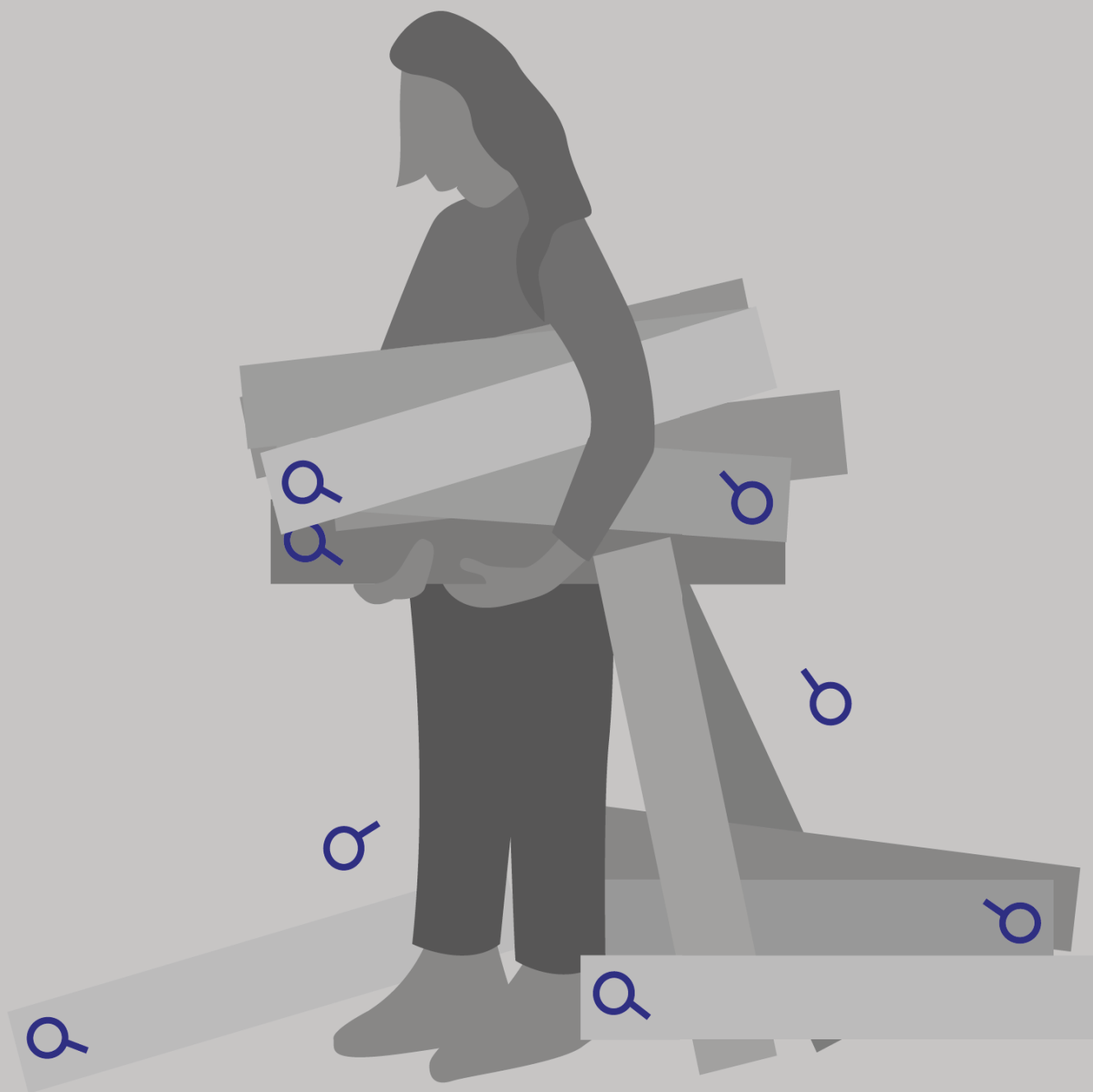
The Court also relied on its opinion in *State of Punjab vs. Ramdev Singh* (AIR 2004 SC 1290) which held that “*rape is violative of victim’s*

fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right to privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society.”

The Court referred to the International Covenant on Economic, Social, and Cultural Rights, 1966, and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, to hold that *“rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity.”* The Court noted that the rape survivors were entitled to medical procedures conducted in a manner that respected their right to consent and considered their health, which were also not cruel, inhuman, or degrading. Further, the Court noted that the State was under an obligation to make such services available to survivors of sexual violence, and there should be no arbitrary or unlawful interference with the privacy of victims of sexual violence.

The Court concluded that *“undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test,*

even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent”, and dismissed the appeal for lack of merit.



R.K. Jain vs. Union of India & Ors.

2013) 14 SCC 794,
2013 (6) SCALE 49

2013

Right to Know and Access Information

Annual Confidential Reports of a public official are documents in the nature of personal information under the RTI Act, the disclosure of which have no relationship to any public activity or public interest and may cause an unwarranted invasion of privacy.

Constitutional Provision(s)

Article 19

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice G.S. Singhvi on behalf of
Justice S.J. Mukhopadhaya and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“[T]he information sought by the appellant herein is the third party information wherein third party may plead a privacy defence and the proper question would be as to whether divulging of such an information is in the public interest or not.” [Judgment by Single Judge of the Delhi High Court, quoted and affirmed.]

Case Brief

In this case, the Supreme Court affirmed a judgment by the Delhi High Court holding that Annual Confidential Reports (“ACR”) of a public officer constituted ‘personal information’ and ‘third party information’ and were therefore exempt from mandatory disclosure under the Right to Information Act, 2005 (“RTI Act”). If disclosure was sought, the procedure prescribed under Section 11 of the RTI Act would mandatorily have to be followed and the Chief Information Commissioner would need to consider the question of a compelling public interest in such disclosure.

In this case, the Appellant, R.K. Jain, had sought information on a tribunal member relating to adverse entries in her ACR and the ‘follow up action’ taken regarding these entries. Release of this information was denied by the Central Public Information Officer (“CPIO”) on the basis of Section 8①(j) of the RTI Act, the denial of which was confirmed in subsequent appeals. The matter finally came before the Supreme Court.

The Court reasoned that information relating to charges, penalties or sanctions imposed on an employee and records containing information of such nature was necessarily a matter between employee and employer, the disclosure of which had no relationship to any public

activity or public interest. The Court further noted that to disclose information of such a nature could cause an unwarranted invasion of privacy. The Court also reiterated that it was the prerogative of the competent authority to decide if such information could be disclosed in the greater public interest.

Case Summary

Facts

In 2009, the Appellant, R.K. Jain, applied to the CPIO for copies of all note sheets and correspondence pages of a file relating to Jyoti Balasundram, a judicial member of the Customs, Excise and Service Tax Appellate Tribunal (“CESTAT”), pursuant to the RTI Act. Release of the information sought was denied by the CPIO on the grounds that the requested file contained an analysis of Jyoti Balasundram’s ACR which was personal information, the disclosure of which was exempted under Section 8①(j) of the RTI Act.

Subsequent appeals to the Director and Appellate Authority and the Central Information Commission (“CIC”) were also rejected. A single-judge bench and Division Bench of the Delhi High Court also rejected the Appellant’s requests on the basis that the information held was third party information, and the proper question for investigation was whether release of the information was necessary in public interest. Finally this case was brought before the Supreme Court by the Appellant.

Issues

A. Whether the information sought by the

Appellant was personal information and exempt from disclosure under Section 8①(j) of the RTI Act; and

B. Whether the information sought was third party information under Section 11 of the RTI Act necessitating a determination of overriding public interest in the dissemination of that information.

Arguments

The counsel for the Appellant argued that the ACR of a public servant has a relationship with public activity as he discharges public duties and therefore, was a question of public interest. Asking for such information did not amount to any unwarranted invasion in the privacy of a public servant. He referred to the decision in *State of U.P. vs. Raj Narain* (AIR 1975 SC 865) and submitted that if the information in the ACR could be provided to Parliament, the information relating to the ACR could not be treated as a personal document or private document.

The Respondent, in turn, contended that the information relating to ACR was personal and disclosure could cause unwarranted invasion of the privacy of the individual. Therefore, according to him, the information sought by the

Appellant, relating to analysis of the ACR of Jyoti Balasundaram, would be exempted under Section 8①(j) of the RTI Act.

Decision

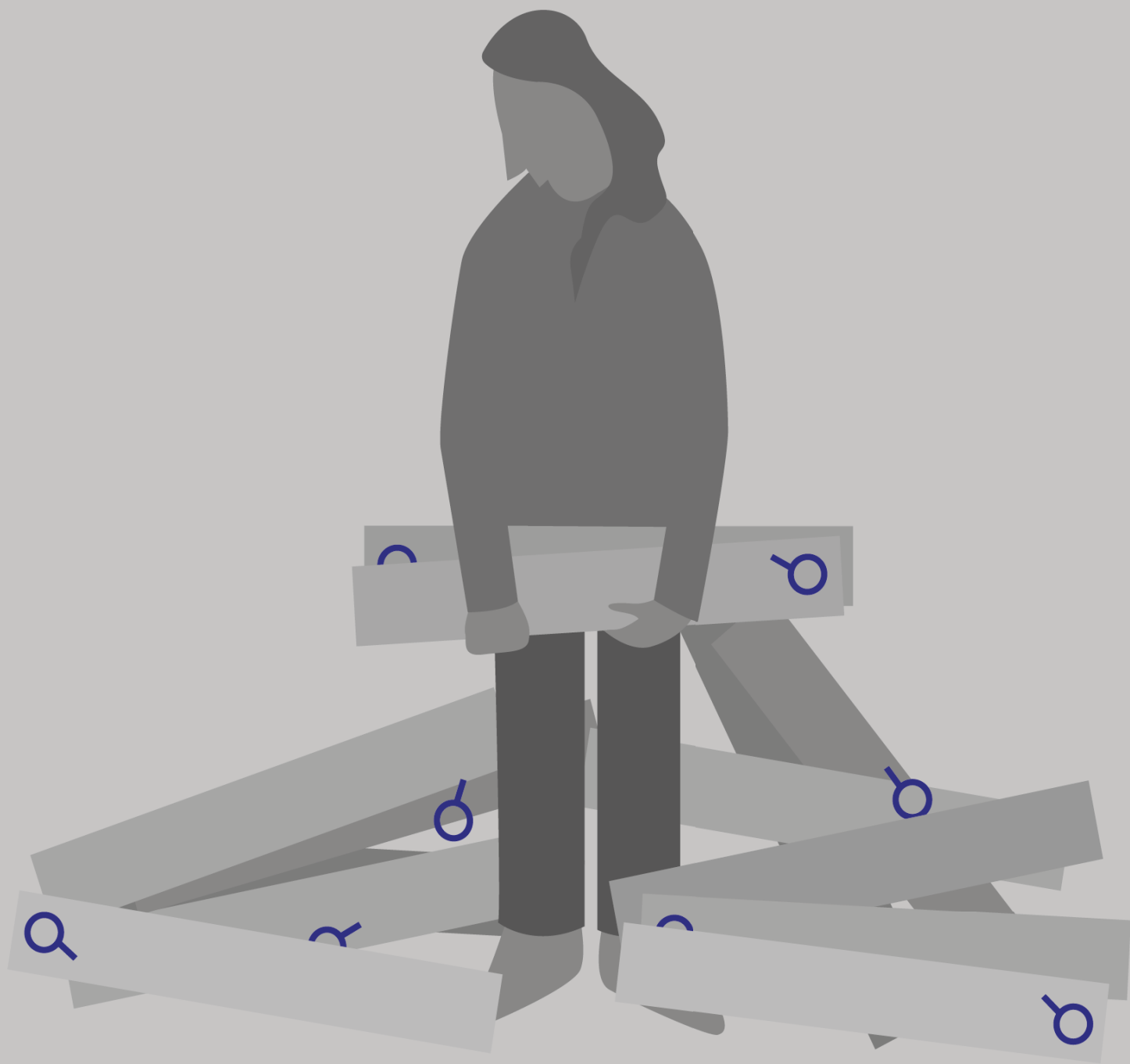
The Court first discussed the question of what constituted personal information by referring to Section 8 of the RTI Act. Section 8 dealt with exemption from disclosure of information. Under Clause (j) of Section 8① of the RTI Act, there was no obligation to give any citizen information which related to personal information and the disclosure of which had no relationship to any public activity or interest, or which would cause an unwarranted invasion of the privacy of the individual. However, information could be disclosed even if it fell under the ambit of this subsection if the CPIO or the State Public Information Officer or the Appellate Authority was satisfied that the larger public interest justified the disclosure of such information.

The second question that the Court dealt with was whether the information sought by the Appellant was third party information. Section 11 of the RTI Act dealt with third party information and the circumstances when such information could be disclosed as well as the manner in which it was to be disclosed, if so decided by the competent authority. According to Section 11①, if the information related to or had been supplied by a third party, and if such information requested under the RTI Act was intended to be disclosed by the CPIO or State Information Public Officer, it could be disclosed only if the third party agreed to such disclosure upon serving of a written notice or if the public interest in the disclosure outweighed the possible harm that shall accrue to the third party.

The Court discussed the case of *Arvind Kejriwal vs. Central Public Information Officer (AIR 2010 Delhi 216)* which discussed the mandatory requirement of following the procedure under Section 11, given the fact that once third party information had been disclosed, it would come into the public domain and the privacy rights of the third party could therefore be affected.

The Court further discussed and relied on the case *Girish Ramchandra Deshpande vs. Central Information Commissioner and Ors. ((2013) 1 SCC 212)* in which the Central Information Commissioner denied the release of information pertaining to the service career of a third party as well as details relating to the assets, liabilities, moveable and immovable properties of the third party, on the ground that the information sought for was qualified to be personal information as defined in Clause (j) of Section 8① of the RTI Act. It also held that the performance of an employee / officer in an organisation was primarily a matter between the employee and the employer, and normally those aspects were governed by the service rules which fell under the expression “*personal information*”, the disclosure of which had no relationship with any public activity or public interest.

The Court finally remitted the case back to the CIC to consider after completing the procedure prescribed under Section 11 of the RTI Act. The decision affirmed that the determination as to when the disclosure of such information would qualify as compelling in the larger public interest, remains within the remit of the Information Commissioners, as intended by the Legislature.



Thalappalam Ser. Coop. Bank Ltd. & Ors. vs. State of Kerala & Ors.

(2013) 16 SCC 82,
2013 (12) SCALE
527

2013

Right to Know and Access Information Informational Privacy

The RTI Act does not warrant disclosure of personal information, which has no nexus with any public activity or serves any larger public interest, and would violate the right to privacy of the concerned person. Both rights, the right to information and the right to privacy have constitutional underpinnings, but are not absolute rights and can be restricted where they impinge on each other, in the larger public interest.

Constitutional Provision(s) **Articles 12, 19, and 21**

Case Type **Civil Appeal**

Case Status **Not Overruled**

Bench Strength

2

1 opinion by
K.S.P. Radhakrishnan on behalf of
Justice A.K. Sikri and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Recognizing the fact that the right to privacy is a sacrosanct facet of Article 21 of the Constitution, the legislation has put a lot of safeguards to protect the rights under Section 8(j), as already indicated. If the information sought for is personal and has no relationship with any public activity or interest or it will not sub-serve larger public interest, the public authority or the officer concerned is not legally obliged to provide those information.”

Case Brief

This case focused on the determination of whether co-operative societies under the administrative control of the Registrar of Co-operative Societies, Kerala (“Registrar”) could be considered public authorities under Section 2(h) of the Right to Information Act, 2005 (“RTI Act”), and were therefore bound under the RTI Act to provide information sought by a citizen. The Supreme Court held that a co-operative society registered under the Kerala Co-operative Societies Act, 1969 (“Societies Act”) was not bound by the RTI Act to provide the information requested by a citizen and that the society did not fall within the definition of “*public authority*” under the RTI Act.

The Court observed that the society could neither be categorized within the definition of “*State*” under Article 12 of the Constitution, nor did it fall under any of the categories referenced in Section 2(h). In arriving at its determination, the Court observed that disclosure of personal information, which had no nexus with any public activity nor served any larger public interest, was not warranted under the RTI Act and would violate the right to privacy of the concerned person. The Court further observed that the rights to privacy and information were not unbridled and could be restricted where they impinged on each other.

Case Summary

Facts

The Applicant, Sunil Kumar, had requested information regarding the bank accounts and financial statements of certain members of the Mulloor Rural Co-operative Society Ltd. (“Society”). The provision of the information sought was declined by the Society. However, the State Information Commission (“Commission”) held that non-disclosure of the information violated Section 7(1) of the RTI Act. This took into consideration a circular issued by the Registrar that established that all societies under the administrative control of the Registrar were “*public authorities*” under Section 2(h) of the RTI Act.

The Society filed a writ petition challenging the Commission’s order, which was disposed of by a single-judge bench of the Kerala High Court. The matter went to a Division Bench, which set aside the order and said that whether a society was a public authority was a question of fact based on whether it received a substantial part of its funding from the Government. Another Division Bench expressed some reservations against this order and thus referred it to a Full Bench of the High Court, which eventually ruled that a society was a public authority. It gave a liberal construction of the words “*public authority*”, bearing in mind the “*transformation of law*” in order to achieve transparency and accountability with regard to affairs of a public body. It held that since societies come under the administrative control of the Registrar, and were statutorily created, they were bound by the RTI Act. The matter then reached the Supreme Court.

Issues

- A. Whether co-operative societies were public authorities under Section 2(h) of the RTI Act; and
- B. Whether such societies were bound under the RTI Act to disclose financial information as requested by the Applicant.

Arguments

The counsel for the Appellants, by referring to the provisions of the Societies Act as well as the RTI Act submitted that societies were autonomous bodies and the supervisory role of the officers under the Societies Act would not make them public authorities under Section 2(h) of the RTI Act. These societies were not covered within the meaning of “*State*” under Article 12 of the Constitution as they were not statutory bodies and were not performing public functions. They were also not owned, controlled or substantially financed by the Government.

The Counsel for the Respondent by referring to the various provisions of the Societies Act submitted that the Registrar had all-pervading control over the societies and the circular was issued by him considering the larger public interest in promoting transparency and accountability in the functioning of cooperative societies in Kerala. This indicates that societies were covered within the meaning of “*public authority*” under Section 2(h) of the RTI Act.

Decision

The Court first considered whether the concerned co-operative societies fell within the expression “*State*” under Article 12 of the

Constitution. In doing so, it distinguished between a body created by a statute and a body which, after coming into existence, was to be governed by a statute. Co-operative societies came under the latter category and were not statutory bodies over which the State exercises pervasive direct or indirect control. It thus held that societies could not be equivalent to the instrumentalities of the state under Article 12. The Court held that co-operative societies were autonomous bodies, and were essentially associations of people who have come together for a common purpose.

The Court then looked into the definition of “*public authority*” under the RTI Act and observed that Section 2(h) provides an exhaustive definition of “*public authority*” as it has used both the expressions “*means*” and “*include*”. After analysing the various sub-clauses of the provision, the Court held that societies which were not owned, controlled or substantially financed by the State or Central Government or formed, established or constituted by law would not be covered under the ambit of the RTI Act.

Regarding the second issue, the Court analysed the interplay between the right to information and the right to privacy, and the need to balance the two. It reiterated the legal position that the right to information, or the right to know, was an indispensable aspect of the freedom of speech and expression, as enshrined in Article 19①(a) of the Constitution and affirmed under various international human rights instruments like the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR) and various United Nations General Assembly resolutions. It also al-

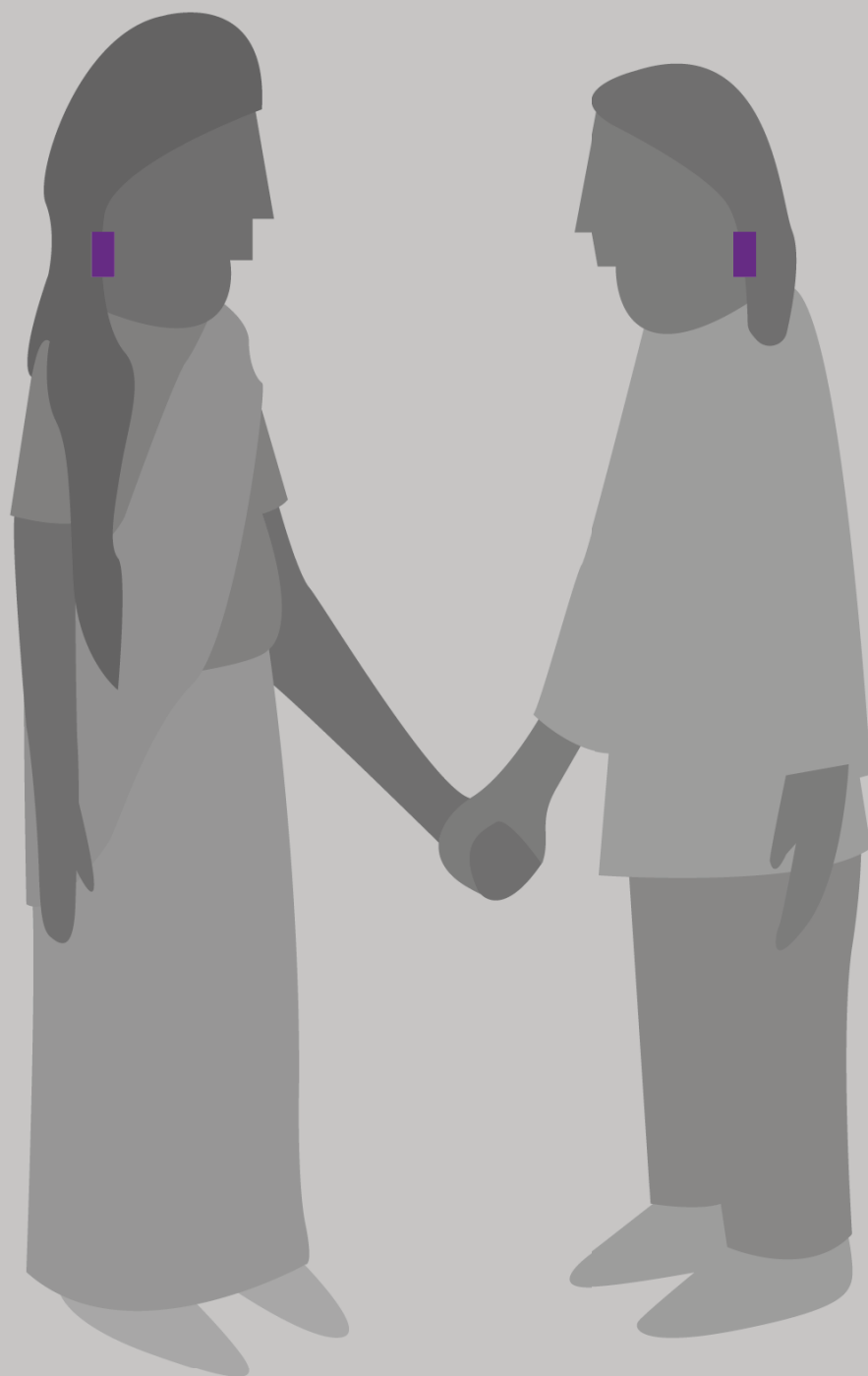
luded to cases like *Bennet Coleman & Co. & Ors. vs. UoI and Ors.* ((1972) 2 SCC 788)) and *People’s Union for Civil Liberties (PUCL) & Ors. vs. UoI & Anr.* ((2003) 4 SCC 399)) that have recognized the right to information as a fundamental right. The Court noted that the RTI Act actualizes this right by ensuring transparency and accountability in the functioning of public authorities.

On the other hand, the right to privacy includes the protection of personal information. The Court observed that while privacy was not expressly guaranteed under the Constitution, it emanated from Article 21 as interpreted by cases like *Kharak Singh vs. State of UP & Ors.* (AIR 1963 SC 1295), *State of Maharashtra vs. Bharat Shanti Lal Shah* ((2008) 13 SCC 5) and others.

The Court observed that both the right to information and the right to privacy under Articles 19①(a) and 21 of the Constitution respectively were not absolute rights and could be regulated keeping in mind the larger public interest. Limitations to the right to information were discernible from the RTI Act itself, and one of these limitations was with respect to privacy and personal information. Even information that is under the control of a public authority within the meaning of Section 2(h) would be limited by Section 8①(j) of the RTI Act, which exempts disclosure of personal information that has no relationship with any public activity or interest and which would cause unwarranted invasion of the privacy of the individual. The Court noted in this regard that the “(r)ight to be left alone is the most comprehensive of the rights and most valued by civilized man”.

The Court recognized that privacy was an essential facet of Article 21 and that Section 8①(j) of the RTI Act protected personal information that did not relate to any public interest. Here the Court referred to *Girish Ramchandra Deshpande vs. Central Information Commissioner & Ors.* ((2013) 1 SCC 212)), wherein the Court held that where there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual under Section 8①(j) of the Act. Further, if an authority believed that personal information needed to be disclosed, then the authority must record its reasons for doing so along with the public interest. Following the discussion above, the Court held that the Registrar was a public authority under Section 2(h) of the RTI Act and was duty bound to provide information covered under Section 2(f) subject to the limitations provided under Section 8 of the RTI Act. He could have access to only that information which is “held” or “under the control of public authority” but was not obliged to disclose information covered under Section 8①(j).

The Court finally held that co-operative societies were not public authorities within the meaning of the RTI Act, and in any case, the disclosure of the information sought by the Applicant was rightly rejected as it was protected under the right to privacy guaranteed under Article 21 of the Constitution and Section 8①(j) of the RTI Act.



National Legal Services Authority vs. Union of India (UOI) & Ors.

AIR 2014 SC 1863,
(2014) 5 SCC 438

2014

Dignity
Autonomy

State is bound to recognise and protect the fundamental right to privacy, self-identity, autonomy and personal integrity of the transgender community.

Constitutional
Provision(s)

Articles 14, 15, 16, 19, and 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

2 concurring opinions by
Justice K. S. Radhakrishnan and
Justice A. K. Sikri.

Number of
Opinion(s)

2/0

OPINIONS DISSENT

“We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.”

Case Brief

This case declared the right of the transgender community to gender identification outside the gender binary, and introduced legal protections for the third gender. It recognized the ongoing violation of rights of transgender persons under Articles 14, 15, 16, 19, and 21 of the Constitution, and also laid down several guidelines for State and Central Governments to accord the actualisation of rights to transgender persons, who it deemed a marginalized and vulnerable minority.

The Court held that the recognition of one's gender identity lay at the heart of the right to dignity, and that gender identity was a fundamental aspect of life. The Court also noted several international instruments supporting this proposition, including the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (“Yogyakarta Principles”) as well as cases from various foreign courts. The Court further recognised the interrelationship of the right to privacy and the right to gender identity, and imposed a positive duty on the State to protect and recognise such rights.

Case Summary

Facts

In 2012, the National Legal Services Authority, the Petitioner, which was constituted to give legal representation to marginalized sections of society, filed a writ petition with the Supreme Court on behalf of members of the transgender community alleging ongoing violations of fundamental rights. Another organization, the Poojaya Mata Nasib Kaur Ji Women Welfare Society, also filed a petition seeking similar reliefs in respect of the Kin-nar community, which was also a transgender community. Finally, Laxmi Narayan Tripathy, an individual who identified as a Hijra, impleaded themselves as an Intervenor to represent the cause of the members of the transgender community.

Issue

Whether the non-recognition of the gender identity of the members of the transgender community led to violation of their rights under Articles 14, 15, 16, 19 and 21 of the Constitution.

Arguments

The Petitioners in this case argued that every person of the transgender community should have a legal right to decide their sexual orientation and determine their own gender identity. As transgender persons were not treated as male, female or given the status of the third-gender, they were effectively deprived of many rights and privileges, including social and cultural participation, access to education, healthcare and public spaces, in violation of their rights under Article 14.

The Petitioners also argued that the discrimination they faced on grounds of gender would violate Articles 14, 15, 16 and 21 of the Constitution.

The Intervenor argued for a third-gender identity, drawing upon historical references, practices in other jurisdictions and international norms. They also submitted that the right to choose one's gender identity was integral to the right to lead a life with dignity, which was guaranteed by Article 21 of the Constitution. The Respondents submitted that the problems highlighted by the transgender community through these petitions were a sensitive human rights issue, which would need consideration by the Ministry of Social Justice and Empowerment. They pointed out that an 'Expert Committee on Issues Relating to Transgender Persons' had already been set up to consider the question, and the views of the Petitioners and others would be taken into consideration in the consultation process.

Decision

The judgment rendered by the Court recognized the rights of transgender persons as a third gender, apart from the gender binary, in order to effectively protect and safeguard their rights under the Constitution. The Court further stated that gender identity was an integral part of the personality and one of the most basic aspects of self-determination, dignity and freedom. It reaffirmed that psychological gender should take primacy over biological gender, and medical procedures could not be a precondition for legal recognition of gender identity.

In discussing the scope of the judgment, the Court noted that “(t)ransgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex” and has “become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex.”

The Bench briefly discussed the historical background of transgender rights in India, looking at several traditional transgender communities including Hijras, Eunuchs, Kothis, Aravanis, Jogappas, and Shiv-Shakthis and acknowledged the historical discrimination faced by them. The Court also listened to testimony from transgender persons including the Intervenor to note the structural discrimination they faced in areas including employment, healthcare, and others, apart from social discrimination.

The Court further delved into the implications of recognition of gender identity and sexual orientation. It classified gender identity as a fundamental aspect of life, as it related to a person’s intrinsic sense of their own gender. In considering this, the Court drew special attention to several international instruments, including the Yogyakarta Principles which deal with the rights of persons of differing sexual orientations and gender identities. The Principles discuss several human rights standards and provide directions to states on how to uphold the rights of persons of varied identities. Principle 6 specifically affirms the applicability of the right to privacy, regardless

of sexual orientation or gender identity.

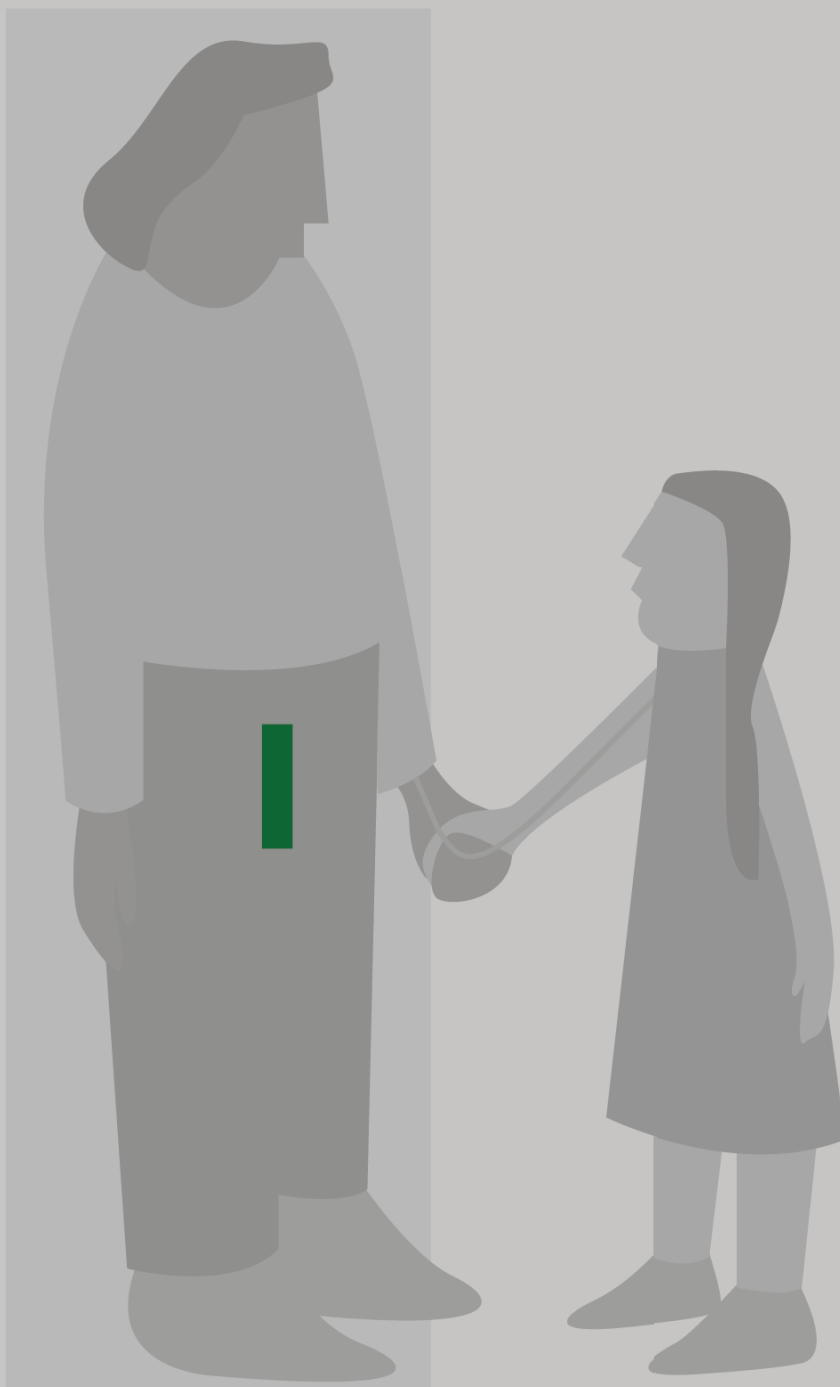
The Court further referred to Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, which relate to privacy protections. The Court held that in the absence of any specific legislation in India relating to recognition of a third gender, and in absence of any domestic law to the contrary, the provisions of these international instruments must be adopted to protect and safeguard the rights of the community.

With respect to Constitutional provisions, the Court held that gender identity was integral to life and would be protected under Articles 19 and 21 of the Constitution of India, as a function of freedom of expression, privacy and dignity. The transgender community’s rights to privacy, self-identity, autonomy, and personal integrity were reaffirmed and the legal recognition of gender identity was considered part of the right to dignity and freedom guaranteed under Article 21 of the Constitution. The Court noted the importance of reading Constitutional provisions in line with present-day conditions based on changing social realities.

The Court also noted that in order to facilitate the exercise of transgender persons’ right to equality under Article 21, the State would have a positive obligation “to ensure equal protection of laws by bringing in necessary social and economic changes.” The Court further noted that discrimination on the grounds of sexual orientation and gender identity would violate Article 14, while discrimination on the basis of sex would violate Articles 15 and 16. Sex was understood to mean all forms of gender-based

discrimination.

The Court noted the need for legal recognition of a third gender and the right of transgender persons to self-identify. The Court gave directions to the State to recognise transgender persons' self-identification and to take steps to treat them as socially and educationally backward for the purpose of extending reservations. The Court further directed the State to operate HIV Sero-surveillance Centres since transgender persons faced several sexual health issues, and to seriously address the mental health problems being faced by the community including shame, gender dysphoria, social pressure, depression and others. Additional directions included spreading public awareness, creating social welfare schemes, bettering medical care, and others. The Court further directed that the Expert Committee constituted by the government should examine the judgment and implement its recommendations within six months.



Dipanwita Roy vs. Ronobroto Roy

(2015) 1 SCC 365,
AIR 2015 SC 418

2014

Autonomy
Dignity

With regard to paternity and DNA tests the Court ruled that the interests of individual privacy must be balanced against the duty of the Court to reach the truth.

Constitutional
Provision(s)

No Specific Constitutional
Provision Referenced

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice J. S. Khehar on behalf of
Justice R.K. Agrawal and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. (...) This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice.”

Case Brief

This appeal looked into the question of using DNA testing of a child to establish fidelity in a marriage. The case arose when Ronobroto Roy, the Respondent husband sought the dissolution of his marriage to the Petitioner wife, Dipanwita Roy on a range of grounds, including infidelity. Apart from other charges, the Respondent claimed that the Petitioner was in an extra-marital relationship and the child born during the marriage was a product of this relationship. The Respondent moved an application seeking DNA testing of the child to substantiate his allegation, which was denied by the family court but affirmed by the High Court of Calcutta.

While upholding the order passed by the High Court of Calcutta, after considering a range of precedents, the Supreme Court allowed the application of the Respondent husband for DNA testing, noting that it was the surest way to prove fidelity in the marriage. However, noting various precedents cautioning against the invasion of privacy caused by compelled medical tests, the Court added a caveat giving liberty to the Appellant wife to comply with or disregard the order of DNA testing. In accordance with Section 114 of the Indian Evidence Act, 1872 (“Evidence Act”), should the Appellant wife resist the test, the Court would draw an ‘adverse inference’ against her. The Court noted that this course preserved privacy to the extent possible, without sacrificing the cause of justice.

Case Summary

Facts

Ronobroto Roy, the Respondent had sought a divorce from his wife, the Appellant. One of the grounds for divorce was the Appellant’s alleged infidelity, including an allegation that she was conducting an affair with one Mr. Deven Shah, who she also had a child with. The Appellant denied the allegations levelled against her and averred that she and the Respondent had been cohabiting throughout the subsistence of their marriage. Following this, the Respondent moved an application in the

family court seeking a DNA test of the child born to the Appellant in order to substantiate his claims. This application was dismissed by the family court but was upheld by the High Court of Calcutta, which allowed his prayer for DNA testing. Aggrieved by the order of the High Court, the Appellant moved the Supreme Court through this petition.

Issue

Whether a civil court could order a child to take a DNA test to determine infidelity in a marriage.

Arguments

The Appellant relied on the Privy Council decision in *Karapaya Servai vs. Mayandi* (AIR 1934 PC 49) to argue that, in line with Section 112 of the Evidence Act, if the opportunity for marital intercourse is shown to have existed during the continuance of a valid marriage, it should act as a conclusive proof and the child born during such marriage would be considered as a legitimate child.

The Appellant further referred to the Supreme Court's decision in *Goutam Kundu vs. State of West Bengal & Anr.* ((1993) 3 SCC 418) to argue that courts could not order a blood test as a matter of course, and there should be a strong *prima facie* case to dispel the presumption of 'access' arising under Section 112 of the Evidence Act. Reference was also made to *Sham Lal @ Kuldeep vs. Sanjeev Kumar and Ors* ((2009) 12 SCC 454), which held that the presumption of legitimacy could not be displaced by any circumstance creating doubt and held, "*Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access.*" The Appellant submitted that the impugned order of the High Court ordering the DNA test of the child and the Respondent, be set aside.

On the contrary, the Respondent argued that a DNA test was required in order to substantiate the allegations made by him against the Appellant.

Decision

The Court clarified at the outset that the issue of legitimacy of the child was not the question in issue, but whether grounds for a divorce

under the Hindu Marriage Act, 1955, had been made out. The question of legitimacy was incidentally involved with the issue of infidelity of the Appellant. The Court would have to, therefore, consider other relevant aspects apart from the presumption under Section 112 of the Evidence Act, and the question of whether the spouses had access to each other during the time of birth of their child would not be the sole determining factor.

The Court referred to the case of *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Anr.* ((2010) 8 SCC 633), which had held that it was permissible for a court to order a DNA test, but it had to consider diverse aspects including the presumption under Section 112 of the Evidence Act, the pros and cons of such an order to balance the interests of the parties and the test of 'eminent need' to decide whether it was possible for the court to reach the truth without holding the test. These caveats were laid down considering that an individual's right to privacy was infringed by compelled medical tests, as well as the shadow it cast over the child involved. It was noted that the privacy rights of an individual would come in conflict with the duty of the court to reach the truth in such cases, and therefore the court must consider the above-mentioned prerequisites before permitting a DNA test.

The Court also referred to *Goutam Kundu vs. State of West Bengal* ((1993) 3 SCC 418) and *Sharda vs. Dharmpal* ((2003) 4 SCC 493), while discussing *Bhabani Prasad Jena*. It noted that both these cases emphasised the need of a strong *prima facie* case for permitting medical tests. The Court also considered the case of *Nandlal Wasudeo Badwaik vs. Lata*

Nandlal Badwaik and Anr ((2014) 2 SCC 576), where Section 112 of the Evidence Act had established that the child was born during the continuance of a valid marriage, but the DNA test reports suggested otherwise. The Court in that instance had opined that proof based on a DNA test would be sufficient to dislodge a presumption under Section 112 of the Evidence Act and held, “*when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.*”

Drawing from *Bhabani Prasad Jena and Nandlal Wasudeo Badwaik*, the Court concluded that depending on the facts and circumstances of the case, the Court could permit holding of a DNA test, in order to determine the veracity of allegations before them. The Court agreed with the Respondent’s claim that it would be impossible to establish the assertion of infidelity, without a DNA test. However, the Court recorded a caveat giving the Appellant liberty to comply with or disregard the High Court’s order because it would help preserve the privacy rights of the Appellant, and it would determine the issue of infidelity without expressly disturbing the presumption under Section 112 of the Evidence Act.

The Court clarified that the issue of legitimacy would be incidentally involved, and in case the Appellant declined to comply with the High Court’s order, the Court would determine the allegations levelled against her by drawing an adverse presumption against her.



ABC vs. State (NCT of Delhi)

AIR 2015 SC 2569,
(2015) 10 SCC 1

2015

Informational Privacy
Autonomy

Compelling a single mother to disclose the name of her child’s father violates the mother’s right to privacy.

Constitutional Provision(s)
No Specific Constitutional Provision Referenced

Case Type
Civil Appeal

Case Status
Not Overruled

Bench Strength

2

Number of Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by
Justice V. Sen on behalf of
Justice A. M. Sapre and himself.

“It is imperative that the rights of the mother must also be given due consideration. As Ms. Malhotra, learned Senior Counsel for the Appellant, has eloquently argued, the Appellant’s fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. Any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world; this does not appear to be so in the present case, on a perusal of the pleading as they presently portray.”

Case Brief

In this judgment, the Supreme Court allowed an appeal against orders of the Delhi High Court and the guardian court dismissing a guardianship application under Section 7 of the Guardians and Wards Act, 1890 (“G&W Act”). The application was filed by an unwed Christian mother who did not want to give specific notice to the father of the child regarding the application filed by her for guardianship of her child, as he had not shown any interest in being involved with the child’s life. In the course of deliberations, the Court held that compelling a mother to disclose details regarding her child’s father would violate her right to privacy, especially in a case where the father has not shown any inclination towards exercising paternal rights.

The Court further observed that in other systems, including under the Hindu Minority and Guardianship Act, 1956, the natural guardianship of an illegitimate child would primarily rest with the mother of the child. The Court noted that the father of an illegitimate child did not stand on the same pedestal. Especially in cases like the present, where the father had not shown any interest in exercising his rights, giving him legal recognition would be unnecessary. The Court observed that in matters relating to children, the rights of the child must remain paramount, which in this case would be best served by allowing his mother to become his legal guardian even if it required relaxing procedural guidelines such as those under Section 11 of the G&W Act.

Case Summary

Facts

The Appellant was a single Christian mother who was well educated and financially independent. She had applied to be the sole guardian of her son under Section 7 of the G&W Act. Section 11 of the G&W Act requires a notice to be sent to the parents of the child before the appointment of a guardian. The Appellant issued public notice of the petition for guardianship but was averse to disclosing the particulars of the child's father. The Appellant also submitted an affidavit mentioning that her rights as a guardian may be revoked, altered or amended if the child's father at any time objected to them. However, the guardian court refused to process her application unless she gave the name and particulars of the child's father. The Delhi High Court dismissed her appeal, holding that the guardianship could not be granted without notifying the natural father and making him a party to the case. She then approached the Supreme Court in appeal.

Issue

Whether it was imperative for an unwed mother to specifically notify the putative father of the child of an application to become the legal guardian of the child.

Arguments

The Appellant argued that she did not want to disclose the identity of the child's father because disclosure of the father's identity would result in controversy regarding the child's paternity and result in social negativity.

On the other hand, the State contended that under Section 11 of the G&W Act, the parents of the minor had to be notified before a guardian was appointed, and that under Section 19 of the G&W Act, no guardian could be appointed if the father was alive and was not unfit to be the guardian of the child.

Decision

The Supreme Court, while arriving at their decision, referred to the provisions of Hindu and Mohammedan laws regarding guardianship in India and noted that in the case of a child born to unwed parents, the mother was given preference in matters of custody. They further analysed laws of countries like the UK, US, Ireland, New Zealand, and South America and observed the common position giving an unwed mother preference for guardianship rights. After discussing the predominant legal opinions on the issue, the Court held that guardianship and other related rights should be granted to the mother of an illegitimate child keeping in mind the paramount welfare of the child. They also considered the Convention on the Rights of the Child to understand the principles regarding the best interests of the child.

Further, the Court said that the argument of the State with respect to Sections 11 and 19 overlooked the significance of Section 7, which was the ‘quintessence’ of the G&W Act. The Court said that Section 11 applied when a third party was seeking guardianship of a child and the views of the child’s natural parents became pertinent. However, in case of an illegitimate child, the meaning of the term ‘parent’ in Section 11 could be limited to the parent who was the sole caregiver. The Court further noted that Section 11 was purely procedural, which procedure could be deviated from in the interests of the welfare of a child. On the question of privacy, the Court noted that the fundamental right to privacy of the mother may be violated by compelling her to provide the father’s name and particulars when she did not want to involve him in her son’s life. The Court noted that the father had

not shown any concern for his son since his birth and that the Appellant had raised him independently, and that the choice of both individuals in this regard must be respected, especially if it was in furtherance of the child’s best interests. The Court accordingly allowed the appeal, and directed that the Appellant’s guardianship application be allowed to proceed.



Supreme Court Advocates-on-record Association & Anr. vs. Union of India

(2016) 5 SCC 1,
(2016) 2 SCC (LS)
253

2015

Informational Privacy

The right to know and the right to privacy are both implied fundamental rights. Information voluntarily supplied by a person recommended for appointment to higher judiciary must not be disclosed.

Constitutional Provision(s) **Articles 21, 124, 124A, 217, 222, 224, and 224A**

Case Type **Civil Writ Petition**

Case Status **Not Overruled**

Bench Strength

5

Number of
Opinion(s)

5/1

OPINIONS DISSENT

4 separate opinions by
Justice J.S. Khehar,
Justice M.B. Lokur,
Justice A. K. Goel and
Justice K. Joseph
and 1 dissenting opinion by
Justice J. Chelameswar.

“The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance.”

Case Brief

This landmark judgment has come to be known as the ‘Fourth Judges Case’. It stemmed from a group of petitions challenging the validity of the Constitution (Ninety-Ninth Amendment) Act, 2014 (“99th Amendment”) along with the National Judicial Appointments Commission Act, 2014 (“NJAC Act”). These Acts sought to replace the prevailing collegium system used for making appointments to the higher judiciary with the National Judicial Appointments Committee (“NJAC”).

The NJAC proposed a greater role for the executive in making judicial appointments. This was allegedly to introduce transparency and accountability in the selection process. However, the Court found the NJAC to be in violation of the principles of separation of power and independence of judiciary that formed part of the basic structure of the Constitution, and a five-judge Constitution Bench struck down the 99th Amendment and consequently the NJAC Act by a majority of 4:1, declaring the Acts unconstitutional.

While discussing concerns regarding transparency and accountability in the NJAC, Justice Lokur observed that the 99th Amendment and the NJAC Act left open questions regarding the privacy of the candidates for appointment as judges. He concluded that the 99th Amendment and the NJAC Act, which were represented to allow transparency into the previously opaque collegium system, did not attempt to balance the candidates' right to privacy with the citizens' right to know. In doing so, he acknowledged the existence of an implicit fundamental right to privacy which would be subject to checks and balances.

Case Summary

Facts

The constitutional validity of the NJAC Act and the 99th Amendment was challenged through this group of petitions before a five-judge Constitution Bench. The NJAC was set up for the selection, appointment, and transfer of the judges to the higher judiciary to replace the prevailing collegium system under Articles 124² and 217¹ of the Constitution. The NJAC included the Union Minister for Law and Justice and two eminent persons, besides the Chief Justice of India, and next two senior most judges in the Supreme Court. The collegium, which the NJAC proposed to supplant, included the Chief Justice of India and a forum of the four senior-most judges of the Supreme Court.

Issue

Whether the NJAC Act and the 99th Amendment Act were constitutionally valid.

Arguments

Regarding the need for increased transparency and accountability, the Attorney General, on behalf of the Respondents asserted that

the manner of selection and appointment of the Judges to the higher judiciary must be known to civil society as they have the right to know. He referred to a range of precedents to buttress the existence of the right to know as part of the fundamental right to freedom of speech and expression, including *Indian Express Newspapers vs. Union of India* ((1985) 1 SCC 641), *Attorney General vs. Times Newspapers Ltd.* (1973 3 All ER 54) and *State of U.P. vs. Raj Narain* ((1975) 4 SCC 428).

The Attorney General pointed out that the NJAC would come within the ambit of the Right to Information Act, 2005, to help remove the opacity of the prevailing collegium system and introduce fairness as well as a degree of meritocracy. He also submitted that the NJAC would diversify the selection process in order to ensure accountability and that the NJAC would introduce transparency in the process of selection and appointments of judges.

Decision

The Court, by a majority of 4:1, struck down the 99th Amendment and consequently the NJAC Act as unconstitutional and void. The majority including Justices Khehar, Lokur,

Goel and Joseph, held that the involvement of the executive in the appointment of judges impinged upon the primacy and supremacy of the judiciary, and violated the principle of separation of powers between the executive and judiciary which formed part of the basic structure of the Constitution. However, Justice Chelameswar in his dissenting opinion disagreed that the NJAC was unconstitutional. He pointed out that though judicial independence formed a part of the basic structure, there was an abundance of opinion that suggested that primacy to the opinion of the judiciary was not the only way for establishing an independent and efficient judiciary and that it was neither a norm nor a fundamental aspect of the Constitution. He added, *“Independence of such fora rests on two integers - independence of the institution and of individuals who man the institution.”*

While the majority judgment revived the collegium system, it acknowledged that the system had to be streamlined to make it more responsive and transparent. However, Justice Chelameswar observed that the present collegium system lacks transparency, accountability and objectivity, and barring occasional leaks, the public had no access to information relating to it. He noted that the proposed composition of the NJAC could have acted *“as a check on unwholesome trade-offs within the collegium and incestuous accommodations between Judicial and Executive branches.”*

While analysing the issue of transparency and accountability in the NJAC framework, Justice Lokur observed that the 99th Amendment and the NJAC Act did not take into account the privacy concerns of individuals who

had been recommended for appointment as a judge. Referring to the contentions made by the Attorney General in this regard, he noted that given that proceedings of the NJAC would be completely accessible and if sensitive information about the recommended individual were made public, it would have a serious impact on the dignity and reputation of the recommended individual. Highlighting the need to balance transparency and confidentiality, he rejected the Attorney General’s contention that the right to know was a fundamental right, and asserted that it was an implicit fundamental right, which was tethered to the implicit fundamental right to privacy and the two implicit rights needed to be balanced.

Further, Justice Lokur also highlighted privacy concerns in the working of the NJAC. He observed that in a situation where information was voluntarily supplied by the candidate, they might not have an absolute right to privacy but might expect that information shared in confidence would not be disclosed to unconcerned third parties. Further, in case the President did not accept the recommendation, the candidate should have the right to non-disclosure of the information supplied by the President, suggested Justice Lokur. He noted that the 99th Amendment and NJAC Act were oblivious to these concerns and did not incorporate any measures required for balancing the two implicit fundamental rights. He concluded by stating that adequate thought had not been given to the privacy concerns of the candidates, and *“merely on the basis of a right to know, the reputation of a person cannot be whitewashed in a dhobi-ghat.”*

Bench Strength

9

Number of
Opinion(s)

6/0

OPINIONS DISSENT

1 plurality opinion by

Justice D.Y. Chandrachud on behalf of
Justice J.S. Khehar,
Justice R.K. Agarwal,
Justice S.A. Nazeer and himself,

1 concurring opinion by

Justice J. Chelameshwar,

1 concurring opinion by

Justice S.A. Bobde,

1 concurring opinion by

Justice R.F. Nariman,

1 concurring opinion by

Justice S.K. Kaul,

and 1 concurring opinion by

Justice A.M. Sapre.

**Constitutional
Provision(s)**

Articles 14, 19, and 21

(2017) 10 SCC 1,
AIR 2017 SC 4161

Case Type

Civil Writ Petition

2017

Case Status

Not Overruled

Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.

Status as a Fundamental Right

The Supreme Court reaffirmed that the right to privacy was a fundamental right derived from life and personal liberty under Article 21 and from Part III of the Constitution. This right is subject to reasonable restrictions.

“The right to privacy is inextricably bound up with all exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails.”

Case Brief

This case is the cornerstone of the ‘Right to Privacy’ jurisprudence in India. The nine-judge bench in this case unanimously reaffirmed the right to privacy as a fundamental right under the Constitution of India. The Court held that the right to privacy was integral to the freedoms guaranteed across fundamental rights, and was an intrinsic aspect of dignity, autonomy and liberty.

The case began with the question of whether the right to privacy was a fundamental right, which was raised in 2015 in the arguments concerning the legal validity of the Aadhaar database. The Attorney General appearing for the State argued that the existence of the right to privacy as a fundamental right was in doubt in view of the two decisions in the cases of *M.P. Sharma vs. Satish Chandra, District Magistrate, Delhi* ((1954) SCR 1077), rendered by an eight-judge bench, and *Kharak Singh vs. State of Uttar Pradesh* ((1964) 1 SCR 332), rendered by a six-judge bench. Both the cases, the State argued, contained observations that the Constitution did not specifically protect the right to privacy as a fundamental right.

At the same time, several subsequent judgments over the years had recognised the right to privacy as a fundamental right. However, these subsequent decisions that affirmed the existence of the right to privacy were rendered by benches of a smaller strength than *M.P. Sharma* and *Kharak Singh*. Due to issues relating to the precedential

value of judgments and noting the far-reaching importance of the right to privacy, this case was referred to a nine-judge bench of the Supreme Court.

The Bench unanimously held that “*the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.*” In doing so, it overruled previous judgments of the Supreme Court in *M.P. Sharma* and *Kharak Singh*, insofar as the latter held that the right to privacy was not recognised under the Indian Constitution.

In addition to cementing the place of the right to privacy as a fundamental right, this case also laid down the need for the implementation of a new law relating to data privacy, expanded the scope of privacy in personal spaces, and discussed privacy as an intrinsic value.

Case Summary

Facts

This case was initiated through a petition filed by Justice K.S. Puttaswamy, a retired judge of the Karnataka High Court in relation to the Aadhaar Project, which was spearheaded by the Unique Identification Authority of India (“UIDAI”). The Aadhaar number was a 12-digit identification number issued by the UIDAI to the residents of India. The Aadhaar project was linked with several welfare schemes, with a view to streamline the process of service delivery and remove false beneficiaries. The petition filed by Justice Puttaswamy was a case that sought to challenge the constitutional validity of the Aadhaar card scheme. Over time, other petitions challenging different aspects of Aadhaar were also referred to the Supreme Court.

In 2015, before a three-judge bench of the Court, the norms for, and compilation of, demographic biometric data by the government were questioned on the grounds of violation of the right to privacy. The Attorney General of India argued against the existence of the fundamental right to privacy based on the judgments in *M.P. Sharma* and *Kharak Singh*. While addressing these challenges, the three-judge bench took note of several decisions of the Supreme Court in which the right to privacy had been held to be a constitutionally protected fundamental right.

However, these subsequent decisions which affirmed the existence of a constitutionally protected right of privacy, were rendered by benches of a strength smaller than those in *M.P. Sharma* and *Kharak Singh*. The case was referred to a Constitution Bench to scrutinize the precedents laid down in *M.P. Sharma* and

Kharak Singh and the correctness of the subsequent decisions. On 18 July 2017, a Constitution Bench considered it appropriate that the issue be resolved by a bench of nine judges.

Issue

Whether the right to privacy was a fundamental right under Part III of the Constitution of India.

Arguments

The Respondents mainly relied upon the judgments in *M.P. Sharma* and *Kharak Singh*, which had observed that the Constitution did not specifically protect the right to privacy. The judgments were pronounced by an eight-judge and a six-judge bench respectively, and the Respondents argued that they would therefore be binding over the judgments of smaller benches given subsequently. The Respondents further argued that the makers of the Constitution did not intend to make the right to privacy a fundamental right.

On the other hand, the submission of the Petitioners was that *M.P. Sharma* and *Kharak Singh* were founded on principles expounded in *A.K. Gopalan vs. State of Madras* (1950 SCR 88). The Petitioners argued that *A.K. Gopalan*, which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge bench in *Rustom Cavasji Cooper vs. Union of India* ((1970) 1 SCC 248). Hence, the Petitioners submitted that the basis of the two earlier decisions was not valid. It was also urged that in the seven-judge bench decision in *Maneka Gandhi vs. Union of India* ((1978) 1 SCC 248), the minority judgment of Justice

Subba Rao in *Kharak Singh* was specifically approved while the decision of the majority was overruled.

In addition to this, other arguments made during the hearing dealt with the scope of the right to privacy. The Petitioners argued for a multi-dimensional model of privacy as a fundamental right, while the Respondents stated that the right to privacy was an ambiguous concept and could only be crystallized as a statutory and common law right.

The Petitioners argued that the Constitution would have to be read in line with the Preamble, while keeping in mind that privacy was a natural right, and an international human right. The Respondents advocated for a narrow approach which focused on the Constitution as the repository of fundamental rights and the Parliament as the only body which had the powers to modify the same.

Decision

The Supreme Court, through six separate opinions, pronounced privacy to be a distinct and independent fundamental right under Article 21 of the Constitution. The crux of the decision spelled out an expansive interpretation of the right to privacy - it was not a narrow right against physical invasion, or a derivative right under Article 21, but one that covered the body and mind, including decisions, choices, information and freedom. Privacy was held to be an overarching right of Part III of the Constitution which was enforceable and multifaceted. Details regarding the scope of the right were discussed in the multiple opinions.

The Court overruled the judgments in *M.P. Sharma*, and *Kharak Singh*, insofar as the latter held that the right to privacy was not a fundamental right. With respect to *M.P. Sharma*, the Court held that the judgment was valid for maintaining that the Indian Constitution did not contain any limit to the laws on search and seizure analogous to the Fourth Amendment in the United States Constitution. However, the Court held that the Fourth Amendment was not an exhaustive concept of privacy and an absence of a comparable protection in the Constitution did not imply that there was no inherent right to privacy in India at all – and therefore the conclusion in *M.P. Sharma* was overruled. The Court rejected the insular view of personal liberty (“ordered liberty”) adopted by *Kharak Singh*, which Justice D.Y. Chandrachud referred to as the “silos” approach borrowed from *A.K. Gopalan*.

The Court observed that this approach of viewing fundamental rights in water-tight compartments was abrogated after *Maneka Gandhi*. The Court further observed that the majority opinion in *Kharak Singh* suffered from an internal contradiction, as there was no legal basis to have struck down domiciliary visits and police surveillance on any ground other than privacy – a right which they referred to in theory but held not to be a part of the Constitution. The Court also held that the decisions subsequent to *Kharak Singh* upholding the right to privacy were to be read subject to the principles laid down in the judgment.

The Court also analysed the affirmative case for whether the right to privacy was protect-

ed under the right to life, personal liberty and the freedoms guaranteed under Part III of the Constitution. The Bench established that privacy was “*not an elitist construct*”. It rejected the argument of the Attorney General that the right to privacy must be forsaken in the interest of welfare entitlements provided by the State.

Significantly, while holding that the right to privacy was not absolute in nature, the judgment also gave an overview of the standard of judicial review that must be applied in cases of intrusion by the State in the privacy of an individual. It held that the right to privacy may be restricted where such invasion meets the three-fold requirement of

- a. legality, which postulates the existence of law;
- b. need, defined in terms of a legitimate state aim; and
- c. proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

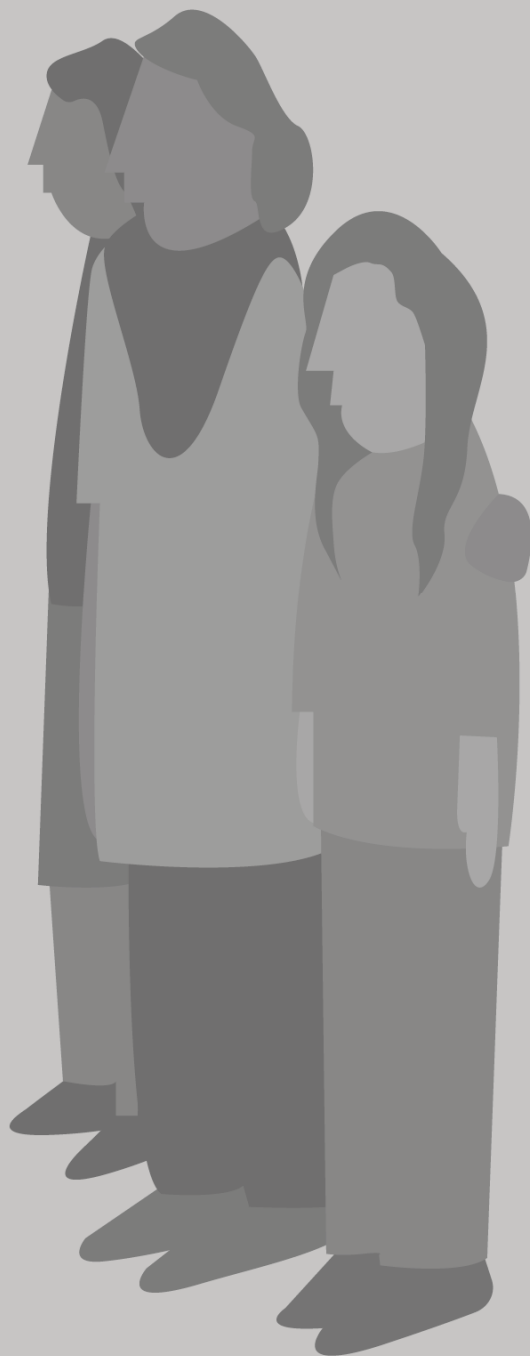
Justice S.K. Kaul added a fourth prong to this test which mandated “*procedural guarantees against abuse of such interference*”.

At the same time, Justice J. Chelameswar held that the standard of “*compelling state interest*” was only to be used in privacy claims which deserve “*strict scrutiny*”. As for other privacy claims, he held that the just, fair and reasonable standard under Article 21 would apply. According to his judgment, the application of the “*compelling state interest*” standard would de-

pend on the context of the case.

The Court also emphasised the fact that sexual orientation was an essential facet of privacy. It further discussed the negative and positive content of the right to privacy, where the State was not only restrained from committing an intrusion upon the right but was also obligated to take necessary measures to protect the privacy of an individual.

The judgment held informational privacy to be a part of the right to privacy. The Court, while noting the need for a data protection law, left it to the Parliament to legislate on the subject.



Independent Thought vs. Union of India & Anr.

(2017) 10 SCC 800,
AIR 2017 SC 4904

2017

Bodily Integrity
Dignity

The Supreme Court recognised that bodily integrity, sexual violence and privacy were closely interlinked concepts. It recognized that the right to privacy would impact all women, and not bear specific relation to married girl children between the ages of 15-18, who were the subject of the petition.

**Constitutional
Provision(s)**

Articles 14, 15 and 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

2 concurring opinions by
Justice M. B. Lokur and
Justice D. Gupta.

Number of
Opinion(s)

2/0

OPINIONS DISSENT

“ We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the Indian Penal Code. Her husband, for the purposes of Section 375 of the Indian Penal Code, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of the Indian

Penal Code. This was recognized by the LCI in its 172nd report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonize the provisions of various statutes and also harmonize different provisions of the Indian Penal Code inter-se.”

Case Brief

In this judgment, the Supreme Court considered the question of whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age would be rape. Although Exception 2 to Section 375 of the Indian Penal Code, 1860 (“IPC”) provided otherwise, the Supreme Court narrowed the scope of the exception and resolved the incongruity between the IPC and Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”) by raising the age of consent to 18 years for ‘marital’ sexual intercourse, in order to preserve and protect the human rights of a married girl child. The Court adopted a purposive approach and read down Exception 2 to Section 375 of the IPC.

The Court noted that the Exception created an unnecessary and artificial distinction between married and unmarried girls, without any rational nexus to the objective of the Section and held it to be arbitrary and discriminatory under Articles 14 and 15 and violative of basic human dignity guaranteed under Article 21 of the Constitution. The Court also noted that the Exception was contradictory to the scheme developed by other pro-child legislations including POCSO, which, being special legislations, would prevail.

While the Court noted a range of cases developing the relationship between the right to privacy and aspects of Article 21, it did not

discuss in detail the applicability of the right to the present case. In his concurring judgment, Justice D. Gupta suggested that this was because the right to privacy was available to all women, and did not bear specific relation to married girl children between the ages of 15-18, who were the subject of the petition.

Case Summary

Facts

In 2013, a child rights organization, Independent Thought, filed a writ petition in public interest before the Supreme Court. This petition challenged the constitutionality of Exception 2 to Section 375 of the IPC which decriminalised sexual intercourse by a husband with his wife between the ages of 15 and 18 years. The Petitioners alleged this provision violated the rights of a married girl child between the ages of 15-18 years, since in all other instances under the IPC the age of consent for sexual intercourse was 18 years. The petition sought clarification and harmonization of Exception 2 with existing laws on child marriage and children's rights.

Issue

Whether Exception 2 to Section 375 of the Indian Penal Code, 1860 insofar it related to girls aged 15 to 18 years, would be void for violating Article 14, Article 15 and Article 21 of the Constitution of India.

Arguments

The Petitioner argued that Exception 2 was arbitrary and discriminatory, as it created an artificial distinction between the rights of a married and unmarried girl child between the ages of 15-18 years. It was argued that this classification neither had a clear objective,

nor any reasonable nexus with the (unclear) objective of the Section 375, IPC. Therefore, Exception 2 was against the basic tenets of Article 14 and Article 21, as well as contrary to the beneficial intent of Article 15³, which enabled Parliament to make special provisions for women and children. Further, considering that almost all statutes in India including Section 375 of the IPC recognised a girl below 18 years as a child and penalised sexual intercourse with a girl child below 18 years, the Petitioner contended that the same position of law should be reflected in Exception 2 to Section 375 of the IPC, in order to preserve the right to bodily integrity and sexual autonomy of the girl child. The Intervenor (Child Rights Trust) raised additional issues relating to privacy and physical and mental health.

The Respondent-State argued that child marriage, though illegal, was still a social reality and largely prevalent in the country, and thus, Exception 2 sought to protect consensual child marriages. Criminalizing these marriages would target certain sections of society and their traditions. The Respondent also argued that by virtue of getting married, the girl child had consented to sexual intercourse with her husband either expressly or by necessary implication.

Decision

The Court delivered a detailed judgment in the form of two concurring opinions, considering the constitutionality of Exception 2 to Section 375, IPC.

The Court agreed with the Petitioner's argument that Exception 2 did not create a reasonable classification, and was violative of Article 14. It was also observed that Exception 2 was a clear infringement on the right to live a dignified right with basic autonomy and safety, as enshrined in Article 21. The Court further noted that while most statutes (including POCSO, the Prohibition of Child Marriage Act, 2006 ("PCMA") and the Juvenile Justice (Care and Protection of Children) Act, 2000 ("JJ Act")) recognize a person below 18 years as a child and prescribe the age of consent for sexual intercourse as 18 years, Exception 2 legalised non-consensual sexual intercourse by husbands with their wives above the age of 15 years. Moreover, the Criminal Law Amendment Act, 2013, amended Section 375 of the IPC and raised the age of consent for sexual intercourse to 18 years.

As a result, Exception 2 became an anomaly, which permitted non-consensual sexual intercourse by a husband with his wife between the ages of 15-18 years. The Court therefore held Exception 2 to Section 375 to be against the provisions and objectives of POCSO and the social welfare aims of Article 15³. To harmonize it with POCSO and fundamental rights, it was deemed necessary to read Exception 2 as saying that only sexual intercourse with a wife above 18 years of age was not rape.

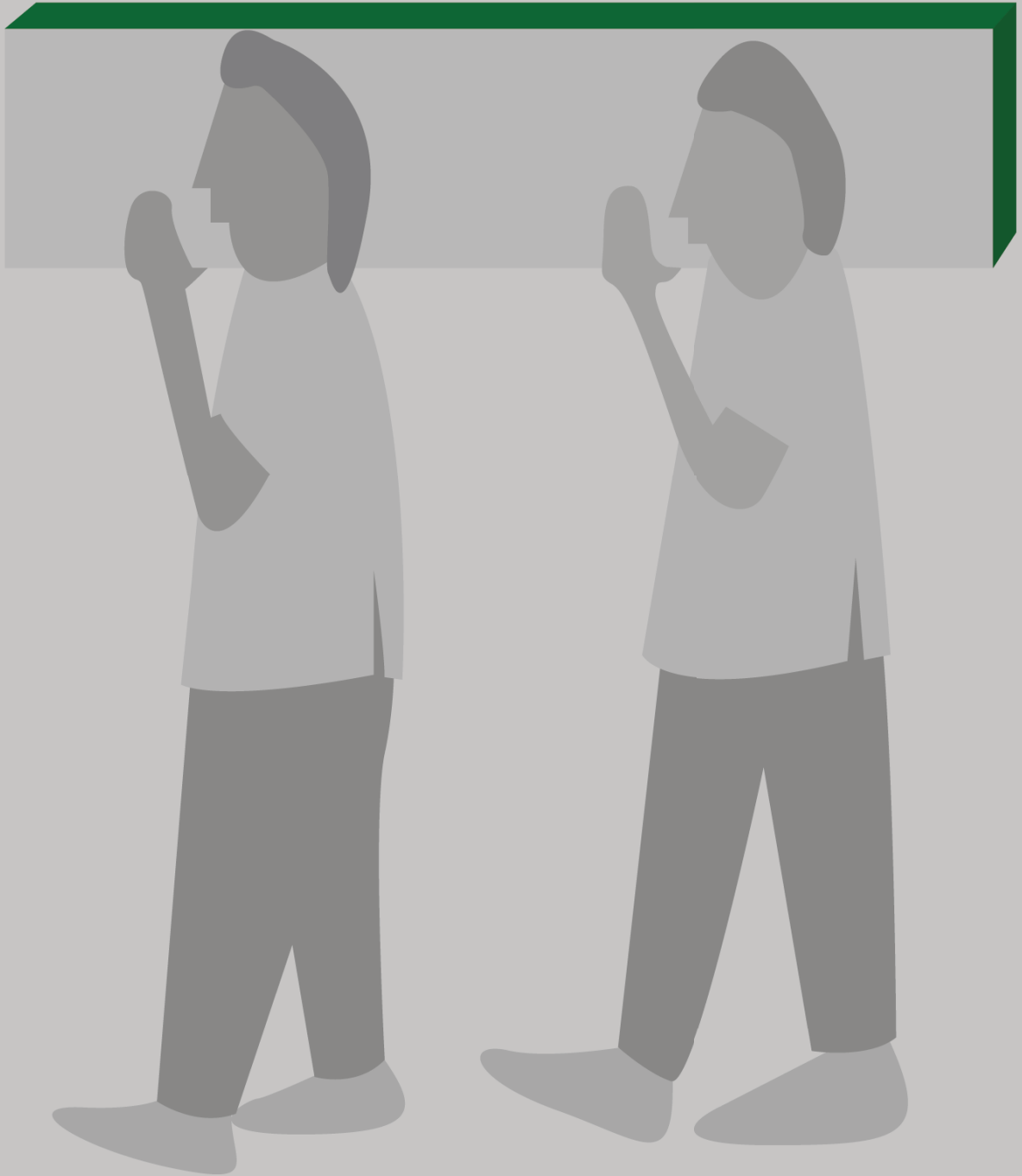
The Court also opined that the right to life included the right to develop physically, men-

tally and economically as an independent self-sufficient female adult and considered a range of material discussing the deleterious effect of child marriage and young childbirth. The effect of Exception 2 was to debilitate the girl child and negatively impact her physical and mental health, which violated her rights under Articles 14, 15 and 21. The Court thus read down Exception 2 to Section 375 insofar as it permitted a husband to have sexual intercourse with his wife below the age of 18 years of age.

The Court was briefly seized with the question of how the right to privacy of a girl child, as recognized by *K.S. Puttaswamy and Anr. vs. Union of India* ((2017) 10 SCC 1), was violated by Exception 2 to Section 375, IPC. However, the Court did not engage directly with the question. Justice M. B. Lokur discussed the right to bodily integrity and sexual autonomy in the context of privacy. He cited various cases in this regard – *Suchita Srivastava vs. Chandigarh Administration* ((2009) 9 SCC 1), where the right to reproductive choice was equated with personal liberty and privacy; *State of Maharashtra vs. Madhukar Narayan Mardikar* ((1991) 1 SCC 57), where the Court held that a woman was entitled to privacy and protection from intrusion and sexual assault irrespective of her sexual history and/or character; and *State of Karnataka vs. Krishnappa* ((2000) 4 SCC 75) and *State of Punjab vs. Gurmit Singh* ((1996) 2 SCC 384), where sexual violence and rape was deemed to be an unlawful intrusion into a woman's privacy.

Justice D. Gupta observed that any detailed analysis of the right to privacy vis-à-vis the impugned provision would have wider ramifications on the legality of marital rape as a

whole. Since the intention behind the Court's ratio was only to raise the age from 15 to 18 years in Exception 2 in order to read it in line with the general legal age of consent and age of marriage in Indian law, and other women empowerment-related goals, it refrained from discussing privacy and sexual violence in detail as it would invariably involve an adjudication upon the legality of marital rape.



Common Cause (A Regd. Society) vs. Union of India & Anr.

(2018) 5 SCC 1,
AIR 2018 SC 1665

2018

Autonomy

Bodily Integrity

Dignity

The right to privacy includes the intimate decisions of an individual with respect to death. Treatment against the wishes of a patient is a violation of the principle of informed consent, bodily privacy and bodily integrity, which are facets of privacy.

**Constitutional
Provision(s)**

Article 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

5

Number of
Opinion(s)

4/0

OPINIONS DISSENT

1 opinion by

Chief Justice D. Misra on behalf of
Justice A. M. Khanwilkar and himself,

3 concurring opinions by

Justice D. Y. Chandrachud,
Justice A. K. Sikri and
Justice A. Bhushan.

“Continuing treatment against the wishes of a patient is not only a violation of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognised as a facet of privacy by this Court.”

Case Brief

This petition was brought by Common Cause, a registered society, which sought a declaration that the right to die with dignity formed a part of the right to live with dignity under Article 21 of the Constitution. It further sought directions to the State to adopt appropriate procedures to allow persons who were of deteriorated health or who were terminally ill to execute Advance Medical Directives or living wills.

The Court extensively considered Indian and international precedent, including the decision in *K.S. Puttaswamy & Anr. vs. Union of India & Ors.* ((2017) 10 SCC 1) and held that the right to die with dignity was a fundamental right under Article 21. The Court also validated the use of Advance Medical Directives, noting that through this mechanism individual autonomy could be safeguarded in order to provide dignity in death.

The Court discussed the development of the right to privacy in some detail, noting that privacy is essential to human dignity, without which liberty cannot be actualised. The right to privacy was also considered central to bodily autonomy, integrity and freedom of choice, which would then be protected as fundamental rights. In balancing State interest and individual privacy, the Court took note of the US decision in *In Re Quinlan* which suggested that as bodily integrity was increasingly violated and chances of recovery lessened, the right to privacy increased and state interest dimmed.

Case Summary

Facts

This writ petition sought a declaration that the “right to die with dignity” fell within the fold of “right to live with dignity” under Article 21, and to ensure that persons of deteriorated health or terminally ill could execute a living will or an Advance Medical Directive.

While this case was initially placed before a three-judge bench, in light of contradictory precedents in determining the law relating to the right to die in India, it was referred to a Constitution Bench. The issue can be traced back to the case of *P. Rathinam vs. Union of India* ((1994) 3 SCC 394), in which a Division Bench of the Supreme Court held that Section 309 of the Indian Penal Code, 1860 (“IPC”) (which criminalised attempting to commit suicide) was unconstitutional as it was violative of the fundamental rights enshrined under Article 14 and 21 of the Constitution. The Court had held that the right to die was encompassed within the right to live.

This was overturned by a five-judge bench of the Supreme Court in the case of *Gian Kaur vs. The State of Punjab* (1996 AIR 946), where the Court held that the right to live does not include the right to die under Article 21 of the Constitution. Finally, in the case of *Aruna Ramachandra Shanbaug vs. Union of India and Ors* ((2011) 4 SCC 454) the Court allowed for passive euthanasia under exceptional circumstances under the strict guidelines laid down by the Court.

Issue

Whether the right to die with dignity was a fundamental right within the fold of the right

to live with dignity guaranteed under Article 21 of the Constitution.

Arguments

The Petitioner argued that the concept of sustenance of individual autonomy was inherent in the right to privacy and also formed a part of the conception of liberty. It was submitted that keeping a patient in a persistent vegetative state through advanced medical methods prolonged pain and suffering and allowed intrusion upon the patient’s autonomy and dignity. The Petitioner further claimed that the right to die with dignity was linked to the right to live with dignity. It also pleaded that to refuse unwanted medical treatment was a common law right and that a person could not be forced to take medical treatment without their consent.

The Respondent-State in its counter-affidavit submitted that the State had considered regulating euthanasia but the Ministry of Health and Family Welfare found it unfavourable. The Respondent argued that the right to live with dignity guaranteed under Article 21 referred to the availability of food, shelter and health and did not include the right to die with dignity.

An intervention application filed by the ‘Society for the Right to Die with Dignity’ was allowed. The affidavit supported the concept of euthanasia and laid emphasis on peaceful exit from life and the freedom of choice not to live in an irrecoverable state. It also supported the idea of a living will and filed a ‘living will’ sample.

Decision

The Court reaffirmed that the right to die with dignity was a fundamental right, as declared by a Constitution Bench of the Supreme Court in the case of *Gian Kaur*. The Court also clarified that the ratio of *Gian Kaur* did not introduce the concept of passive euthanasia. The Court discussed the distinction between active and passive euthanasia, where active euthanasia requires an overt action, whereas passive euthanasia is the act of withdrawal of life support. It held that the Court in *Aruna Shanbaug* had erred in holding that passive euthanasia could only be introduced through a legislation.

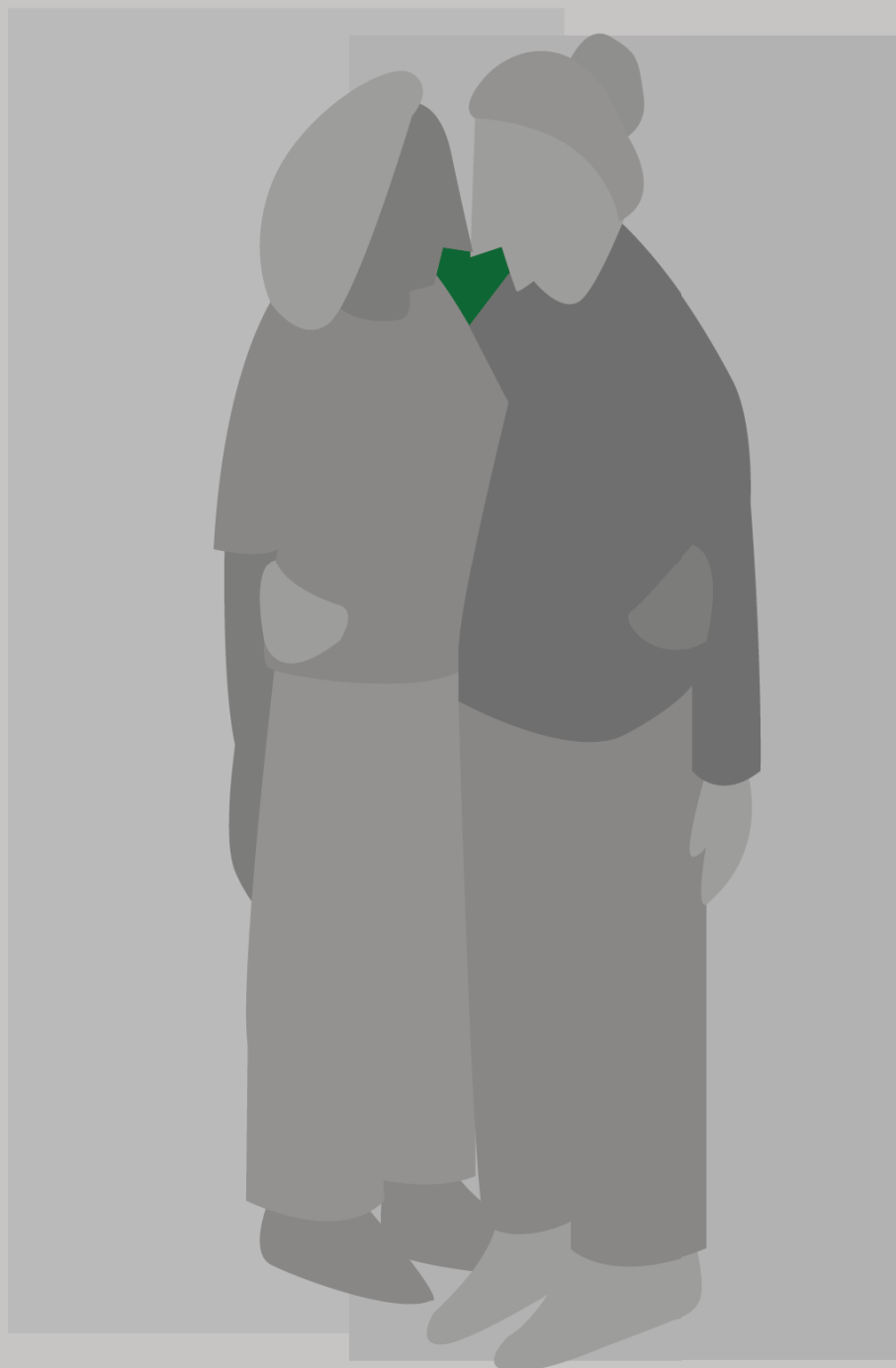
In relation to the topic of living wills, the Court held that there was a clear indication of the acceptance of the concept of Advance Medical Directives in this country. It further stated that the right to execute an Advance Medical Directive was a step towards the protection of the right to self-determination and bodily integrity. In the case of patients who were unable to take an informed position on the matter, a 'best-interest' position could be applied, allowing a guardian to step in and take this decision on their behalf.

The case extensively discussed the right to privacy as explained in *K.S. Puttaswamy vs. Union of India* (2017 (10) SCC 1) and its relation to autonomy and liberty. The Court relied on excerpts from all six judgments in this case. In addition to Indian cases, the Court also examined judgments from foreign jurisdictions, and discussed the relationship between the right to privacy and its implications for euthanasia.

The Court relied upon the judgement *In re*

Quinlan (70N.J.10; 355 A.2d 647 (1976)) where the New Jersey Supreme Court held that as the prognosis of the patient dimmed, the state's interest grew weaker, and the right to privacy of the individual with respect to their bodily autonomy grew stronger. If the individuals themselves were not in a position to assert their privacy, this could be done by a guardian on their behalf. It also relied upon the judgement by the European Court of Human Rights in the case of *Pretty vs. The United Kingdom* (Application No. 2346/02) where the Court concluded that an individual had a choice to avoid what they consider an undignified and distressing end to their life, and that such a choice would be guaranteed under the right to respect for private life under Article 8¹ of the European Convention on Human Rights.

The Court opined that the right to privacy mandated safeguarding the integrity of individual choice in the intimate sphere of decisions relating to death and held that the protection of these rights was an emanation of the right to privacy, as they were related to the fundamental right to life and personal liberty guaranteed by the Constitution.



Shafin Jahan vs. Asokan K.M. & Ors.

(2018) 16 SCC 368,
AIR 2018 SC 1933

2018

Autonomy

The intimacies of marriage lie within a core zone of privacy and are inviolable as the right to privacy and autonomy of each individual includes the ability to take decisions on aspects which define one's identity.

Constitutional Provision(s)

Articles 19, 21, and 226

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

3

Number of Opinion(s)

2/0

OPINIONS DISSENT

1 opinion by

Chief Justice D. Misra on behalf of
Justice A.M. Khanwilkar and himself,

1 concurring opinion by

Justice D.Y. Chandrachud.

“The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one’s personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme.”

Case Brief

In this case, the Supreme Court upheld an individual’s right to marry a person of one’s own choice as well as the right to choose a religion. The Court noted that expression of choice was a fundamental right under Articles 19 and 21 of the Constitution, and formed an essential component of the exercise of liberty and autonomy. These

constitutionally protected freedoms fell under the umbrella of Article 21, including the ability to take decisions on aspects which define one's personhood and identity. Relying on the judgment in *K.S. Puttaswamy vs. Union of India* ((2017) 10 SCC 1), Justice Chandrachud's opinion also reaffirmed the idea that the choice of marital partner would fall within the sphere of the right to privacy.

The Supreme Court analysed the allegations made by K.M. Asokan, the Respondent, that her daughter, Hadiya alias Akhila had been forcibly converted to Islam and was deceived into marrying Shafin Jahan, the Appellant. The Supreme Court noted that the High Court vide its impugned order had annulled Hadiya's marriage, calling it a 'sham' and directed her to be in the custody of her parents, ignoring the fact that she was an adult aged about 24 years. The Supreme Court examined the exercise of jurisdiction by the High Court and noted that it had wrongly exercised its *habeas corpus* jurisdiction in deciding the "*just way of life or correct course of living*" for Hadiya, denying her autonomy over her person.

The High Court also erred in invoking the *parens patriae* doctrine, as Hadiya did not suffer from any kind of mental incapacity or vulnerability, and had expressed her choice in unequivocal terms. Relying on the judgment in *Anuj Garg vs. Hotel Association of India* ((2008) 3 SCC 1), the Supreme Court further noted that the *parens patriae* doctrine could be subject to constitutional challenge on the grounds of the right to privacy. The Court held that parental concerns could not be reflected in the judiciary's exercise of constitutional powers. It noted that by declaring the marriage of Hadiya with Shafin Jahan null and void while entertaining a writ of *habeas corpus*, the High Court had transgressed its powers. The Court took note of the statements by Hadiya and affirmed her right to live her life in the manner of her choosing, striking down the judgment of the High Court.

Case Summary

Facts

Hadiya alias Akhila, Respondent No. 9, had completed a degree in homeopathy medicine and was pursuing her internship at a college in Salem. Her father, K.M. Asokan (Respondent No. 1) was informed that Akhila had gone to the college wearing a ‘pardah’ and had decided to change her faith. As a result, he fell ill. Hearing this news, Hadiya left Salem with a friend but did not reach her father’s house; when the father enquired about Hadiya at her friend’s house, he was told that Hadiya had escaped. The father filed a police complaint about his missing daughter.

After a few days, the father filed a writ petition of *habeas corpus* before the Division Bench of the Kerala High Court, as there was no progress made by the police in the investigation of the matter. Hadiya appeared before the High Court and filed an impleadment application following which she was impleaded as a Respondent. Later, she also filed an affidavit stating the facts and circumstances under which she left her father’s house, and that she had communicated the same to her father and the police. Further, Hadiya filed a writ petition before the Kerala High Court seeking protection from police harassment. The High Court disposed of the matter after being convinced that Hadiya had taken admission in a hostel to pursue her education further and was not illegally confined. Thereafter, Hadiya withdrew her writ petition.

Hadiya’s father filed a second writ petition alleging that his daughter had been subjected to forced conversion and was likely to be transported out of the country. The High Court

passed an interim order directing Hadiya to be kept under surveillance, to ensure that she does not leave the country. Hadiya informed the Court that she did not possess a passport and there was no likelihood of her being taken to Syria. During the course of the proceedings, Hadiya informed the High Court that she had married Shafin Jahan, i.e. the Appellant.

Displeased with the manner in which the marriage was conducted, the Kerala High Court invoked its *parens patriae* jurisdiction and annulled their marriage, noting that “a girl aged 24 years is weak and vulnerable and capable of being exploited in many ways” and it was the duty of the Court to ensure her safety. The High Court also directed surveillance to continue to ensure her safety. An investigation was ordered into the education, family background, antecedents and other relevant details of the Appellant and others involved in the conduct of the marriage. Aggrieved by the order of the High Court, the Appellant filed an appeal before the Supreme Court.

Whether the High Court was justified in allowing the writ of *habeas corpus* and annulling the marriage between the Appellant and the Respondent No. 9.

The judgment does not record any arguments made on behalf of the Appellant.

The Respondent submitted that the High Court was justified in invoking its *parens patriae* power to prevent radicalization of a vulnerable adult.

Decision

The Supreme Court ordered Respondent No. 1 to produce his daughter, Hadiya (Respondent No. 9) before the Court. After interacting with Hadiya, the Court noted her will and directed that she be admitted to the Medical College in Salem where she intended to pursue her internship and the Government of Kerala to make all necessary arrangements for her to travel to Salem.

The Court traced the legal history of the writ of habeas corpus and interpreted its meaning and scope. In doing so, it referred to Indian as well as English and American cases such as *Cox vs. Hakes* ((1890) 15 AC 506), *Secretary of State for Home Affairs vs. O'Brien* [(1923) AC 03], *Kanu Sanyal vs. District Magistrate, Darjeeling and Ors.* [(1973) 2 SCC 74], *Ware vs. Sanders* (124 NW 1081 (1910)) and *Ummu Sabeena vs. State of Kerala and Ors.* ((2011) 10 SCC 781).

The Court observed that “*the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detinue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint.*” Moreover, the “*ambit of a habeas corpus petition is to trace an individual who is stated to be missing. Once the individual appears before the court and asserts that as a major, she or he is not under illegal confinement, which the court finds to be a free expression of will, that would conclude the exercise of the jurisdiction.*”

The Court further noted that the “*expression of choice is a fundamental right under Articles 19 and 21*”. The Court pointed out that “*Hadiya [had] appeared before the High Court and stated that she was not under illegal confinement*” and in view of this, the High Court had no warrant to proceed further in the exercise of its jurisdiction under Article 226 but had been incorrectly swayed by Respondent No. 1’s averments. It observed that the Court could not be influenced by parental concerns and did not have the jurisdiction to decide what would “*be a ‘just’ way of life or ‘correct’ course of living for Hadiya. She has absolute autonomy over her person.*” Moreover, the High Court was wrong in making observations relating to social radicalization and welfare concerns in a writ of habeas corpus, and any apprehensions related to future criminal activity and otherwise were not under the writ jurisdiction and were to be governed and controlled by the State in accordance with law.

Further, the Court invalidated the order of the High Court invoking the *parens patriae* doctrine. It traced the origin of the doctrine in British Common law, and referred to precedents in India, U.K, U.S, Canada and Australia to note its usage and purpose. It referred to *Thomasset vs. Thomasset* ((1894) P 295), *Charan Lal Sahu vs. Union of India* ((1990) 1 SCC 613), *Anuj Garg and Ors. vs. Hotel Association of India and Ors.* ((2008) 3 SCC 1), *Aruna Ramachandra Shanbaug vs. Union of India* ((2011) 4 SCC 454), *Heller vs. Doe* (509 US 312 (1993)), *E. (Mrs.) vs. Eve* ((1986) 2 SCR 388), *Secretary, Department of Health and Community Service vs. J.W.B. and S.M.B.* ((1992) HCA 15), and *AC vs. OC (a minor)* ((2014) NSWSC 53).

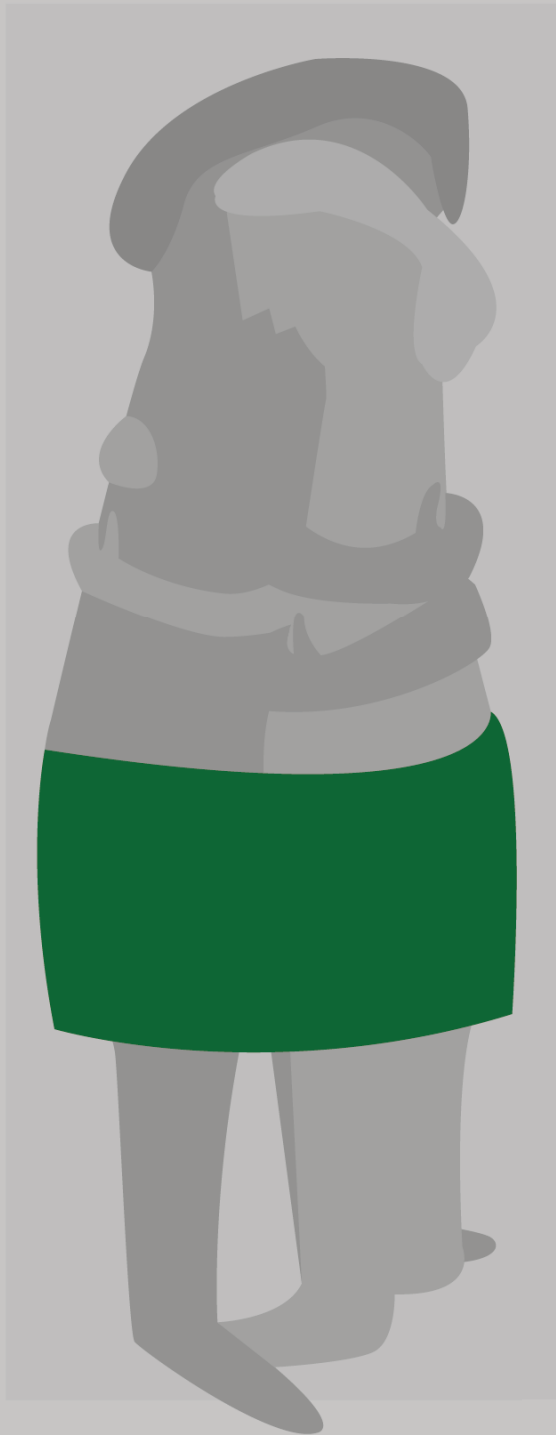
The Court noted that *“the said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian.”* Referring to the interaction with Hadiya, the Court opined that the *parens patriae* jurisdiction was *“not applicable to the facts of the present case, as “there is nothing to suggest that she suffers from any kind of mental incapacity or vulnerability.”* Moreover, *“(s)he was absolutely categorical in her submissions and unequivocal in the expression of her choice.”*

The Court noted that *“(e)ach individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.”* It cited *Justice K.S. Puttaswamy vs. Union of India and Ors. [2017 (10) SCC 1]*, which held that autonomy was an individual’s ability to make decisions on important matters of their life, and that the intersection between one’s mental integrity and privacy entitles the person to the freedom of thought and self-determination regarding marriage, procreation and sexual orientation, and were integral to a person’s dignity.

The Court held that the *“exercise of the jurisdiction to declare the marriage null and void, while entertaining a petition for habeas corpus, is plainly in excess of judicial power. The High Court has transgressed the limits on its jurisdiction in a habeas corpus petition. In the process, there has been a serious transgression of constitutional rights.”* The Court elucidated this aspect further and noted that liberty and autonomy recognised by the Constitution included the ability to take decisions on *“aspects*

which define one’s personhood and identity” and the *“choice of a partner whether within or outside marriage lies within the exclusive domain of each individual (as) Intimacies of marriage lie within a core zone of privacy, which is inviolable”*. The Court also noted that the *“Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme.”* The Court held that the High Court had erred in deciding whether Shafin Jahan was a fit person for Hadiya to marry, as *“the right to marry a person of one’s choice is integral to Article 21 of the Constitution”* and *“society has no role to play in determining our choice of partners”*.

Further on matters of belief and faith, the Court noted that *“whether to believe (or not) are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere.”* The Court thus upheld Hadiya’s right to autonomy and self-determination regarding her marriage and faith. It quashed the impugned judgment of the High Court, but held that the ongoing criminal investigation would remain unaffected by its observations.



Navtej Singh Johar & Ors. vs. Union of India

AIR 2018 SC 4321,
(2018) 10 SCC 1

2018

Autonomy
Dignity

In relation to a legislation criminalising acts against the order of nature, it was noted that within privacy, autonomy occupies a significant space and this would include self-determination of one's sexual identity.

Constitutional
Provision(s)

Articles 14, 15, 19, and 21

Case Type

Writ Petition

Case Status

Not Overruled

Bench Strength

5

Number of
Opinion(s)

4/0

OPINIONS DISSENT

1 opinion by

Chief Justice D. Misra on behalf of
Justice A. M. Khanwilkar and himself,

3 concurring opinions by

Justice R. F. Nariman,
Justice D.Y. Chandrachud and
Justice I. Malhotra.

“Given our judgment in Puttaswamy, in particular, the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21, it is clear that Section 377, insofar as it applies to same-sex consenting adults, demeans them by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma associated with such persons.”

Case Brief

This petition sought recognition of the right to sexuality, the right to sexual autonomy and the right to choice of a sexual partner as part of the right to life guaranteed under Article 21 of the Constitution of India. The petition further sought a declaration that Section 377 of the Indian Penal Code, 1860 (“IPC”), which criminalised consensual sexual conduct between adults, was unconstitutional. The Petitioners contended that homosexuality, bisexuality and other sexual orientations were natural variations of expression, and to criminalise these sexual orientations would have the effect of violating the Constitution’s guarantees relating to dignity and privacy.

Accepting these contentions, the Supreme Court found Section 377 to be discriminatory towards the Lesbian, Gay, Bisexual and

Transgender (LGBT) community and noted that sexual orientation was an inherent part of their identity, dignity and autonomy. On this basis, the Court decided that Section 377 constituted a violation of the right to dignity, privacy and sexual autonomy under Article 21, freedom of expression under Article 19, the right to equality under Article 14, and nondiscrimination under Article 15 of the Constitution.

While the Supreme Court had previously considered the question of the constitutionality of Section 377 in the case of *Suresh Kumar Koushal & Anr. vs. Naz Foundation & Ors.* ((2014) 1 SCC 1) (which overturned the Delhi High Court's judgement in *Naz Foundation vs. Government of NCT of Delhi & Ors.* ((2009) 111 DRJ 1), in light of several factors including the progressive development of the right to privacy and its intrinsic link to dignity and personal autonomy in the cases of *NALSA vs. Union of India & Ors.* ((2014) 5 SCC 438) and *K.S. Puttaswamy & Anr. vs. Union of India & Ors.* ((2017) 10 SCC 1), a three-judge bench of the Supreme Court referred the petition to a larger bench for final adjudication.

Case Summary

Facts

The primary issue in this case related to the constitutional validity of Section 377 of the IPC, which dealt with “unnatural offences” and criminalised “carnal intercourse against the order of nature”, insofar as it impacted consensual same-sex relationships. In 2009, Section 377 was held to be unconstitutional by the High Court of Delhi in the *Naz Foundation* case, which was overruled by the Supreme Court in *Suresh Kumar Koushal*. The Petitioner, Navtej Singh Johar filed a writ petition before a three-judge bench of the Supreme Court in 2016 challenging its decision in *Suresh Kumar Koushal* and the constitutionality of Section 377. The matter was referred to the five-judge bench considering the importance of the issue.

Issue

Whether Section 377 of the Indian Penal Code, 1860 insofar as it applied to consensual sexual conduct between adults was unconstitutional and whether the judgment in *Suresh Kumar Koushal* should be upheld or set aside.

Arguments

The Petitioners contended that homosexuality, bisexuality and other sexual orientations were natural and based on lawful consent and were neither a physical nor a mental illness. The Petitioners further contended that criminalising sexual orientations violated the concept of individual dignity and decisional autonomy inherent in the personality of a person, and the right to privacy under Article 21. The Petitioners submitted that the rights of the LGBT community, who form 7-8 percent of the Indian population need to be rec-

ognised and protected. They relied on the *Puttaswamy* case to argue that Section 377 was unconstitutional because it discriminated against the LGBT community on the basis of sexual orientation, which was an essential attribute of privacy, and that sexual orientation and privacy lay at the core of fundamental rights guaranteed under Articles 14, 19 and 21. The Petitioners sought recognition of the right to sexuality, the right to sexual autonomy and the right to choice of a sexual partner as part of the right to life guaranteed under Article 21.

The Respondents submitted that insofar the constitutional validity of Section 377 was concerned with the ‘consensual acts of same sex adults in private’, they would leave it to the wisdom of the Court. Some Intervenor argued in favour of retention of Section 377 as it furthered “*a compelling state interest to reinforce morals in public life.*” Arguing that fundamental rights were not absolute, the Intervenor submitted that Section 377 was not discriminatory as it “*criminalises acts and not people*” and applied equally to all unnatural sexual conduct, irrespective of sexual orientation and criminalised some forms of carnal intercourse by both heterosexual and homosexual couples.

Decision

The Supreme Court, while observing the judgment in *Suresh Kumar Koushal*, noted that it relied on the minuscule minority rationale to deprive the LGBT community of their fundamental rights and did not differentiate between consensual and non-consensual sexual acts between adults. The Court noted in this regard that a “*distinction has to be made between consensual relationships of*

adults in private, whether they are heterosexual or homosexual in nature.” Moreover, consensual relationships between adults could not be classified along with offences of sodomy, bestiality and non-consensual relationships.

Further, the Court analysed the constitutionality of Section 377 on the bedrock of the principles enunciated in Articles 14, 15, 19 and 21. The Court relied on the NALSA judgment, which granted equal protection of laws to transgender persons, to reiterate that sexual orientation and gender identity were integral parts of a person’s personality, and the *Puttaswamy* judgment, which recognised the interrelationship between privacy and autonomy and that the right to sexual orientation was an intrinsic part of the right to privacy, to conclude that “*it is imperative to widen the scope of the right to privacy to incorporate a right to ‘sexual privacy’ to protect the rights of sexual minorities.*” The Court further discussed the Yogyakarta Principles on Gender Identity and Sexual Orientation and the U.K. Wolfenden Committee Report, 1957, which abolished penal offences involving same-sex consenting adults amongst many other international comparative references.

The Court also relied on its judgment in *Shakti Vahini vs. Union of India & Ors.* ((2018) 7 SCC 192), and *Shafin Jahan vs. Asokan K.M* (AIR 2018 SC 1933) to reaffirm that the right to choose a life partner was a feature of individual liberty and dignity protected under Articles 19 and 21 and referred to principles stated in *Shayara Bano vs. Union of India and Ors.* ((2017) 9 SCC 1) to hold that Section 377 was irrational, arbitrary and violative of Article 14 as it made consensual relationships in private spaces a crime and subjected the

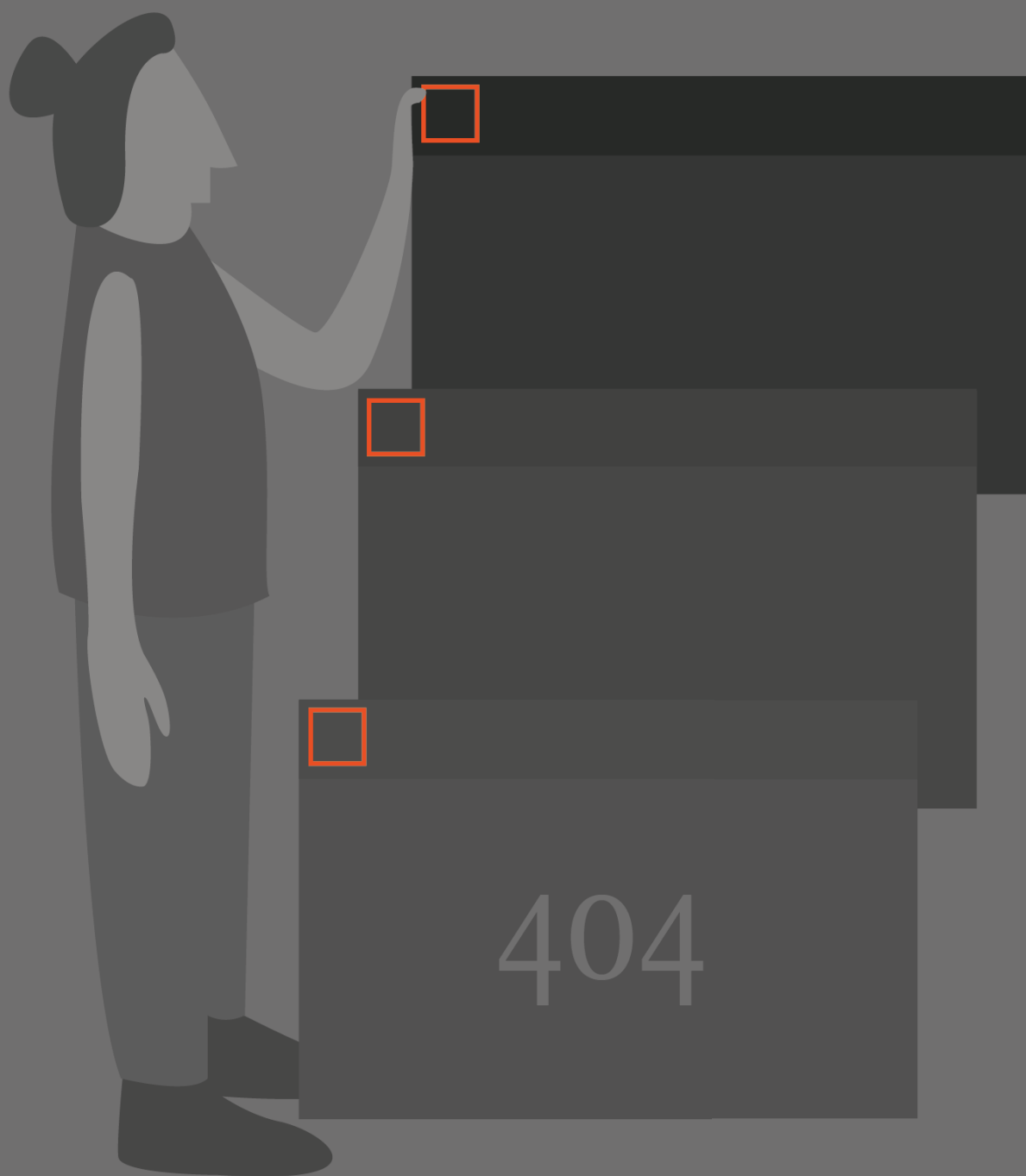
LGBT community to discrimination and unequal treatment. Moreover, the Court used the maxim *“et domus sua cuique est tutissimum refugium”* which translates to *“a man’s house is his castle”* to hold that Section 377 was disproportionate and unreasonable for restricting LGBT persons’ right to freedom of expression and choice as the restrictions did not protect public order, decency or morality.

On the interplay of morality and constitutionality, the Court noted that a *“subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest.”* The Court reiterated that *“any restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality.”* Further, one of the principles that emerged from comparative jurisprudence analysis was that *“(i)ntimacy between consenting adults of the same-sex is beyond the legitimate interests of the state.”*

The Court concluded that sexual orientation was natural, innate and immutable. It held that the *“choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice, and an expression of their autonomy and self determination.”* Further, although the LGBT community constituted a sexual minority, they were equally protected under Part III of the Constitution.

The five-judge bench unanimously held Section 377 to be unconstitutional and read down Section 377 to the extent it criminalised

consensual sexual conduct between adults, whether of the same sex or otherwise, in private. However, the Court clarified that consent must be free, voluntary and devoid of any duress or coercion.



Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.

(2019) 1 SCC 1

2018

Informational Privacy
Dignity

The case upheld the validity of the Aadhaar Act while striking down certain provisions of the Act, which encroached upon the right to privacy.

**Constitutional
Provision(s)** **Articles 14, 19, 21, and 110**

Case Type **Civil Writ Petition**

Case Status **Not Overruled**

Bench Strength

5

Number of
Opinion(s)

3/1

OPINIONS DISSENT

1 majority opinion by
Justice A.K. Sikri on behalf of
Justice D. Misra,
A.M. Khanwilkar and himself,

1 partially concurring opinion by
Justice A. Bhushan, and

1 dissenting opinion by
Justice D.Y. Chandrachud.

“Having due regard to the test of proportionality which has been propounded in Puttaswamy and as elaborated in this judgment, we do not find that the decision to link Aadhaar numbers with mobile SIM cards is valid or constitutional. The mere existence of a legitimate state aim will not justify the means which are adopted. Ends do not justify means, at least as a matter of constitutional principle. For the means to be valid, they must be carefully tailored to achieve a legitimate state aim and should not be either disproportionate or excessive in their encroachment on individual liberties.”

Case Brief

In this case, the Supreme Court upheld the constitutional validity of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (“Aadhaar Act”) and declared that its legislative passage as a Money Bill was legal and valid, although Justice D.Y. Chandrachud dissented.

The Court was tasked with reviewing 27 different petitions, each challenging a distinct aspect of the Aadhaar system. For instance, the Court was required to decide whether it was legal to mandate the use of Aadhaar to receive government subsidies given the possibilities of exclusion of beneficiaries. The infringement of the fundamental right

to privacy by the Aadhaar Act was also contested, with the Petitioners arguing that the use of Aadhaar to track and profile individuals violated the Constitution and constructed a surveillance state.

The Court held that using Aadhaar for the purpose of welfare schemes was constitutional, and upheld the mandatory linking of Aadhaar with PAN cards. The mandatory linking of Aadhaar to bank accounts, on the other hand, was declared unconstitutional as the provision did not meet the test of proportionality and thus, violated the right to privacy. In its majority judgment, the Court also struck down Section 57 of the Aadhaar Act, holding that private companies could not require citizens to provide their Aadhaar numbers for the provision of services.

Case Summary

Facts

In 2009, the Indian Government devised the Aadhaar project as a universal identification system to better track disbursement of services provided by it. The Aadhaar project entailed the collection of biometric information of individuals to be used for identification and authentication of service delivery and was initially begun by way of an executive order in 2009. The Aadhaar project received statutory sanction by the enactment of the Aadhaar Act in 2016.

However, the Aadhaar project attracted public scrutiny and eventually both the administrative action as well as the Aadhaar Act were challenged before the Supreme Court for violating the Constitution, including the right to privacy. The first writ petition was filed in 2012, but doubts were raised as to the existence of the right to privacy as a fundamental

right, which led to the constitution of a nine-judge bench in the case of *K.S. Puttaswamy and Anr. vs. Union of India ((2017) 10 SCC 1)*, (*“Puttaswamy I”*). *Puttaswamy I* affirmed the right to privacy as a fundamental right, following which the Court posted the matter for final hearing in 2018 before a five Judge Constitution Bench.

Issues

- A. Whether the Aadhaar Project created or had the tendency to create a surveillance state and was unconstitutional on this ground;
- B. Whether the Aadhaar Act and Section 139AA of the Income Tax Act, 1961 (“IT Act”) violated the right to privacy and were unconstitutional on this ground;
- C. Whether children could be brought within the sweep of Sections 7 and 8 of the Aadhaar Act;

- D. Whether the Aadhaar Act could be passed as a 'Money Bill' within the meaning of Article 110 of the Constitution; and
- E. Whether other sections of the Aadhaar Act were unconstitutional.

Arguments

The arguments from the Petitioners' side largely pertained to privacy, surveillance, data protection, consent and the legislative process. The Petitioners argued that the information collection for Aadhaar was mishandled since the Unique Identification Authority of India ("UIDAI") had employed several third parties for the work. Further, they argued that the project was laying the groundwork for a surveillance state. With regard to consent, they argued that by making Aadhaar compulsory for basic services and daily requirements like banking, SIM cards, phone connections, people were not practically in a position to withhold consent and that the idea of consent was, therefore, illusory in nature.

The Petitioners also argued that by making biometric authentication a prerequisite for getting subsidies, exclusion from welfare benefits had increased. The Petitioners submitted that the objective of creating a single pervasive identification over time was illegal and thus rendered the Aadhaar Act violative of Article 14. Finally, the legislative passage of the Aadhaar Act as a Money Bill was questioned by the Petitioners and it was argued that bypassing the Rajya Sabha was unlawful and therefore the Act was inherently invalid due to the problematic legal process behind its enactment.

The Respondents argued that the information gathered for the Aadhaar project was non-invasive and non-intrusive identity information. It was argued that the Aadhaar scheme and the manner in which it operated excluded every possibility of data profiling and, therefore, the question of State surveillance would not arise. The Respondents also argued that identity information data resided in the Central Identities Data Repository ("CIDR"), which was not in the control of the Government or the police. The Respondents further argued that enough safeguards were in place in the Aadhaar Act to avoid any data breaches. The Respondents submitted that the tests laid down in *Puttaswamy I* had been satisfied and hence the Aadhaar Act was not unconstitutional.

Decision

The Supreme Court upheld the constitutional validity of the Aadhaar Act, its passage as a Money Bill, and the use of compulsory Aadhaar-based identification for those State welfare schemes, the expenditure of which was borne out of the Consolidated Fund of India.

On the question of whether the project created or had the tendency to create a surveillance state, the Court said that neither the structure of Aadhaar nor the provisions under the Act created a surveillance state. Taking from arguments presented by the UIDAI, the Court said: only 'minimal' biometric data was collected during the process; the UIDAI was purpose blind as it did not gather the purpose, location or other information related to the transaction; the collated data was siloed,

the merging of which was banned; the process of authentication was shielded from the internet and ample security measures were undertaken; and the use of only registered devices was mandated for requests related to authentication. Therefore, the Court held that it was extremely difficult to profile individuals based on their biometric and demographic information stored in CIDR. Certain provisions relating to data protection were strengthened by the Court, which ordered that authentication records were not to be stored for a period longer than six months, as opposed to the permitted five years under the Act.

On the question of whether the Act violated the right to privacy, the Court referred to the 2017 decision in *Puttaswamy I* where privacy was declared to be a fundamental right, and stated that any invasion of the right, to be justifiable, must meet the three fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted.

In the opinion of the Court, the very existence of the Aadhaar Act coupled with the aim of delivery of welfare benefits passed the first two prongs of the test. The Court stated that the third requirement of proportionality had also been met as the purpose of the Aadhaar Act was to accurately identify the beneficiaries of State welfare schemes and that it achieved the balancing of two fundamental rights with privacy on one hand, and the right to food, shelter and employment on the other. While Section 139AA of the IT Act which provided for mandatory Aadhaar-PAN linkage was upheld, the mandatory linkage of Aadhaar with

bank accounts was held to not satisfy the test of proportionality and was struck down. Similarly, the mandatory linkage with mobile numbers was not upheld.

On the question of whether children could be brought within the sweep of Sections 7 and 8 of the Aadhaar Act, it was held that for a child's enrolment into the Aadhaar programme, parental consent was mandatory and that such enrollees were entitled to opt-out on attaining the age of majority.

On the question of whether the Aadhaar Act could be passed as a Money Bill within the meaning of Article 110 of the Constitution, the Court stated that considering the fact that the aim of the Act was to create a unique identification so that deserving beneficiaries were able to access subsidies or services, the expenditure of which was drawn from the Consolidated Fund of India, the Aadhaar Act was validly passed as a Money Bill.

However, certain sections of the Aadhaar Act were struck down as unconstitutional. Section 57 which allowed the use of Aadhaar by private companies was one such provision. The judgment stated that the term 'any purpose' in Section 57 was vulnerable to misuse and that permitting any company or person to use Aadhaar for authentication, based on a contract, would allow exploitation of private data and was thus violative of the right to privacy. Section 47 of the Act which provided that only UIDAI could file a complaint in case of violation of the Act, was struck down, and it was directed that the provision must be amended to include any individual/victim whose right has been violated. Regulation 27 that provided for storage of data for a period of five years was struck down, and it was held that reten-

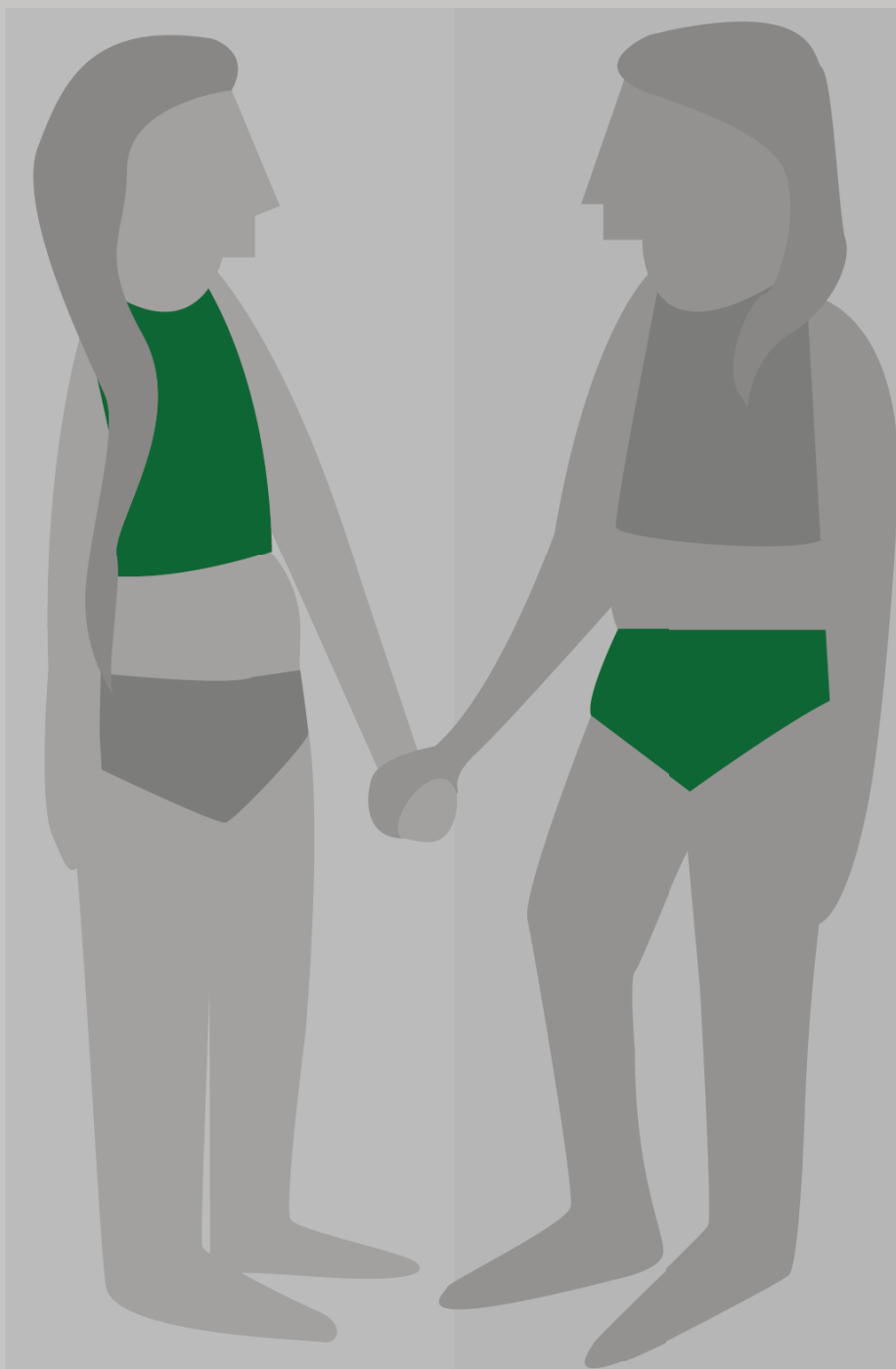
tion for a period longer than six months was not permissible.

In his dissenting opinion, Justice D.Y. Chandrachud made several notable points with regard to privacy violations by the Aadhaar project and Aadhaar Act. He held that the legislative passage of the Aadhaar Act as a Money Bill was unconstitutional. He noted that adequate norms needed to be laid down for each step from the collection to retention of biometric data based on informed consent, along with specifying the time period for retention; individuals must be given the right to access, correct and delete data; and an opt-out option should be necessarily provided. He pointed out that the Aadhaar Act was bereft of these privacy safeguards. He also raised questions on the independence and accountability of the UIDAI.

Justice D.Y. Chandrachud stated that while the requirement of a legitimate state aim was met, the Aadhaar Act did not meet the requirements of necessity and proportionality. He added that the legitimate aim of the State could be fulfilled by adopting less intrusive measures as opposed to the mandatory enforcement of the Aadhaar scheme as the sole repository of identification. In his opinion, the State had failed to satisfy the Court that the targeted delivery of subsidies which bolstered the right to life entailed a necessary sacrifice of the right to individual autonomy, data protection and dignity when both these rights were protected by the Constitution.

He further held that Aadhaar violated the principles of informational privacy, informational self-determination and data protection. He reiterated the point that Aadhaar bore the risk of creating a surveillance state

and stressed the additional risks of commercial profiling of individuals and potential swaying of elections. He also held that in the absence of an independent regulatory and monitoring framework which provided robust safeguards for data protection, the Aadhaar Act was violative of Article 14. Finally, Justice D.Y. Chandrachud stated that the Aadhaar Act was overly-broad and not effectively limited.



Joseph Shine vs. Union of India

(2019) 3 SCC 39,
AIR 2018 SC 4898

2018

Autonomy

The Court held that autonomy was intrinsic in a dignified human existence, and that the criminalisation of adultery denied women from making choices relating to their autonomy and was therefore unconstitutional.

Constitutional Provision(s)	Articles 14, 15, and 21
Case Type	Criminal Writ Petition
Case Status	Not Overruled

Bench Strength

5

Number of
Opinion(s)

4/0

OPINIONS DISSENT

1 opinion by
Chief Justice D. Misra on behalf of
Justice A. M. Khanwilkar and himself,

1 concurring opinion by
Justice R.F. Nariman

1 concurring opinion by
Justice D.Y. Chandrachud, and

1 concurring opinion by
Justice I. Malhotra.

“The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.”

Case Brief

In 2017, Joseph Shine, an Indian citizen living in Italy, filed a petition in public interest under Article 32 challenging the constitutional validity of Section 497 of the Indian Penal Code, 1860 (“IPC”), which dealt with the criminal offence of adultery and Section 198②, Code of Criminal Procedure 1973 (“CrPC”), which provided that no person other than the husband of a person accused of adultery would be deemed to be aggrieved by the commission of an offence under Section 497 or Section 498 of the IPC.

The Supreme Court struck down Section 497 of the IPC on the grounds that it violated Articles 14, 15, and 21 of the Constitution. The five-judge bench, in four concurring judgments, unanimously held that the law was archaic, arbitrary and paternalistic, and infringed upon a woman’s autonomy, dignity, and privacy. Section 198② of the CrPC which allowed only a husband to bring a prosecution under Section 497 of the IPC was also struck down as unconstitutional. This decision overruled

the Court's previous decisions in *Yusuf Abdul Aziz vs. State of Bombay* (1954 SCR 930), *Sowmithri Vishnu vs. Union of India* ((1985) Supp SCC 137) and *Vishnu Revathi vs. Union of India* ((1988) 2 SCC 72) where the constitutional validity of Section 497 was upheld.

The various judgments discussed the developments in the right to privacy in some detail, referring to *K.S. Puttaswamy vs. Union of India* ((2017) 10 SCC 1) to affirm the need to protect sexual autonomy and the privacy of the matrimonial sphere. The Court held that while there might be negative effects of the failure of parties to a marriage to be faithful to each other, it would be left to the parties to decide how to proceed, whether by resorting to divorce or otherwise, and introducing criminal sanctions would serve no purpose.

Case Summary

Facts

In December 2017, a Public Interest Litigation petition was filed challenging the constitutional validity of the offence of adultery under Section 497 of the IPC read with Section 198② of the CrPC. A three-judge bench, headed by the then Chief Justice of India, Dipak Misra, had referred the petition to a five-judge Constitution Bench, conceding that the law did seem to be archaic.

Issue

Whether Section 497 of the IPC read with Section 198② of the CrPC violated Articles 14, 15 and 21 of the Constitution of India.

Arguments

The Petitioner discussed several aspects of Section 497 that tended to violate fundamental rights. It was argued that the law provided for a man's punishment in case of adultery,

whereas no action against a woman was provided for. Under the provision, a woman was not permitted to file a complaint against her husband for adultery due to the lack of any legal provision to such effect. Further, he argued that women were treated like objects under this law as the act was 'criminal' depending on the husband's consent or lack thereof.

The Petitioner argued that the provisions were violative of fundamental rights granted under Articles 14, 15 and 21 of the Constitution, due to their paternalistic and arbitrary nature. It was submitted that since sexual intercourse was a reciprocal and consensual act for both the parties, neither should be excluded from liability. The Petitioner further contended that Section 497 of the IPC was violative of the fundamental right to privacy under Article 21, since the choice of an intimate partner fell squarely within the area of autonomy over a person's sexuality. It was submitted that each individual had an unfettered right (whether

married or not; whether man or woman) to engage in sexual intercourse outside his or her marital relationship.

The Respondent argued that allowing individuals to have sexual relations outside marriage would inevitably destroy the institution of marriage and thus, the provision criminalising adultery was essential for maintaining the sanctity of marriage. It was submitted that an act which outraged the morality of society, and harmed its members, ought to be punished as a crime. The Respondent argued that the right to privacy and personal liberty under Article 21 was not an absolute right and was subject to reasonable restrictions when legitimate public interest was at stake. It was also argued that Section 497 was valid as being a form of affirmative action in favor of women.

Decision

The Supreme Court struck down Section 497 of the IPC as unconstitutional, being violative of Articles 14, 15 and 21 and held that Section 198② of the CrPC was unconstitutional to the extent that it was applicable to Section 497 of the IPC. This judgment overruled several previous judgments upholding the criminalization of adultery.

The Court held that Section 497 was archaic and constitutionally invalid as it stripped a woman of her autonomy, dignity and privacy. It opined that the impugned provision resulted in the infringement of a woman's right to life and personal liberty by espousing an idea of marriage that subverted true equality by applying penal sanctions to a gender-based approach to the relationship between a man and a woman. It held that the exaggerated focus on the aspect of connivance or consent of

the husband translated to subordination of the woman. The Court reaffirmed sexual privacy as a natural right under the Constitution.

It was further held that Section 497 disregarded substantive equality as it reaffirmed the idea that women were not equal participants in a marriage, and that they were not capable of independently consenting to a sexual act in society and a legal system that treated them as the sexual property of their spouse. Therefore, this Section was held to be in violation of Article 14. The judges also held that Section 497 was based on gender stereotypes and in doing so, contravened the non-discrimination provision of Article 15. Further, it was held to be violative of Article 21 as it denied women of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy.

The Court noted that adultery remained a civil wrong and a valid ground for divorce and although it was no longer criminalised. It stated that criminal offences were committed against the society as a unit, while adultery fell under the umbrella of personal issues. In treating adultery as a crime, the Court held that the State interfered with people's personal lives and crossed over into the private realm and subsequent to the act of adultery, the husband and the wife should be allowed to make a mutual decision based on their personal discretion.

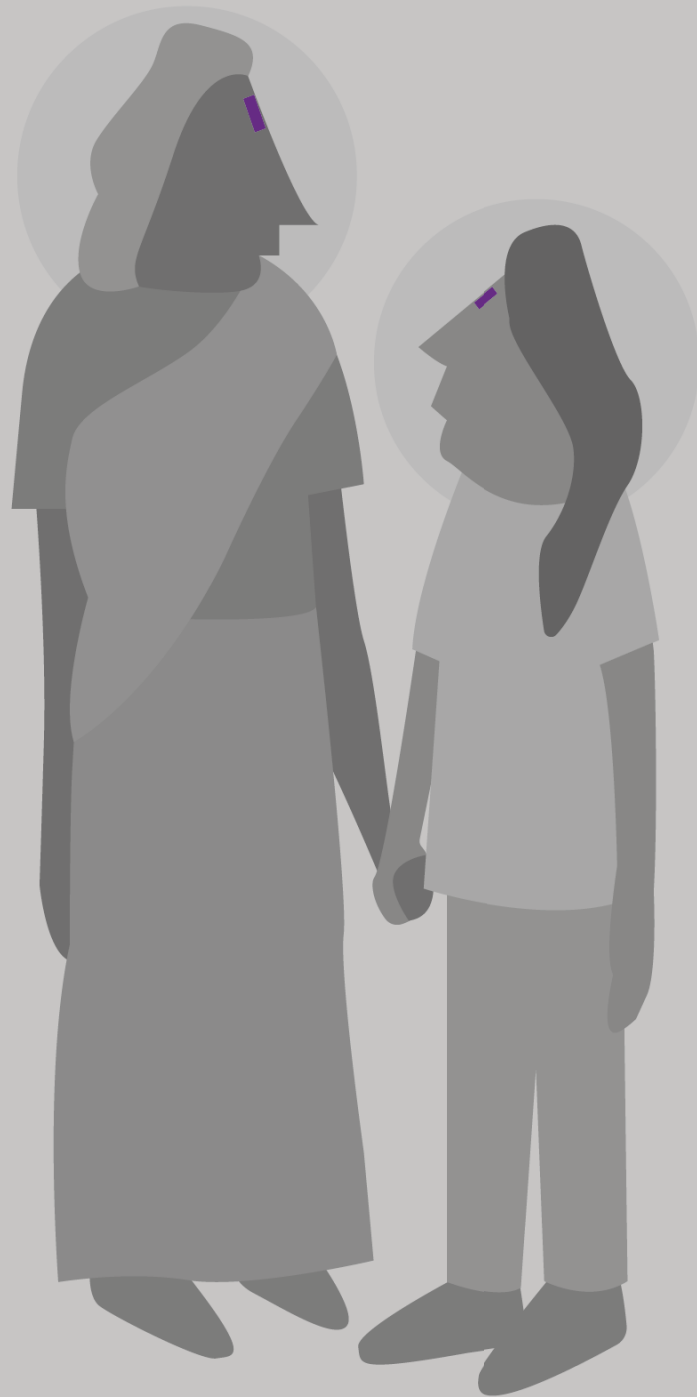
Justice D. Misra opined (for himself and Justice A.M. Khanwilkar) that treating adultery as a crime was an intrusion into the extreme privacy of the matrimonial sphere. He distinguished adultery from the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a com-

plaint for second marriage as the latter set of offences are meant to subserve various other purposes relating to a matrimonial relationship. Criminalising adultery, in his opinion, offended two facets of Article 21 of the Constitution, namely, the dignity of husband and wife, and the privacy attached to a relationship between the two.

Justice D.Y. Chandrachud discussed the ways in which adultery implicated the right to privacy by referring to the jurisprudence of the US Supreme Court. He reiterated that misogyny and patriarchal notions of sexual control of a woman found no place in our constitutional order which recognises dignity and autonomy as intrinsic to a person. He referred to the case of *Navej Singh Johar vs. Union of India*, (AIR 2018 SC 4321) to discuss the importance of sexual autonomy as a facet of individual liberty, to highlight the indignity suffered by an individual when “acts within their personal sphere” were criminalised on the basis of regressive social attitudes, and to emphasise that the right to sexual privacy was a natural right, fundamental to liberty and dignity.

In his judgment, Justice D.Y. Chandrachud also referred to *K.S. Puttaswamy vs. Union of India* ((2017) 10 SCC 1) to emphasize that law must reflect the status of women as equals in a marriage, entitled to constitutional guarantees of privacy and dignity; and that a life of dignity entailed that the “inner recesses of the human personality” be secured from “unwanted intrusion”. His judgment “dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21.” He held that Section 497 deprived a woman of her sexual freedom and denuded her of autonomy, dignity and privacy.

Justice I. Malhotra opined that adultery should remain a civil wrong as the freedom to have a consensual sexual relationship outside marriage by a married person did not warrant protection under Article 21. However, in her opinion, the autonomy of an individual to make their choices with respect to their sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. Thus, she held that Section 497 did not meet the three-fold test necessary for invasion of privacy in the context of Article 21 laid down in the *Puttaswamy* case.



Indian Young Lawyers Association & Ors. vs. the State of Kerala & Ors.

(2019) 11 SCC 1

2018

Dignity
Autonomy

In relation to a temple tradition of excluding women from worship due to menstruation, the Court held that the menstrual status of a woman was a deeply personal and intrinsic part of their privacy.

Constitutional Provision(s) **Articles 14, 15, 17, 21, 25, 26, 29, and 51**

Case Type **Civil Writ Petition**

Case Status **Under Review***

* After a review petition (Review Petition (Civil) No. 3358/2018 in Writ Petition (Civil) No. 373/2006) was heard, this case was referred to a larger bench for adjudication. Chief Justice R. Gogoi, Justice A.M. Khanwilkar and Justice I. Malhotra issued the majority opinion confirming, with Justice R.F. Nariman and Justice D.Y. Chandrachud dissenting. A preliminary question was raised as to whether a reference to a larger bench was maintainable in a review petition, which was answered in the affirmative by a nine-judge bench of the Court. The case has been tagged with other similar cases and is currently pending before the Supreme Court.

Bench Strength

5

Number of
Opinion(s)

4/0

OPINIONS DISSENT

1 opinion by

CJI Dipak on behalf of
Justice A.M. Khanwilkar and himself,

1 concurring opinion by

Justice D.Y. Chandrachud and

1 concurring opinion by

R. F. Nariman,

dissenting opinion by

Justice I. Malhotra.

“The menstrual status of a woman is deeply personal and an intrinsic part of her privacy. The Constitution must treat it as a feature on the basis of which no exclusion can be practised and no denial can be perpetrated.”

Case Brief

This case was referred by a three-judge bench to a Constitution Bench of the Supreme Court. The Court was called upon to determine the constitutionality of Rule 3(b) of the Kerala Hindu Places of Worship (Authorisation of Entry) Act, 1965 (“KHPW Act”), which prohibited women of menstruating age, i.e. between 10-50 years, from entering the Sabarimala Temple devoted to Lord Ayyappan and to issue directions to the temple authorities and local government representatives facilitating such entry.

The majority decision of the Court struck down the impugned Rule 3(b) as it prevented women from exercising their right to religious freedom under Article 25①, and did not warrant any exemption as an essential religious practice of a separate religious denomination. The majority of the Court did not find that the devotees of Lord Ayyappa qualified as a separate religion and despite Article 26(b) permitting religious institutions to manage their own affairs. As Hindus, they were subject to the provisions of Article 25②(b) which permitted reform of Hindu religious institutions. The Court discussed that a practice that discriminated or segregated based on biological characteristics could never be constitutional, as it infringed the dignity, freedom and autonomy of women. The Court specifically noted that the menstrual status of a woman was a part of her person and privacy, and that compulsory disclosure of the same was violative of a woman’s right to privacy under Article 21.

Case Summary

Facts

This case was referred from a three-judge bench of the Supreme Court, in the case of *Indian Young Lawyers Association and Ors. vs. State of Kerala and Ors.* ((2017) 10 SCC 689). The case was centred around the Sabarimala shrine, which is a Hindu temple dedicated to God Ayyappan, in Kerala. As per tradition, women of menstruating age, i.e. between 10-50 years, were not allowed to enter the temple as the temple was dedicated to a celibate God, and there was a belief that women of menstruating age would cause an affront to the value of celibacy in the temple.

This exclusion was justified on the basis of ancient custom, which was legitimised by Rule 3(b), framed under the KHPW Act. Rule 3(b) provided for the exclusion of “women at such time during which they are not by custom and usage allowed to enter a place of public worship.”

The Kerala High Court, in the case of *S. Mahendran vs. The Secretary, Travancore Devaswom Board, Thiruvananthapuram and Ors* (AIR 1993 Ker. 42) had held that such a restriction was not violative of the fundamental rights of women under the Constitution. The matter was finally placed before a Constitution Bench of the Supreme Court.

Issues

- A. Whether an exclusionary practice which was based upon a biological factor exclusive to the female gender amounted to “discrimination” and thereby violated Articles 14, 15 and 17 without being pro-

tected by “morality” as used in Articles 25 and 26 of the Constitution;

- B. Whether the practice of excluding such women constituted an “essential religious practice” under Article 25 and whether a religious institution could assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion;
- C. Whether Ayyappa Temple had a denominational character and, if so, was it permissible on the part of a ‘religious denomination’ managed by a statutory board and financed out of the Consolidated Fund of Kerala and Tamil Nadu to violate constitutional morality; and
- D. Whether Rule 3(b) of the KHPW Rules, 1965 was ultra vires the KHPW Act, 1965 and if treated to be intra vires, whether it violated Part III of the Constitution.

Arguments

The Petitioners argued that the discrimination perpetrated against women of menstruating age was arbitrary under Article 14 as there was no constitutional basis for making a separate, excluded class of women between the ages of 10-50 years. They also argued that the Lord Ayyappa temple and its devotees did not constitute a separate religious denomination for the purposes of Article 26.

Additionally, one of the Intervening Applications (No. 10 of 2016) submitted that compulsory disclosure of menstrual status was a violation of women’s right to privacy. They relied on the judgment in *K.S. Puttaswamy and*

Anr. vs. Union of India ((2017) 10 SCC 1) to argue that denial of entry to menstruating women was exclusionary and adversely impacted their dignity.

The Respondents argued that Rule 3(b) was not unconstitutional, as it did not deny entry to all women as a class, but merely to women of a specific age group, for a specific objective. Amicus Curiae, Mr. K. Ramamoorthy also argued that the devotees of Lord Ayyappa could be considered a religious sect and therefore were not subject to the reform provisions of Article 25, but could manage their own affairs under Article 26.

Mr. Raju Ramchandran also submitted that the exclusionary practice in its implementation required an involuntary disclosure by women of both their menstrual status and age, which amounted to forced disclosure that violated the right to dignity and privacy under Article 21 of the Constitution of India, as recognised in the *Puttaswamy* judgment.

Decision

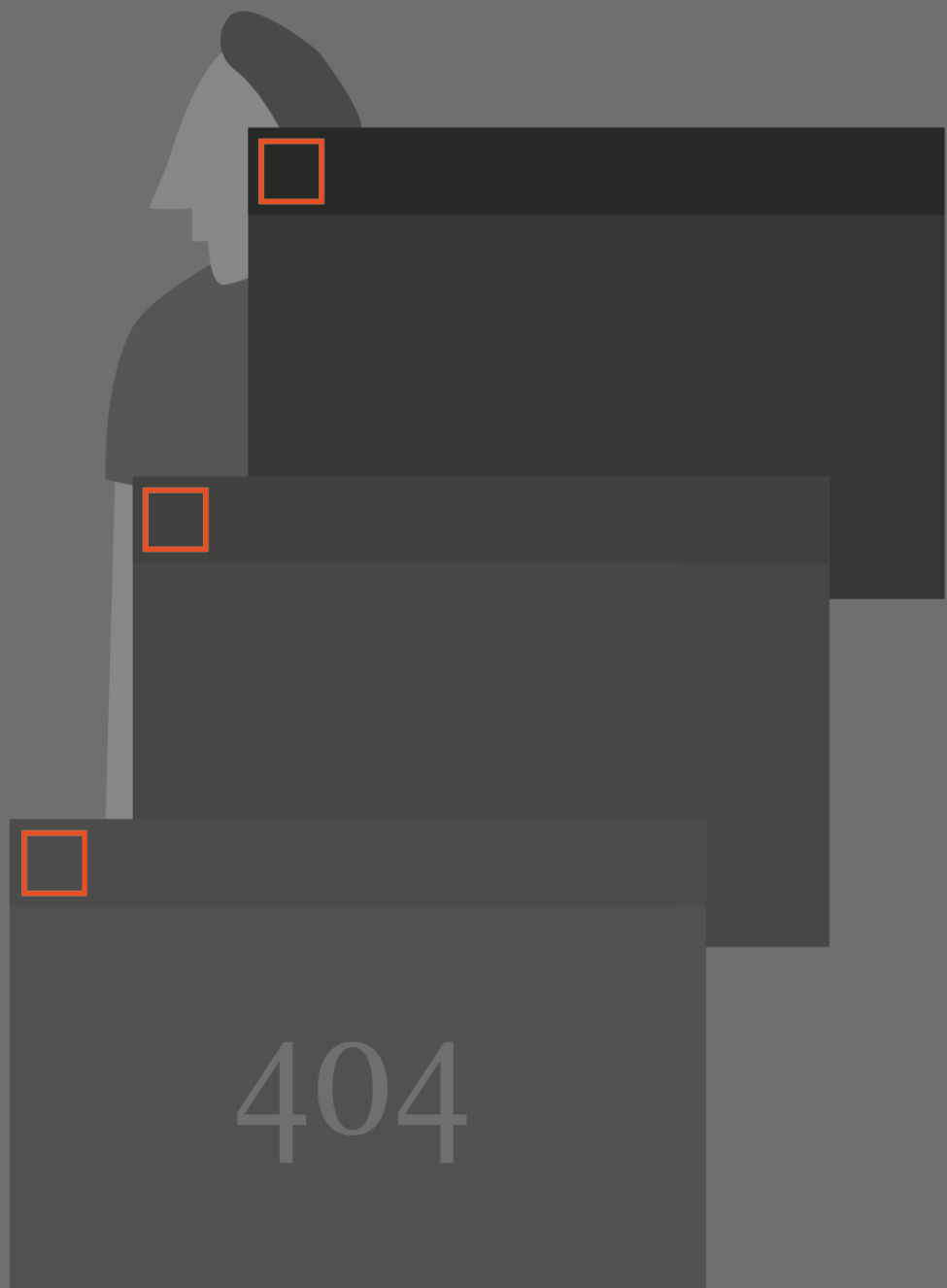
The Supreme Court, in a 4:1 verdict, held that the restrictions upon the entry of women between the ages of 10-50 into the Sabarimala shrine were unconstitutional and struck down Rule 3(b) of the KHPW Act. The Court further passed directions to ensure the safety of women pilgrims entering the shrine.

The majority held that the devotees of Lord Ayyappa did not constitute a separate religious denomination but were part of the Hindu fold, and that in the absence of any scriptural or textual evidence justifying the same, exclusion of women could not be considered to be an essential religious practice. The

opinion also observed that Rule 3(b) was ultra vires the aim of the KHPW Act, which was to reform and open public Hindu places to all people. The Court further declared that Rule 3(b) of the KHPW Rules was unconstitutional for being violative of Part III of the Constitution of India.

Justice D.Y. Chandrachud further observed that the social exclusion of women, based on physiological attributes like menstrual status, was comparable to a form of untouchability, following notions of “purity and pollution”, which served to stigmatize individuals, and could not be justified in the scheme of constitutional morality, besides being explicitly prohibited under Article 17. With reference to the right to privacy, Justice D.Y. Chandrachud in his opinion, held that the menstrual status of a woman would be an intrinsic part of her privacy. He further opined that imposing exclusionary disabilities on the basis of menstrual status, violated the dignity of women which was guaranteed by the Constitution.

Justice I. Malhotra, in her dissenting opinion, noted that the case should fail for lack of standing by the Petitioners. She also held that Ayyappans or worshippers at the Sabarimala Temple satisfied the requirements of being a religious denomination, and therefore could avail the protections of Article 26. She further held that the limited restriction on the entry of women would not be violative of Part III of the Constitution.



Kamal Nath vs. Election Commission of India & ors.

(2019) 2 SCC 260,
AIR 2019 SC 336

2018

Informational Privacy

The profiling of electors through text based voter lists is unlawful, therefore the Election Commission is duty bound to take all precautionary measures to protect the privacy of voters.

Constitutional Provision(s)

Article 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A.K. Sikri on behalf of
Justice A. Bhushan and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“ECI has given the reasons for not adhering to the request of the Petitioner in providing draft electoral roll in searchable PDF format. According to it, issues of privacy of voters are involved and the move of ECI is aimed at prevention of voter profiling and data mining. According to ECI, ensuring free and fair elections, to which it is committed, also necessitates that ECI is duty bound to protect the privacy and profiling of electors. Therefore, it is duty bound to take all precautionary measures.”

Case Brief

Through this petition, the Supreme Court noted and affirmed the need to protect the right to privacy of voters. The Petitioner, a member of the Indian National Congress, sought directions to the Respondent i.e., the Election Commission of India (“ECI”) to a) conduct Voter Verifiable Paper Audit Trail (VVPAT) verification for 10% of the votes cast in the Madhya Pradesh 2018 Assembly elections; and b) publish and supply soft copies of the draft voter list in ‘searchable’ text format, which would enable them to scrutinise the data for any errors (such as duplicate or fake entries) and submit suggestions and objections to the Respondent. However the Respondent decided not to make the voter lists available in a ‘searchable’ text format, in order to prevent data mining and to protect the privacy and profiling of voters.

The Court discussed the various interpretations assigned to the ‘text mode’ mentioned in Clause 11.2.2.2 of the Chapter XI of the Election

Manual, 2016, which the Petitioner claimed made it incumbent on the Respondent to provide searchable voter rolls. However, the Court observed that the clause did not mention that the provided file would be searchable, but only that it would be in 'text' format, i.e., not including images. Therefore the Petitioner could not claim for 'searchable' voter rolls as a right. Moreover, the Court held that it was the prerogative of the Respondent to publish the voter lists in a format which it deemed proper in light of its objective of ensuring free and fair elections while protecting the privacy of voters. However, the Court opined that there was no bar on converting the publically available scannable text format into a 'searchable' format.

Case Summary

Facts

The Petitioner, Kamal Nath, President of Madhya Pradesh Congress Committee, alleged that the Respondent, the ECI, had dropped a large number of voters from the voter lists of Madhya Pradesh for Assembly Elections, 2018 and many of those included in the lists were found to be suspect entries. The Petitioner had requested the ECI to rectify the same. Though the Respondent admitted to having some duplicate or fake entries, they stated that they had corrected the voter lists before the Petitioner's complaint and that the allegations of the Petitioner were unsubstantiated. It further stated that to ensure that the voter lists were accessible, the Respondent uploaded these lists on the website for public access and also provided copies to the political parties. The Respondent further averred that the lists could be further amended by the political parties by pointing out the errors, or by the excluded voters making a representation to the Respondent.

The Petitioner sought directions to the Respondent to publish and supply voter lists in 'searchable' text mode, so that they could electronically scan the same and find out whether there were any duplicate or fake voters in the voter lists. However, the Respondent had only provided Compact Discs (CDs) containing the draft electoral roll published on July 31, 2018 in a PDF non-editable form.

Issue

Whether the publication of the electoral list in a searchable-text format would violate the right of privacy of voters under Article 21 of the Constitution.

Arguments

The Petitioner referred to Clause 11.2.2.2 of the Chapter XI of the Election Manual, 2016 ("Election Manual"). He argued that as per the aforementioned clause, the Respondent was required to prepare the draft roll in text mode, which was searchable, albeit without photographs. Further, the Petitioner submitted that since the Respondent provided electoral

rolls in text mode during the 2013 assembly elections in Madhya Pradesh and 2018 elections in Rajasthan, the same being changed was unreasonable.

The Respondent submitted that it had consciously decided to not give copies of the voter list in searchable text mode to the political parties in view of the security and privacy concerns of voters, especially given that the right to privacy was now recognised as a fundamental right in *K.S. Puttaswamy and Anr. vs. Union of India and Ors. ((2017) 10 SCC 1)*. Further, it argued that searchable text format would enable data mining, and referred to Clause 11.2.2.2, to submit that the ‘text mode’ mentioned related to the ‘content’ of the draft voter lists and not its ‘format’, and that there was nothing called a ‘text mode’ format of a PDF document. The Election Manual prescribed that voter lists should contain only the ‘text’ of the voter’s details such as their name, address, age, etc. and not their photograph. Moreover, the Respondent contended that the Election Manual was only an administrative manual and had no statutory force.

Decision

The Court discussed the function, reputation and processes undertaken by the Respondent to ensure fair elections and noted that “(t)here is no doubt about the bona fides of the ECI”, as well as the fact that the Respondent shared the copies of voter lists with the political parties so that they could additionally check the list or seek correction.

The Court observed that the argument of the Petitioner was based on the Clause 11.2.2.2 of the Election Manual, which placed an obliga-

tion on the Respondent to put the draft voter lists on the website in ‘PDF format’, and the main dispute hinged upon the meaning to be assigned to ‘text mode’ mentioned in the second part of the Clause 11.2.2.2.

The Court found reason in Respondent’s interpretation of the Clause and observed that “(t)he Clause nowhere says that the draft electoral roll has to be put up on the Chief Electoral Officer’s website in a ‘searchable PDF’” and that the absence of the word ‘search’ made all the difference. The Court therefore held that “the Petitioner cannot claim, as a right, that the draft electoral roll should be placed on the website in a ‘searchable mode’”.

Moreover, the Respondent had the right to decide in which format the voter list was to be published and it was justified in not providing a searchable copy, to prevent data mining and voter profiling, and to protect the privacy of the voters. The Court held that, as contended by the Respondent, the “ECI is duty-bound to protect the privacy and profiling of the voters” and “take all precautionary measures.” The Court opined that “the format in which the draft electoral roll is supplied to the Petitioner fulfills the requirement contained in the Election Manual”, however, “if the Petitioner so wants, he can always convert it into searchable mode.”



Indian Hotel and Restaurant Association (AHAR) & Anr. vs. The State of Maharashtra & Ors.

2019 (3) SCC 429,
AIR 2019 SC 589

2019

Surveillance, Search and Seizure

Mandating installation of CCTV Cameras in dance bars would be disproportionate and excessive as it would be an unwarranted invasion of the privacy of both the patrons and the performers.

Constitutional Provision(s)

Articles 14, 19, and 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A.K. Sikri on behalf of
Justice A. Bhushan and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“(I)nstalling of CCTV Cameras... would be totally inappropriate and amounts to invasion of privacy and is, thus, violative of Articles 14, 19(1)(a) and 21 of the Constitution as held in K.S. Puttaswamy case.”

Case Brief

This case dealt with the constitutional validity of certain provisions of the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (working therein) Act, 2016 (“Dance Act”) and the rules framed thereunder. The Supreme Court held that the applications for grant of licence should be considered with an open mind and without imputing any moral standard so that there would not be a complete ban on staging dance performances at designated places.

The case challenged conditions imposed under the Dance Act, including the classification of obscene dances, the ban on serving alcohol in dance bars, licensing requirements under the Dance Act and the prescribed civil and criminal consequences for contravention of the Act. In this case, the Court observed that there could be no blanket ban on the operation of dance bars, and that only provisions which directly related to the object of the Dance Act would be upheld. Consequently, the Court upheld the ban on obscene dances, the requirements relating to the payment of salaries of bar dancers, and the ban on showering currency notes on the dancers. It struck down the ban on serving alcohol in dance bars, the enforced separation between discotheques and dance bars and the conditions relating to the character of the person applying for a licence.

Specifically in the context of privacy, the Court discussed the condition which required the installation of CCTV cameras in the rooms where dances were to be performed. The Court struck down this condition as an infringement of the right to privacy.

Case Summary

Facts

This case involved three writ petitions filed by the Association of Hotel and Bar Owners, the R.R. Patil Foundation, and the Bhartiya Bar-girls Union which challenged certain provisions of the Dance Act.

In 2005, the State introduced Sections 33A and 33B to the Maharashtra Police Act, 1951 (“Police Act”). Section 33A barred the performance of dance in any eating house, permit room or beer bar, and Section 33B provided an exception, allowing for dance performances in a theatre, or a club where entry was restricted to members only. This was struck down by the Bombay High Court, and later upheld by the Supreme Court in the case of *State of Maharashtra vs. Indian Hotel and Restaurants Association and Ors* ((2013) 8 SCC 519).

Further, in 2014, the State of Maharashtra introduced the Maharashtra Police (Second Amendment) Act, 2014 and added Section 33A to the Maharashtra Police Act, 1951, which reintroduced the ban on dancing in any eating house, permit room or beer bar, without the exemptions previously provided under Section 33B. The Supreme Court, in the case of *Indian Hotel and Restaurants Association and Ors vs. State of Maharashtra (Writ Petition (Civil) No.793 of 2014)*, stayed the operation of the provision with a rider that ‘no performance of dance shall remotely be expressive of any kind of obscenity’. Following this, the Respondent State enacted the Dance Act and rules framed thereunder, certain provisions of which were challenged by way of this petition.

Issue

Whether Sections 28(i), Section 64, Section 82 and 4 of the Dance Act and rules framed thereunder were constitutionally valid.

Arguments

The Petitioners argued that the State was trying to ban dance performances in bars/permit homes or restaurants altogether. This was supported by the fact that not a single licence had been issued till date. The petitioners also made several references to the judgments in the case of *State of Maharashtra vs. Indian Hotel and Restaurants Association and Ors* ((2013) 8 SCC 519), which dealt with the constitutionality of amendments made to the Police Act that prohibited dance performances in any eating house, permit room or beer bars. The case had struck down the amendment as unconstitutional, and the Petitioners argued that the present Dance Act was a restatement of the same.

The Bharatiya Bar Girls Union also argued that the ban on bar girls had a direct impact on the livelihood of the members, and that following the ban the membership of the union had shrunk from 5000 to 110 performers, leaving most of the women who were formerly working as bar dancers unemployed. They also argued that the women in question had the right to choose to work as bar dancers, and to negotiate their remuneration with the bar owners. They submitted that the ban stemmed from the State’s belief and perception of bar dancing, and considered it to be innately vulgar.

In the context of privacy, the Petitioners refer to the concept of unpopular privacy, as

raised in the case of *K.S. Puttaswamy and Anr. vs. Union of India* ((2017) 10 SCC 1) including decisional privacy which protects the right of citizens to make intimate choices about their rights from intrusion by the State; and proprietary privacy which is related to the protection of one's reputation. Due to the social stigma associated with dance bars, CCTV footage of dance bars would cause unwarranted intrusion into both the privacy of the patrons as well as the dancers.

The Respondents in their submissions argued that the Dance Act and rules were adopted to curb prostitution rackets, which were being run in hotels, under the guise of dance bars. They also sought to stop the performance of such dance forms in furtherance of public morality. They submitted that the Dance Act was introduced to improve the conditions of work and protect the dignity and safety of women in such places with a view to prevent their exploitation. The Respondents also submitted that the conditions imposed, such as those on tipping were introduced with a view to protect the cultural ethos of the society. The additional conditions placed upon the dance bars were justified as they were imposed in the interest of “*public order, decency and morality*”.

With respect to the condition mandating the installation of CCTV cameras, the Respondents argued that the right to privacy comes to an end when there is a possibility of the commission of a crime, and that this clause was aimed at preventing crime. Moreover, such a clause was necessary in public interest and to achieve the purpose behind the Act.

Decision

In its decision, the Court addressed the question of morality, and how far a State may go to impose morality on its citizens. The Court focused on the transient and adaptive nature of morality and remarked upon how something which may have been immoral in the past, may not be so anymore. The Court examined the definition of obscene dance in Section 2⑧ which included the phrase “*aimed at arousing the prurient interest of the audience*” and held that this could not be considered vague and incapable of definite connotation, especially since the term was also defined in the Indian Penal Code, 1860 (“IPC”).

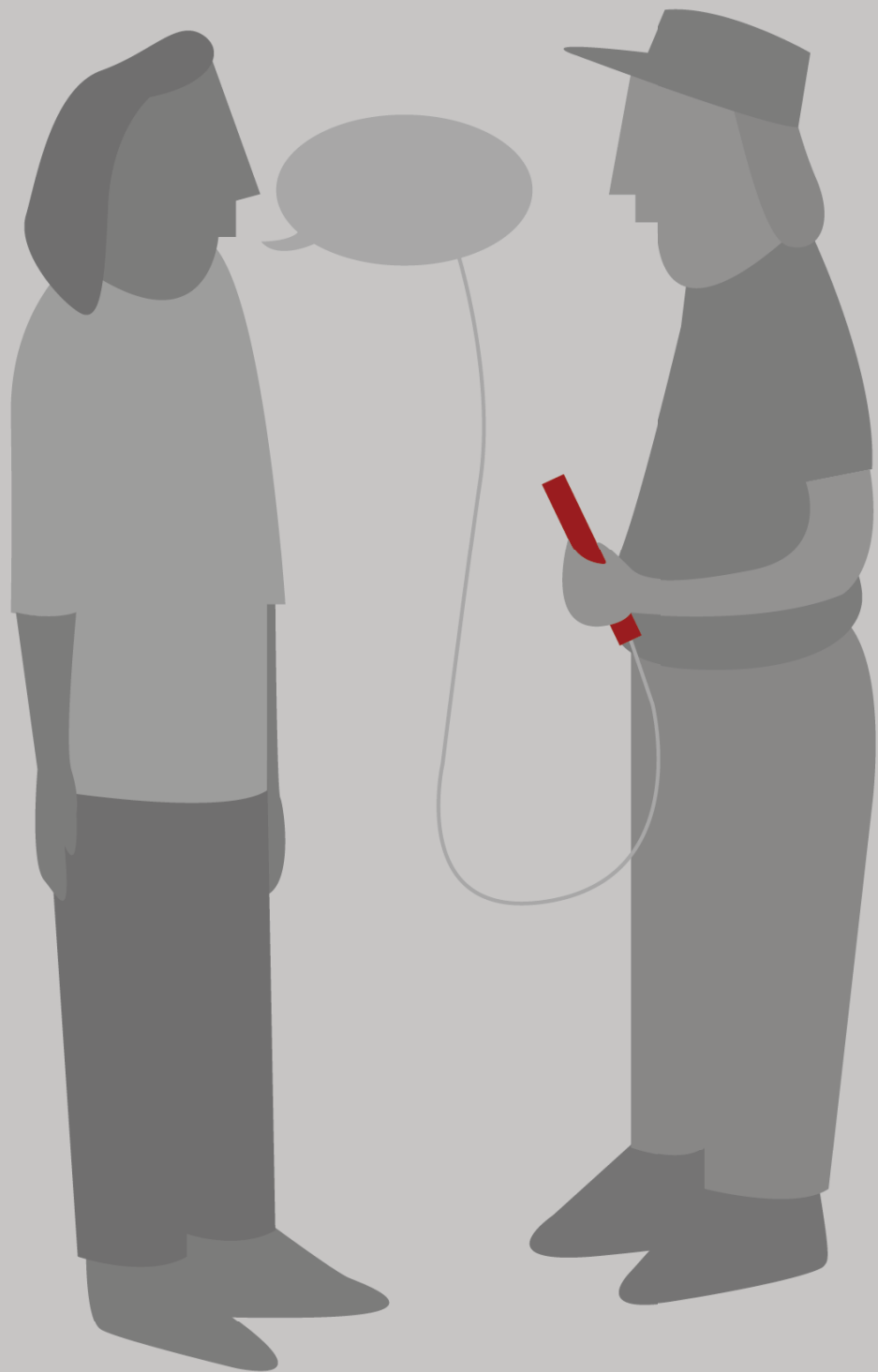
The Court then discussed Section 6④ of the Dance Act which forbade the grant of licences for discotheques or orchestras, if a licence was granted under the Dance Act, and vice-versa, so that a place could either be a dance bar or a discotheque but not both. The Court held that this provision was arbitrary, irrational and had no rational nexus with the purpose of the act, and consequently struck it down as violative of Article 14.

In responding to the challenges brought to Section 8② of the Dance Act, the Court upheld the ban on obscene dances and the punishment for the same, but struck down the provisions relating to the prohibition on serving alcohol in the bar room where dances were staged. In respect of Section 8④ relating to tipping the performers, the provisions allowed customers to tip the performers as long as the money was not thrown or showered on them. The Court held that the State could not impose a particular manner of tipping, and that this matter would be between the employer and performer on one hand and

the performer and visitor on the other.

The Court also set aside the requirements relating to possessing a good character to obtain a license as vague and uncertain. It also struck down the rule mandating maintaining a distance of one kilometre from educational and religious institutions, as this would be contrary to the ground realities in the city of Mumbai. In the context of working conditions of the women, the Court upheld the provisions relating to hiring women under contract, and depositing the salaries into their bank accounts but struck down the rule about providing monthly salary to performers, as this could be restrictive for both employers and performers.

With respect to the CCTV surveillance of bars, the Court held that mandating the installation of CCTV cameras would amount to an invasion of the right to privacy. It would also violate Articles 14, 19①(a), and 21 of the Constitution. Specific reference was made to the discussion on ‘unpopular privacy’ in *K.S. Puttaswamy*, wherein the Court relied on Anita Allen’s conception of ‘unpopular’ privacy laws and duties to protect the common good, even if privacy was being forced on people who did not want it. Thus, the condition mandating the installation of CCTV cameras was set aside by the Court.



Ritesh Sinha vs. State of Uttar Pradesh & Anr.

(2019) 8 SCC 1,
AIR 2019 SC 3592

2019

Bodily Integrity

Compelling an accused to give their voice sample was held not to violate the privacy rights of an individual.

Constitutional
Provision(s)

Articles 20, 21, and 142

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

3

1 opinion by

Chief Justice R. Gogoi on behalf of
Justice D. Gupta,
Justice S. Khanna and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“The fundamental right to privacy cannot be construed as absolute and [sic] must bow down to compelling public interest... we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India.”

Case Brief

This case was referred to the present Bench after a two-judge bench returned a split verdict. The issue in discussion was whether a court could give orders compelling an accused to record his voice sample, in the absence of any specific enabling provision in the Code of Criminal Procedure Code, 1973 (“CrPC”), and given the right against self-incrimination incorporated in Article 20³ of the Constitution.

The Court considered whether compelling an accused to give his voice sample in the course of an investigation was prohibited under Article 20³ or violated his right to privacy, and answered it in the negative. It relied on the ratio in *State of Bombay vs. Kathi Kalu Oghad* (AIR 1961 SC 1808) and held that Article 20³ did not prohibit compelling the accused to record his voice sample because it did not by itself tend to

incriminate the accused. The Court further referred to *Gobind vs. State of Madhya Pradesh and Anr.* ((1975) 2 SCC 148) and *K.S. Puttaswamy and Anr. vs. Union of India and Ors.*((2017) 10 SCC 1) to note that the right to privacy could be curtailed on the basis of compelling public interest.

After examining the relevant provisions of the CrPC and 87th Report of the Law Commission of India, the Court noted that there was a lacuna in the law regarding the recording of voice samples as there were no statutory provisions specifically empowering a court to give such orders. The Court applied the principles of *ejusdem generis* and imminent necessity and adopted the rule propounded by Lord Denning of finding the words to give 'force and life' to a statute. The Court therefore read into the CrPC an empowering provision allowing a Judicial Magistrate to give orders to record a voice sample from a person undergoing an investigation.

Case Summary

Facts

An FIR was filed against the Appellant, Ritesh Sinha and his associate, alleging that he was involved in the collection of monies from different people on the promise of jobs in the police. The associate was arrested and a mobile phone was seized from him. In order to verify whether the conversations recorded on the phone were between the associate and the Appellant, the Investigating Authority filed an application before the Chief Judicial Magistrate, Saharanpur ("CJM") requesting the court to summon the Appellant to give his voice sample. This order of the CJM was challenged by the Appellant under Section 482 of the CrPC before the High Court of Allahabad, which dismissed the appeal. The matter came before the two-judge bench of the Supreme Court, which gave a split opinion, and referred the matter to a three-judge bench.

Issues

- A. Whether Article 20③ of the Constitution extended to protecting an accused from being compelled to give his voice sample during the course of investigation into an offence; and
- B. Whether in the absence of any provision in the CrPC, a Magistrate could authorize the investigating agency to record the voice sample of the person accused of an offence.

Decision

The Court noted that the two-judge bench was in agreement while deciding the first issue and had referred to the rule laid down in *State of Bombay vs. Kathi Kalu Oghad* (AIR 1961 SC 1808). *Kathi Kalu* dealt with the issue of determining the culpability of the accused by comparing the writing sample of the ac-

cused with the other writings in light of the prohibition under Article 20③, and held that *“the prohibition contemplated by the constitutional provision contained in Article 20③ would come in only in cases of testimony of an Accused which are self-incriminatory or of a character which has the tendency of incriminating the Accused himself”* and *“does not say that an Accused person shall not be compelled to be a witness.”* The Court further noted that compelling an accused to furnish a specimen of their handwriting or finger impression did not incriminate the accused as they *“belong to the third degree of material evidence which is outside the limit of ‘testimony’”* and *“are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable”*. Based on this decision, the Court held that Article 20③ did not prohibit compelling the accused to record his voice sample.

While determining the second issue, the Court referred to amendments in Sections 53, 53A and 311-A of the Code of Criminal Procedure by Act No. 25 of 2005 and the 87th Report of the Law Commission of India, which discussed a similar issue in the context of Identification of Prisoners Act, 1920 to note that there was no specific statutory provision in India which gave power to a police officer or a court to require an accused to furnish a specimen of his voice.

The Court observed that the Legislature may have justified reasons to remain silent, despite express reminders to fill this gap in the statute, but *“such [a] void must be filled up not only on the principle of ejusdem generis but on the principle of imminent necessity with a call to the Legislature to act promptly in the matter”*.

The Court adopted the view enunciated by Lord Denning in *Seaford Court Estates Ltd. vs. Asher* ((1949) 2 ALL ER 155, 164), that *“When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament -- and then he must supplement the written words so as to give ‘force and life’ to the intention of legislature”*, and held that *“until explicit provisions are engrafted in the CrPC by the Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime”*, while exercising its power under Article 142.

Further, the Court considered whether compelling an accused to give a voice sample would violate his right to privacy. It referred to its opinion in *Modern Dental College and Research Centre and Ors. vs. State of Madhya Pradesh and Ors.* ((2016) 7 SCC 353), *Gobind vs. State of Madhya Pradesh and Anr.* ((1975) 2 SCC 148) and *K.S. Puttaswamy and Anr. vs. Union of India and Ors.* ((2017) 10 SCC 1) to reiterate that *“the fundamental right to privacy cannot be construed as absolute and but must bow down to compelling public interest.”* However, the Court noted that this point had not been argued before them and therefore did not deliberate it extensively.



Thalappalam Ser. Coop. Bank Ltd. & Ors. vs. State of Kerala & Ors.

2019 SCC OnLine
SC 1459, 2019 (16)
SCALE 40

2019

Right to Know and Access Information

The right to know and access information must be weighed with the right to privacy of a person and where the public interest in access to information outweighs the possible harm to privacy, the information must be allowed to be disseminated.

Constitutional Provision(s) **Articles 12, 19, 20, 21, 25, and 124**

Case Type **Civil Appeal**

Case Status **Not Overruled**

Bench Strength

5

Number of
Opinion(s)

3/0

OPINIONS DISSENT

1 majority opinion

Justice S. Khanna on behalf of
Chief Justice R. Gogoi,
Justice D. Gupta and himself,

1 concurring opinion by
Justice N. V. Ramana, and

1 concurring opinion by
Justice D. Y. Chandrachud.

“The right to privacy gets the benefit of both the quantitative and the qualitative protection. The former refers to the disclosure already made and what is yet undisclosed, whereas the latter refers to the privateness of the material, invasion of which is an illegal intrusion into the right to privacy. Claim for confidentiality would generally fail when the information is in public domain. The law of privacy is, therefore, not solely concerned with the information, but more concerned with the intrusion and violation of private rights.”

Case Brief

This case discussed several questions relating to the disclosure of information under the Right to Information Act, 2005 (“RTI Act”). The Petitioner in this case filed three applications with the Central Public Information Officer, Supreme Court of India (“CPIO”) requesting access to a range of information relating to judges of the Supreme Court, including relating to their assets, which were rejected on the grounds of the exemptions provided under Section 8 of the RTI Act. Following the appeals process, the petitions were eventually referred to the Supreme Court.

In discussing whether the Petitioner was entitled to the information sought, the Court held that the office of the Chief Justice of India (“CJI”) would constitute a public authority under the RTI Act. It further held that transparency and judicial independence were not in conflict

with one another, and that there was a need to balance the right to information and the right to privacy.

With respect to the right to privacy and confidentiality under Section 8① (f) of the RTI Act, the Court held that while personal information would be entitled to protection from an unwarranted invasion of privacy, conditional access could be granted where a larger public interest was involved. The Court emphasised that public interest would have to be examined in each case to determine the balance between the two. The Court ultimately found that the release of information relating to judicial assets was in the greater public interest, but the release of information relating to third parties needed to be re-examined after considering the procedure set out in Section 11 of the RTI Act.

Case Summary

Facts

This case dealt with three appeals relating to information requested under the RTI Act, which were moved by the Respondent in front of the CPIO. The first request was filed based on a newspaper article alleging influence over a judicial decision. It asked for a copy of the correspondence of the former CJI, which was denied on the grounds that such information was not available with the Court registry. On appeal, the Central Information Commission (“CIC”) directed the disclosure of this information.

The second request asked for a complete copy of all papers and correspondence available with the Court relating to the appointment of judges through the collegium system, which was rejected by the CPIO. In this petition as

well, the CIC directed the disclosure of the documents sought.

The final petition sought the disclosure of the declaration of assets made by the judges to the chief justices in the states, which was also dismissed by the CPIO. On appeal, the CIC directed the CPIO to provide the information requested. All three cases were appealed by the CPIO, who filed a writ petition before a Single Judge of the Delhi High Court, in the case of *Central Public Information Officer, Supreme Court of India vs. Subhash Chandra Agarwal & Anr.* (AIR 2010 Delhi 159). The Single Judge held that the CJI was a public authority under the RTI Act and that the office is a “public authority”. It also held that the declaration of assets given to the CJI would constitute ‘information’ under Section 2(f) of the RTI Act. It further clarified that the asset declarations held by the CJI were not held in a fiduciary

capacity, and hence there would be no breach if he were directed to reveal the information.

On further appeal, the matter was brought before a Full Bench of the Delhi High Court, in the case of *Secretary General, Supreme Court vs. Subhash Chandra Agarwal (LPA 501 of 2009)* which upheld the orders of the Single Judge and dismissed the appeal. The Court linked the three cases to be heard together, and held that the cases involved substantial questions of law relating to the interpretation of the Constitution. It therefore referred the matter to a larger bench, and the matter was listed before the Supreme Court.

Issue

Whether the provision of the information sought by the Petitioner would be protected from release under the provisions of Section 8 of the RTI Act or should be released in the greater public interest.

The Appellants contended that disclosure of the information sought would impede the independence of judges, who are to be exempt from any publically litigated debate. The right to information was not an unfettered constitutional right, but a right available within the framework of the RTI Act, and thus must be subject to the conditions and exclusions thereunder. They argued that information on the assets held by judges was personal information, and the disclosure would have no bearing on any public activity or interest. Similarly, the release of information relating to prospective candidates being considered for judicial appointments would cause an unwarranted invasion of privacy and serve no larger public interest. Finally, they also con-

tended that the information on assets voluntarily disclosed by the judges to the CJI was held by the CJI in his fiduciary capacity and therefore would be protected under Section 8①(e) of the RTI Act.

The Respondent argued that the disclosure of such information would not undermine the independence of the judiciary, and would instead foster transparency and openness with respect to functions that affect the public domain. He also argued in favour of primacy to the citizens' right to seek information. The Respondent suggested that public interest in the nature of the information sought outweighed the exemption given under Section 8①(j) of the RTI Act.

Decision

The Supreme Court held that the RTI Act sets out a regime that enables greater access and information into the functioning of public authorities, in the furtherance of efficient and transparent governance. However, the right to know could not be absolute as it would then conflict with the right to privacy. The scheme of the RTI Act acknowledges this under Section 8①(j) and Section 11, which protect personal information and information relating to a third party, respectively. Further, the RTI Act moderates and regulates the conflict between the two rights by applying the test of larger public interest or comparative examination of public interest in disclosure of information with possible harm and injury to the protected interests.

The Court drew a distinction between the right of confidentiality and the right to privacy, where the law of privacy was not solely con-

cerned with the information, but rather with the intrusion and violation of private rights. It referred to the three-fold test laid down in the case of *K.S. Puttaswamy and Anr. vs. Union of India* ((2017) 10 SCC 1) to test intrusions into the right to privacy and held that the RTI Act fulfilled the criteria laid down.

It then discussed the protections accorded to public and personal information. Section 8①(j) seeks to protect personal information from unwanted intrusion, but makes an exception for information that should be disclosed for legitimate public aims. In this context, the Court noted that details of the personal assets of judges would not amount to personal information and disclosure of the same would not violate the right to privacy of judges.

In dealing with the question of transparency in the appointment of judges and the potential effects on the independence of the judiciary, the Court recognized four major arguments which could be invoked to deny access to the public. These were:

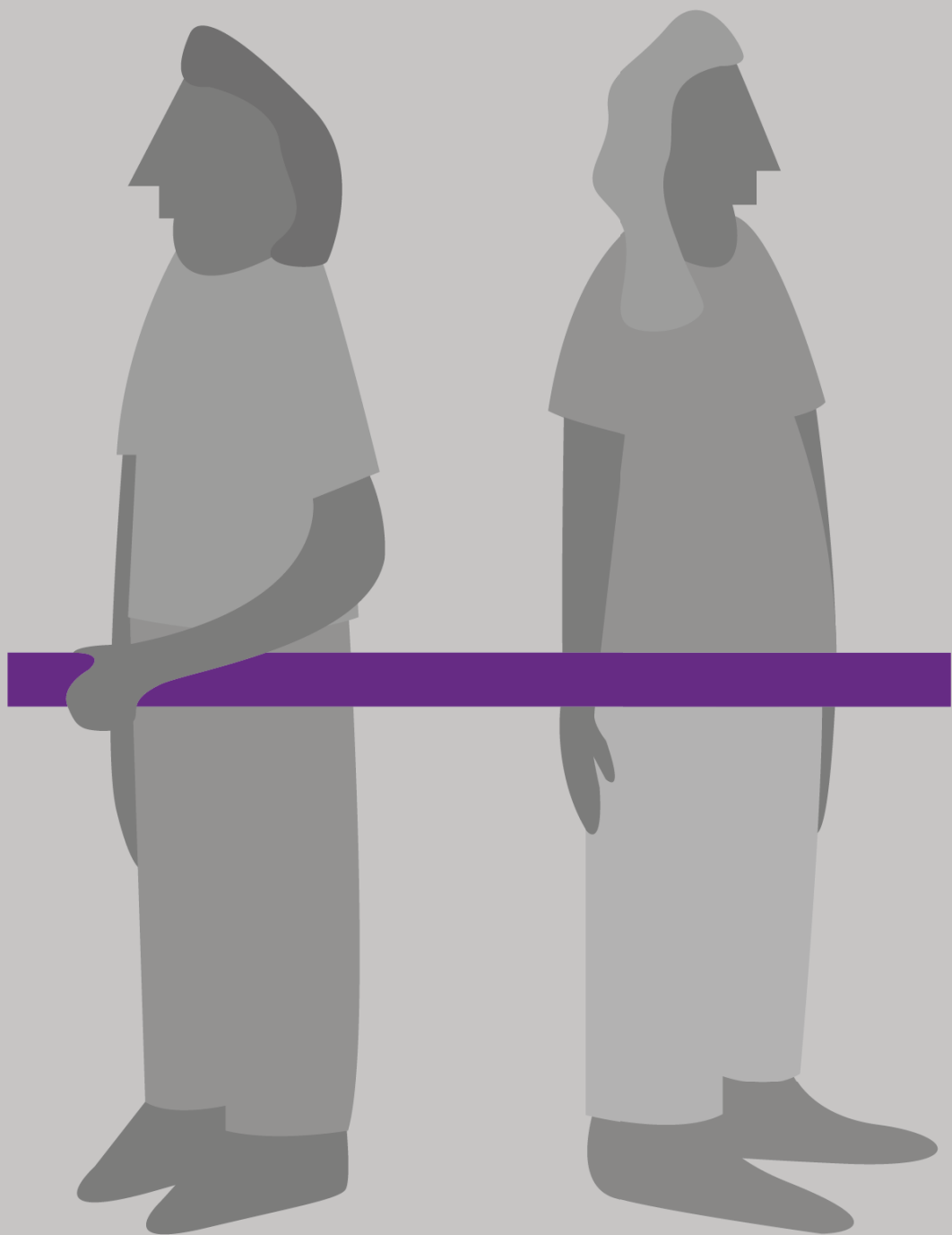
- confidentiality concerns;
- a. data protection;
- b. reputation of those being considered in
- c. the selection process, especially those whose candidature/eligibility stood negated; and
- potential chilling effect on future candidates given the degree of exposure and
- d. public scrutiny involved.

Thus, while judicial independence was a matter of public interest, it would be necessary

to balance it with judicial accountability. The Court held that there was no definite answer to this question, and that accountability and independence of the judiciary would have to be balanced depending upon the public interest in each case.

The Court also considered the exception under Section 8①(e) of the RTI Act which exempted disclosure of information made available to a fiduciary unless it was in the larger public interest. Here the Court discussed the defining principles of fiduciary relationships, including the no conflict rule, no-profit rule, undivided loyalty rule, and duty of confidentiality. The Court held that ordinarily, the relationship between the CJI and the other judges could not be classified as a fiduciary relationship, however, this was not absolute, and would have to be evaluated based on the circumstances of the case.

The appeals were partially allowed to the extent that the CPIO, Supreme Court was directed to re-examine the matters relating to third parties, following the procedure under Section 11 of the RTI Act. However, the information relating to judges' assets was directed to be disclosed.



P. Gopalkrishnan @ Dileep vs. State of Kerala & Anr.

AIR 2020 SC 1,
2019 (16) SCALE
752

2019

Dignity
Informational Privacy

The Court advised that the right to fair trial of the accused must be balanced with the right to privacy of the victim.

Constitutional
Provision(s)

Article 21

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A.M. Khanwilkar on behalf of
Justice D. Maheshwari and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Considering that this is a peculiar case of intra-conflict of fundamental rights flowing from Article 21, that is right to a fair trial of the Accused and right to privacy of the victim, it is imperative to adopt an approach which would balance both the rights.”

Case Brief

This was a case where the Supreme Court had to balance two fundamental rights emerging out of Article 21, i.e. the right to a fair trial of the accused and the right to privacy of the victim. In this application, the Appellant, who was accused of rape, had sought a direction to the Respondent-State to provide him with cloned copies of the contents of a memory card containing the video of the alleged rape incident. While the trial court denied the application on grounds of violation of privacy and dignity of the rape victim, the High Court held that the memory card was a material object not forming part of the documentary evidence and therefore did not need to be shared with the Appellant.

The Supreme Court, however, observed that the contents of the memory card would qualify as a ‘document’ within the meaning of Section 3 of the Indian Evidence Act, 1872 (“Evidence Act”) and Section 29 of the Indian Penal Code, 1860 (“IPC”), and furnishing of documents to the accused / Appellant under Section 207 of the Code of Criminal Procedure, 1973 (“CrPC”) was a facet of the right of the accused to a fair trial enshrined in Article 21. However, in order to balance conflicting rights and protect the identity and privacy of the victim, it allowed only an inspection of the contents of the memory card and forensic analysis by an independent laboratory.

It further noted that in ordinary circumstances, the accused must be given a cloned copy to enable them to present an effective defence during the trial but in sensitive circumstances such as these, directions balancing the rights should be issued. The Court, in its determination, applied the principles of public interest and primacy enunciated in *Asha Ranjan vs. State of Bihar* ((2017) 4 SCC 397) and *Mazdoor Kisan Shakti Sangathan vs. Union of India* ((2018) 17 SCC 324) to balance the conflict of fundamental rights flowing from Article 21.

Case Summary

Facts

The Appellant was one of the accused in a case of sexual assault under Sections 342, 366, 37, 506①, 120B and 34 of the IPC and Sections 66E and 67A of the Information Technology Act, 2000 (“IT Act”). The material evidence supplied to the Appellant, on which the prosecution sought to rely, did not include inter alia the electronic record (contents of the memory card / pen drive containing the video of the alleged rape incident).

The Appellant filed an application before the judicial first class magistrate and sought directions to the prosecution to furnish a cloned copy of the contents of the memory card along with call data records to him. The magistrate rejected the application on the ground that it would impinge upon the esteem, decency, chastity, dignity, and reputation of the victim and would also be against the public interest. However, it allowed the Appellant to inspect the contents of the video footage at the convenience of the court.

Aggrieved by this order, the Appellant filed an appeal before the High Court of Kerala, which upheld the order of the magistrate but on a different ground; it held that the seized memory card was a medium used for recording the incident and hence it was a product of the crime and therefore it could not form part of the documentary evidence under Section 207 of the CrPC. The Appellant filed a criminal appeal before the Supreme Court against the order of the High Court.

Issues

- A. Whether the contents of a memory card/ pen drive being an electronic record under Section 2①(t) of the IT Act qualify as a ‘document’ within the meaning of Section 3 of the Evidence Act and Section 29 of the IPC; and
- B. Whether the Court could decline the request of the accused to furnish a cloned copy of the contents of the memory card or pen drive in the form of video footage on the ground that it would impinge upon the fundamental right to privacy of the victim.

Arguments

The Appellant argued that the prosecution’s case was broadly founded on the memory card / pen drive and they proposed to use it against him. It was necessary to furnish a cloned copy of the contents of the memory card to him, not only in terms of Section 207 read with Section 173⑤ of the CrPC, but also to uphold the right of the Appellant to a fair trial guaranteed under Article 21 of the Constitution of India.

The Respondent-State and the Intervenor (the victim) argued that if a cloned copy of the contents of the memory card were made available to the Appellant, there was reason to believe that it would be misused by the Appellant to execute the conspiracy of undermining the privacy and dignity of the victim. They further argued that the contents of the memory card / pen drive were material objects and should be considered physical evidence of the commission of crime.

Decision

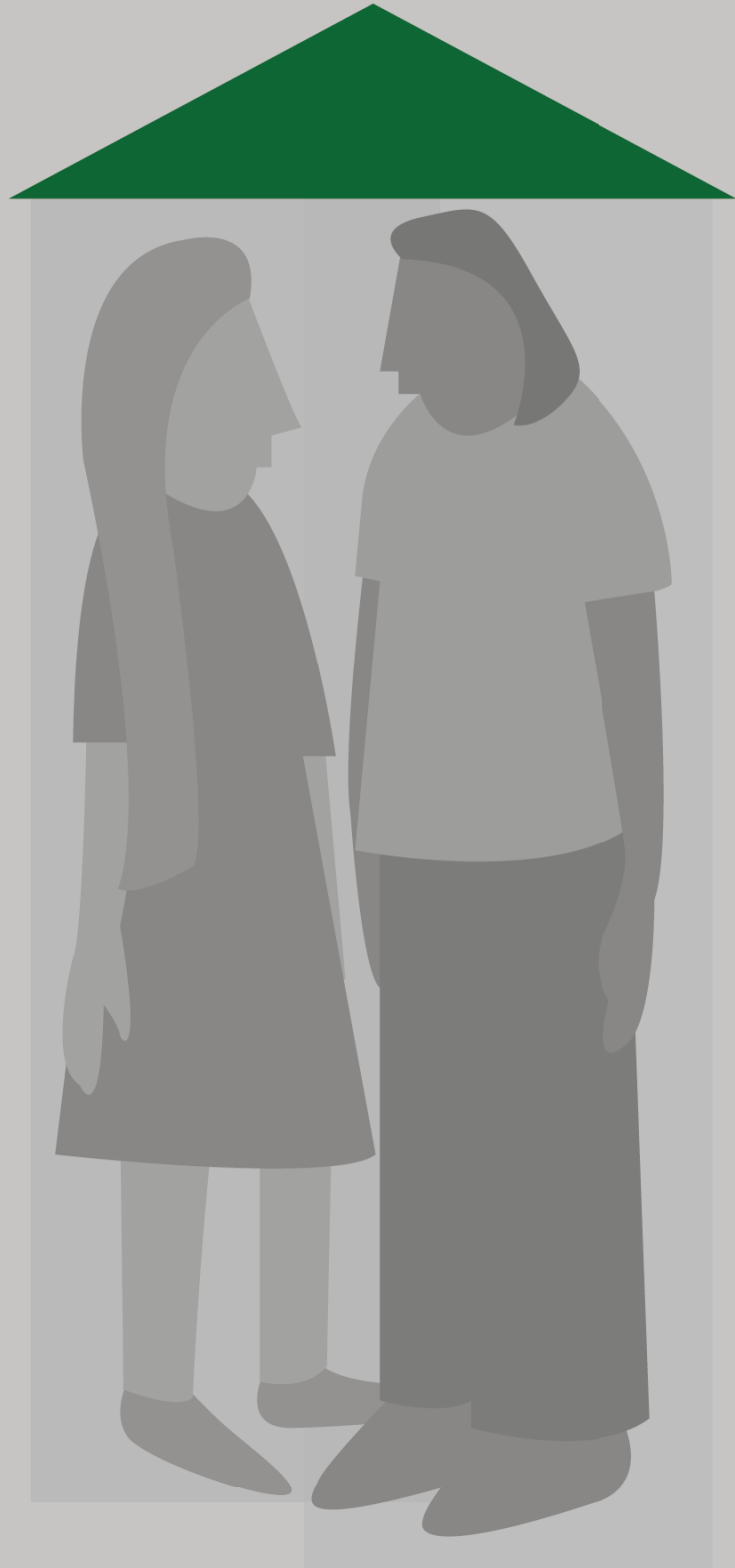
The Court deliberated on the first issue at length and concluded that the contents of the memory card would qualify as a ‘document’ within the meaning of Section 3 of the Evidence Act and Section 29 of the IPC. The Court also clarified that the contents of the documents would come within the meaning of ‘electronic record’. Moreover, the Court observed that furnishing documents to the accused under Section 207 of the CrPC was a facet of the right of the accused to a fair trial enshrined in Article 21. The Court cited the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Satyen Bhowmick & Ors.* ((1981) 2 SCC 109) to reiterate that the accused was entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him during the trial.

The Court noted that any relief granted to the Appellant would be extended to the other seven accused in this case; furnishing copies to the accused under such circumstances would raise the possibility of misuse, and hence moulded the relief, considering the principles laid down in *Tarun Tyagi vs. CBI* ((2017) 4 SCC 490). The Court permitted the Appellant to seek an expert opinion from an independent agency in order to reassure himself about the genuineness and credibility of the contents of the memory card.

Further, the Court observed that this was a “peculiar case of intra-conflict of fundamental rights flowing from Article 21, that is the right to a fair trial of the accused and the right to privacy of the victim, [and] it is imperative to adopt an approach which would balance both

the rights.” It referred to the principles laid down in *Asha Ranjan vs. State of Bihar* ((2017) 4 SCC 397), which held that “the “greater community interest” or “interest of the collective or social order” would be the principle to recognise and accept “the right of one which has to be protected” and that the “right to fair trial is not singularly absolute”, as it “takes in its ambit and sweep the right of the victim(s) and the society at large.” The Court also referred to *Mazdoor Kisan Shakti Sangathan vs. Union of India* ((2018) 17 SCC 324), which further clarified the principle of primacy and noted that this principle did not extinguish the rights of one party completely but rather curtailed them to the extent of protecting the rights of the other part.

The Court decided that, if the prosecution was relying on the contents of the memory card or pen drive, then “ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as the privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and their lawyer or expert for presenting effective defence during the trial.”



Christian Medical College Vellore Assn. v. Union of India

(2020) 8 SCC 705

2020

Autonomy

The Supreme Court of India held that prescribing a uniform entrance examination for all educational institutions did not violate the fundamental rights of minority educational institutions.

**Constitutional
Provision(s)**

**Articles 14, 19 (1) (g), 25, 30 (1)
and 47**

Case Type

Transferred Case (Civil)

Case Status

Not Overruled

Bench Strength

3

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice Arun Mishra on behalf of
Justice Vineet Saran,
Justice MR Shah and himself.

“By and large, at present education is devoid of its real character of charity, it has become a commodity. To weed out evils from the system, which were eating away fairness in admission process, defeating merit and aspiration of the common incumbent with no means, the State has the right to frame regulatory regime for aided/ unaided minority/private institutions as mandated by Directives Principles, Articles 14 and 21 of the Constitution.”

Case Brief

In this case, the Supreme Court of India (“Court”) held that prescribing a uniform entrance examination for all educational institutions did not violate the fundamental rights of minority educational institutions.

The Medical Council of India (“MCI”) and the Dental Council of India (“DCI”) issued notifications to implement the National Eligibility-cum-Entrance Test (“NEET”) as the uniform admissions examination for all medical educational institutions (“Notifications”). Several minority educational institutions contended that the Notifications posed an unreasonable restriction on their autonomy to implement an independent admissions process. Aggrieved by the Notifications, the minority institutions filed civil cases, appeals, and special leave petitions before various courts with the appropriate jurisdiction. The Court clubbed all the cases that were filed on this matter, and placed them before a three-judge bench of the Court.

The Court upheld the constitutional validity of the Notifications. It held that mandating the use of NEET as the common admissions examination for all institutions was a reasonable restriction on the rights of minority educational institutions. The Notifications were equally applicable to all medical and dental educational institutions,

and did not place minority institutions in a disadvantageous position. Hence, the Court held that the Notifications did not violate the right to autonomy, or any other constitutional rights of the minority educational institutions.

Case Summary

Facts

This case dealt with the constitutional validity of the Notifications, which introduced NEET as the uniform examination for admissions in graduate and postgraduate courses in all medical and dental educational institutions.

The MCI and DCI issued the Notifications to amend various Central statutes governing higher education in medical and dental sciences, and to prescribe the implementation of NEET examinations. The Notifications also introduced specific provisions to lower the eligibility criteria for the admission of Scheduled Caste/Scheduled Tribes candidates and candidates with physical disabilities. The Notifications were applicable to all medical and dental educational institutions in India, including aided and unaided minority educational institutions.

Consequently, several minority educational institutions filed civil cases, appeals, and special leave petitions, before various courts with the appropriate jurisdiction. The institutions argued that the Notifications restricted their right to autonomy to implement their existing admissions process, and their ability to provide education for religious and lin-

guistic minorities. Hence, they argued that the Notifications violated Article 19(1)(g) (right to practice a profession) and Article 30 (right of minorities to establish and administer educational institutions) of the Constitution. Consequently, the minority institutions sought for the Court to strike down the Notifications.

The Court clubbed the various transferred civil cases, appeals and writ petitions that were filed before various courts, and placed it before a three-judge bench of the Court.

Issue

Whether the use of NEET as the uniform admissions examination for medical educational institutions violated the constitutional rights of minority institutions, and restricted their autonomy to admit students of their choice.

Decision

In a unanimous opinion, the Court held that the prescription of NEET for admissions in medical and dental educational institutions was not violative of the fundamental rights of aided/unaided minority educational institutions.

The Court applied the test of proportionality to determine if the Notifications were uncon-

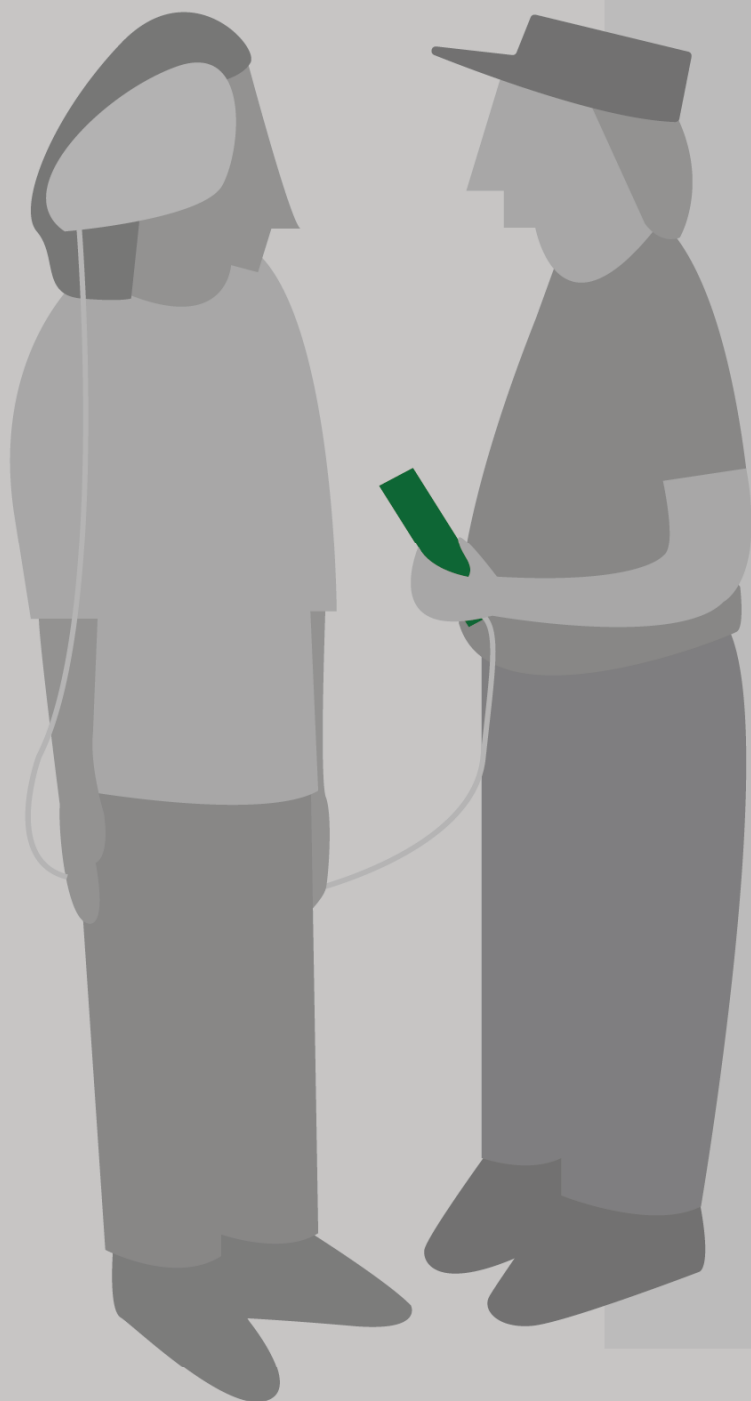
stitutional. The Court held that the Notifications prescribed reasonable restrictions on all medical and dental institutions, and did not place minority institutions at a disadvantageous position. It stated that the Notifications were “reasonable, fair and intended to bring transparency in the professional education imparted by institutions”. Hence, the Court held that the Notifications did not violate any constitutional rights of minority educational institutions, including their right to autonomy.

The Court considered that the State had limited powers to interfere with individual autonomy, liberty, and other rights, as per the constitutional doctrine of ‘limited governance’. The Court had stressed the significance of this doctrine in previous judgements, including in *Justice K.S. Puttaswamy (Retd.) vs. Union of India* ((2017) 10 SCC 1). However, the Court observed that the Notifications were issued in public interest, to balance and protect the constitutional rights of students applying to medical educational institutions. The Notifications introduced guidelines to secure the educational interests of Scheduled Castes, Scheduled Tribes, and other disadvantaged groups under Article 47 of the Constitution. The NEET examination also ensured equal opportunities and equal access to all students, thereby protecting their right to equality under Article 14 of the Constitution.

The Court recognised the rights of aided/unaided minority institutions under Article 19① (g) (right to practice a profession) and Article 30 (right of minorities to establish and administer educational institutions) of the Constitution. It further noted that minority educational institutions derive their right to autonomy from these constitutional rights. However,

these rights could not be placed on a higher status than other constitutional provisions. The Court clarified that the rights of the religious or linguistic minorities under Article 30 of the Constitution must therefore be balanced with other constitutional rights.

Hence, the Court held that the Notifications did not violate the minority institutions’ right to autonomy. The Court dismissed the petitions, and held that the Notifications placed reasonable restrictions on the constitutional rights of minority educational institutions.



Tofan Singh vs. State of Tamil Nadu

(2021) 4 SCC 1

2020

Autonomy

The Supreme Court held that confessions recorded under the NDPS Act would be inadmissible as evidence against the person, as it violated their right against self- incrimination.

Constitutional Provision(s)

Articles 20 (3) and 21

Case Type

Criminal Appeal

Case Status

Not Overruled

Bench Strength

3

Number of Opinion(s)

1/1

OPINIONS DISSENT

1 majority opinion by

Justice R.F. Nariman on behalf of **Justice Navin Sinha and himself.**

1 dissenting opinion by

Justice Indira Banerjee.

“The interpretation of a statute like the NDPS Act must needs be in conformity and in tune with the spirit of the broad fundamental right not to incriminate oneself, and the right to privacy, as has been found in the recent judgments of this Court.”

Case Brief

In this case, the Supreme Court (“Court”) held that confessions recorded under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS Act”) would be inadmissible as evidence against the person. Using such confessions as evidence would violate the person’s right against self-incrimination under Article 20③, and their right to privacy under Article 21 of the Constitution.

In this case, officers of the National Crime Bureau (“NCB”) arrested the Appellant for offences under the NDPS Act. The officers exercised their powers under Section 67 of the NDPS Act (the power to call for information, etc.) and asked the Appellant to provide a confessional statement. The Appellant subsequently retracted his confession. However, the Additional Special Court under the NDPS Act admitted the confession as evidence and convicted the Appellant.

The Court held that the Appellant’s conviction, based upon a retracted confessional statement, violated his fundamental rights. It further held that statements recorded under Section 67 of the NDPS Act would not be admissible as evidence, as they would violate Article 20③ (right against self-incrimination) and Article 21 (right to privacy) of the Constitution. Additionally, the Court stressed the importance of stringent penal statutes like the NDPS Act to be highly cognizant of their impact on an individual’s fundamental rights, particularly the rights under Article 20③ and Article 21.

Case Summary

Facts

The present case arose when officers of the NCB arrested four individuals, including the Appellant, under the NDPS Act for possession and transportation of narcotic drugs. The officers exercised their powers under Section 67 of the NDPS Act to record a confessional statement of the Appellant. Section 67 granted officers conducting enquiries under the Act the power to call for information from any person in connection with violations of the Act.

Although the Appellant had subsequently retracted his confession, the Additional Special Court under the NDPS Act still admitted the confession as evidence, and convicted the Appellant for possession and transportation of narcotic drugs. Aggrieved by this, the Appellant approached the Madras High Court. The Appellant argued that he was convicted solely based on the retracted confessional statement recorded by the officers. However, the High Court rejected this argument and dismissed the appeal. This prompted the Appellant to approach the Supreme Court.

The Court directed the matter to be placed before a larger bench of the Court and sought the larger bench to provide its judgement on two key questions. First, whether officers empowered under the NDPS Act would be considered as ‘police officers’ within the meaning of the Indian Evidence Act, 1872 (“Evidence Act”). Second, whether any confessions recorded by such officers would attract the provisions of Section 25 of the Evidence Act, which stated that any confessions made to police officers would not be admissible as evidence.

Issue

Whether the use of confessions recorded under Section 67 of the NDPS Act as evidence violates a person’s right against self-incrimination and right to privacy under Article 20③ and Article 21 of the Constitution.

Decision

In a 2:1 majority, the Court held that a person’s right against self-incrimination and right to privacy under Article 20③ and Article 21 of the Constitution would be applicable against confessions recorded under Section 67 of the NDPS Act. Therefore, such confessions would not be admissible as evidence.

The Court observed that the right to privacy was not only a facet of the right to life and personal liberty. It also derived its roots from various other fundamental rights, as the Court discussed in *Justice K.S. Puttaswamy (Retd.) vs. Union of India* ((2017) 10 SCC 1). Thus, the right to privacy would be read into Article 20③, to protect an individual’s right to autonomy and choice against being compelled to provide self-incriminatory confessions.

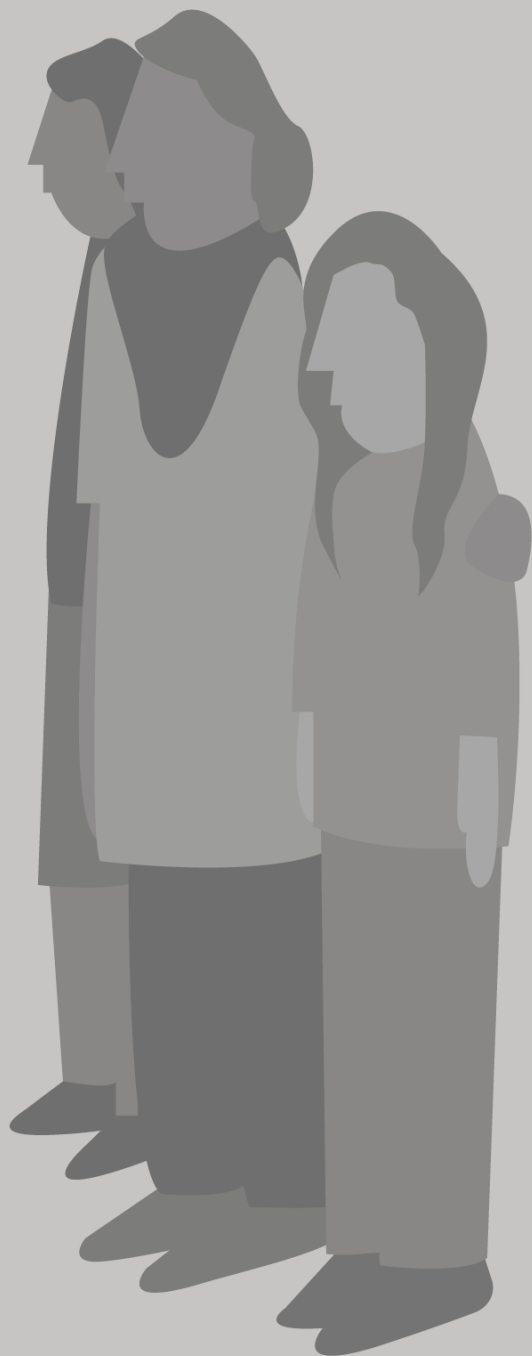
The Court noted that various provisions of the NDPS Act provided safeguards to protect individuals’ fundamental rights. Hence, Section 67 should be similarly construed to balance the powers of the officers with individuals’ fundamental rights. The Court stressed that courts must adopt this approach when interpreting provisions of stringent penal statutes, like the NDPS Act. Such statutes must be construed in a manner that protects the rights under Articles 20③ and 21 of the Constitution.

The Court noted that Section 25 of the Evidence Act intended to prevent police officers from compelling or coercing individuals to make self-incriminatory confessions. Consequently, the Court highlighted that the officers under the NDPS Act were exercising the functions of police officers to conduct enquiries, and such officers were in a position to compel or coerce individuals into recording confessions. Therefore, officers under statutes like the NDPS Act should also be construed as ‘police officers’ under Section 25 of the Evidence Act. The Court held that, therefore, to protect the fundamental right against self-incrimination and the right to privacy, confessions made before such officers would be inadmissible as evidence.

The Court also overruled previous judgments wherein the courts held that Section 25 of the Evidence Act would not be applicable to officers under certain penal statutes. The Court held that providing such exceptions to certain officers directly infringed the rights to equality, privacy, and the right against self-incrimination under Articles 14, 21, and 20³ of the Constitution.

In her dissenting opinion, Justice Banerjee held that the officers under the NDPS Act would not be considered ‘police officers’, since they did not hold all the powers of police officers under the Code of Criminal Procedure, 1973. Therefore, confessions recorded by such officers would be admissible as evidence. Relying on *Justice K.S. Puttaswamy (Retd.)*, she stated that the right to privacy was not an absolute right, and the NDPS Act prescribed reasonable restrictions on individuals’ rights, to protect the larger public against drug-related offences. Hence, the confessions recorded

under Section 67 of the NDPS Act should be admissible as evidence.



Ashok Kumar vs. Raj Gupta

2022 1 SCC 20

2021

Bodily Integrity
Autonomy

The Supreme Court held that a Plaintiff could not be compelled to take a DNA test in a suit for the ownership of inherited property.

**Constitutional
Provision(s)**

**No Specific Constitutional
Provision Referenced**

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice Hrishikesh Roy on behalf of
Justice R Subhash Reddy and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“DNA is unique to an individual (barring twins) and can be used to identify a person’s identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in *K.S Puttaswamy v. Union of India*, wherein the right to privacy has been declared a constitutionally protected right in India.”

Case Brief

In this case, the Supreme Court of India (“Court”), held that a Plaintiff could not be compelled to take a DNA test in a suit for the ownership of inherited property. The Court held that compelling an individual to undergo a DNA test against their wish would amount to an infringement of their privacy.

The Plaintiff claimed to be the son of a deceased couple, and filed a suit in the Trial Court of Kalka (“Trial Court”) seeking declaration of ownership over their property. The three daughters of the deceased couple (“Defendants”) refuted this claim and argued that the Plaintiff was not the biological child of their parents. The Defendants sought an order from the Trial Court to compel the Plaintiff to take a DNA test to prove his biological relationship with their parents. The Plaintiff refused to take the DNA test, stating that he had already produced sufficient evidence to prove his relationship with the deceased couple.

The Court observed that a DNA test could encroach upon the Plaintiff’s right to privacy and personal liberty. Therefore, a DNA test could only be ordered only when the test of proportionality (laid down in the *K.S. Puttaswamy vs. Union of India* ((2017) 10 SCC 1)) was satisfied, and not

as a matter of routine. The Court also reaffirmed that Indian law leans in the favour of the presumption of legitimacy of children, and it would not repel this presumption lightly.

Case Summary

Facts

This case was a suit for declaration of ownership to property. The Plaintiff claimed to be the son of a deceased couple and sought share in the parental property. The three daughters of the couple were the Defendants to this suit. They denied the Plaintiff's claim that he was the biological son of their parents and argued that he was not entitled to any share of property. During the course of proceedings in the Trial Court, the Plaintiff produced sworn affidavits from the deceased mother and the Defendants admitting to their relationship with him. The Defendants filed an application requesting the Trial Court to order the Plaintiff to undergo a DNA test. They argued that a DNA test of the Plaintiff with one of the Defendants would disprove any biological link between the Plaintiff and the Defendants parents.

The Trial Court dismissed the application of Defendants seeking a DNA test. The Trial Court stated that the burden of proof to establish his relationship as a coparcener lay on the Plaintiff. However, the Plaintiff had adduced evidence to prove his relationship and had refused to undergo a DNA test. Consequently, the Trial Court held that it could not compel

the Plaintiff to undergo a DNA test and dismissed the application filed by the Defendants. In a revision petition filed by the Defendants, the High Court of Punjab and Haryana ("High Court") reversed the order of the Trial Court. The High Court ordered the Plaintiff to prove his relationship to the Defendants through a DNA test. Therefore, the Plaintiff filed an appeal to the Supreme Court.

Issue

Whether the Court could order an individual to take a DNA test to determine ownership in parental property?

Decision

The Court held that the Plaintiff could not be compelled to undergo DNA testing to prove his relationship to his parents in a suit for the ownership of property. The Court held that compelling the Plaintiff to undergo a DNA test when he had already adduced other evidence would negatively impact his personal liberty and right to privacy.

The Court observed that a DNA test was a unique tool to identify a person's identity, to establish family linkages and reveal sensitive medical health information. It relied on its opinion in previous cases like *Banarsi Dass vs. Teeku Dutta* (2005) 4 SCC 449 and

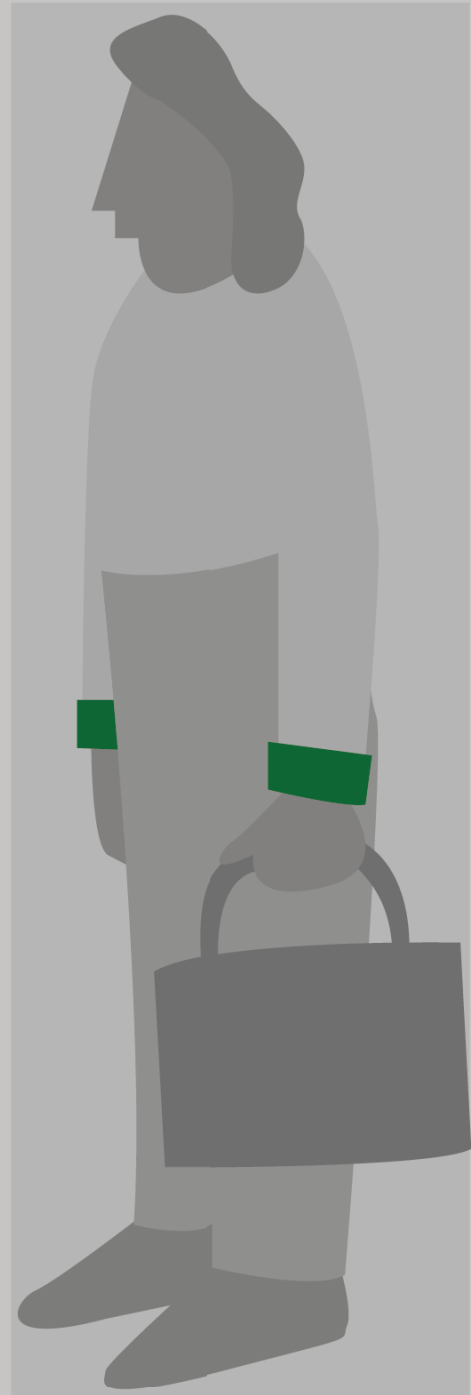
Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women & Anr. (2010) 9 SCR 457. These cases held that courts in India could not order blood tests as a matter of course and that any order for a DNA test would have to be based on a strong prima facie case and sufficient evidence.

The Court also noted that in cases where other types of evidence were available to prove or disprove the relationship, courts should abstain from ordering DNA tests. It held that a DNA test impinged upon the right to privacy and had significant cultural and social implications. The Court considered that if the Plaintiff was shown to not be biologically related to his parents, this would cause him to be socially stigmatised. This social stigma of being ‘bastardised’ would be a violation of the Plaintiff’s right to privacy.

The Court stated that ordering a DNA test should also be based on the test of proportionality, laid down in *K.S. Puttaswamy vs. Union of India ((2017) 10 SCC 1)*. The test of proportionality requires the courts to assess the proportionality of the restrictions on privacy against the legitimate aims being pursued by the act. The Court would have to consider a) that the aim is not arbitrary or discriminatory, b) whether it has an adverse impact on the person and c) if it justifies the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA Test.

The Court noted that the Plaintiff had adduced evidence through sworn affidavits by the deceased mother and the Defendants indicating his relationship with them. It observed that at this stage of the trial, the burden was on the Defendant to prove otherwise. Therefore, it

held that the Plaintiff could not be compelled to undergo a DNA test and adduce evidence on the behalf of the Defendants. The Court concluded that in such a case where there was no ‘eminent need’ for the Plaintiff to undergo a DNA test, they could not be compelled to do so. It stated that while balancing interests, if there is no eminent need, the Plaintiff’s right to privacy should be given precedence. Consequently, the Court set aside the order passed by the High Court and restored the order passed by the Trial Court.



Jigya Yadav (minor) through Guardian/ Father Hari Singh vs. C.B.S.E. & Ors.

(2021) 7 SCC 535

2021

Autonomy

In this case the Supreme Court held that CBSE by-laws which prevented candidates from changing their names in certificates was an unreasonable restriction on the candidates' rights to speech and expression.

**Constitutional
Provision(s)**

Articles 12 and 19

Case Type

Civil Appeal

Case Status

Not Overruled

Bench Strength

2

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice A.M. Khanwilkar on behalf of
Justice B.R. Gavai,
Justice Krishna Murari, and himself.

“The test of reasonableness requires that the impugned law is intelligently crafted in such a manner that it is able to justify the ultimate impact of the law on its subjects. If it restricts, it must restrict on the basis of reason and if it permits, it must permit on the basis of reason. Similarly, if a law draws a classification, it must classify intelligently i.e., backed by reason. Reason is the foundation of all laws and their validity is immensely dependent on the availability of sound reason.”

Case Brief

In this case, the Supreme Court of India (“Court”) considered whether certain bye-laws of the Central Board of Secondary Education (“CBSE”) imposed reasonable restrictions on candidates’ rights to speech and expression under Article 19 of the Constitution. The bye-laws prevented candidates from changing their names in the certificates issued by the CBSE after the certificates were published. The Court held that the bye-laws imposed an unreasonable restriction on the rights of the candidates under Article 19. It also noted that the ability to change details of their names was an important element of candidates’ fundamental right to freedom of expression and identity under Article 19 of the Constitution.

In the present case, the Court heard a batch of petitions on appeal from various High Courts. This case concerned the CBSE Examination Bye-laws, 2007 (“Bye-laws”), which only allowed candidates to make corrections to their names to match their school records, and to make

changes to their names on satisfying certain conditions before the CBSE published their results. Candidates approached various High Courts to change particulars relating to themselves or their parents in certificates issued by the CBSE leading to inconsistent outcomes from the courts. The candidates and the CBSE appealed various orders of the High Courts to the Court.

The Court held that the Bye-laws imposed an unreasonable restriction on candidates' right to speech and expression under Article 19. It observed that names are among the foremost indicators of identity and that an individual must be in complete control of their name (subject to reasonable restrictions). In the present case, the Court held that the Bye-laws were unreasonable as they fully barred the ability of candidates to change their names after the CBSE published their results. It issued detailed directions for the CBSE in respect of changes and corrections requested by candidates. It directed the CBSE to process requests for corrections and changes in accordance with the Court's directions, and to amend its Bye-laws to incorporate the Court's order.

Case Summary

Facts

The CBSE is a national-level board of education for public and private schools, and was established by the Government of India in 1929. It was set up to regulate and maintain the standard of secondary education in India. Bye-law 69 allowed changes in the names, surnames, and dates of birth of candidates and their parents subject to certain restrictions.

In particular, candidates who wanted to change their names in the CBSE's records had to, before the CBSE published their results, obtain permission from a court and publish a notification in the government gazette. How-

ever, the CBSE allowed candidates to correct errors in their names (such as in the spelling, or typographical errors) to bring them in alignment with existing school records.

Candidates approached various High Courts to change their particulars in certificates issued by the CBSE, which led to conflicting outcomes from the High Courts. Subsequently, the candidates and the CBSE appealed the High Courts' orders, and the Court heard the present batch of petitions.

Issue

Whether Bye-laws that restricted candidates' ability to change their names in certificates issued by the CBSE imposed reasonable restrictions on their rights to speech and expression

under Article 19 of the Constitution.

Decision

In a unanimous judgement, the Court held that the Bye-laws imposed an unreasonable restriction on candidates' rights to speech and expression under Article 19 of the Constitution.

In the present case, the petitions related to requests for changes in the names, surnames, and dates of births of candidates and their parents. However, the Court highlighted and separately considered the issue of whether the Bye-laws could restrict the right of candidates to change their own names with respect to certificates issued by the CBSE.

The Court highlighted its decisions in *National Legal Services Authority vs. Union of India* (AIR 2014 SC1863), *Navtej Singh Johar and Ors. vs. Union of India* (AIR 2018 SC 4321) and *Justice K.S. Puttaswamy (Retd.) and Anr. vs Union of India and Ors.* (AIR 2017 SC 4161) and observed that a person's identity is protected under the Constitution. The Court relied on *Navtej Singh Johar* to reaffirm that the freedom of speech and expression under Article 19 would include expression of identity.

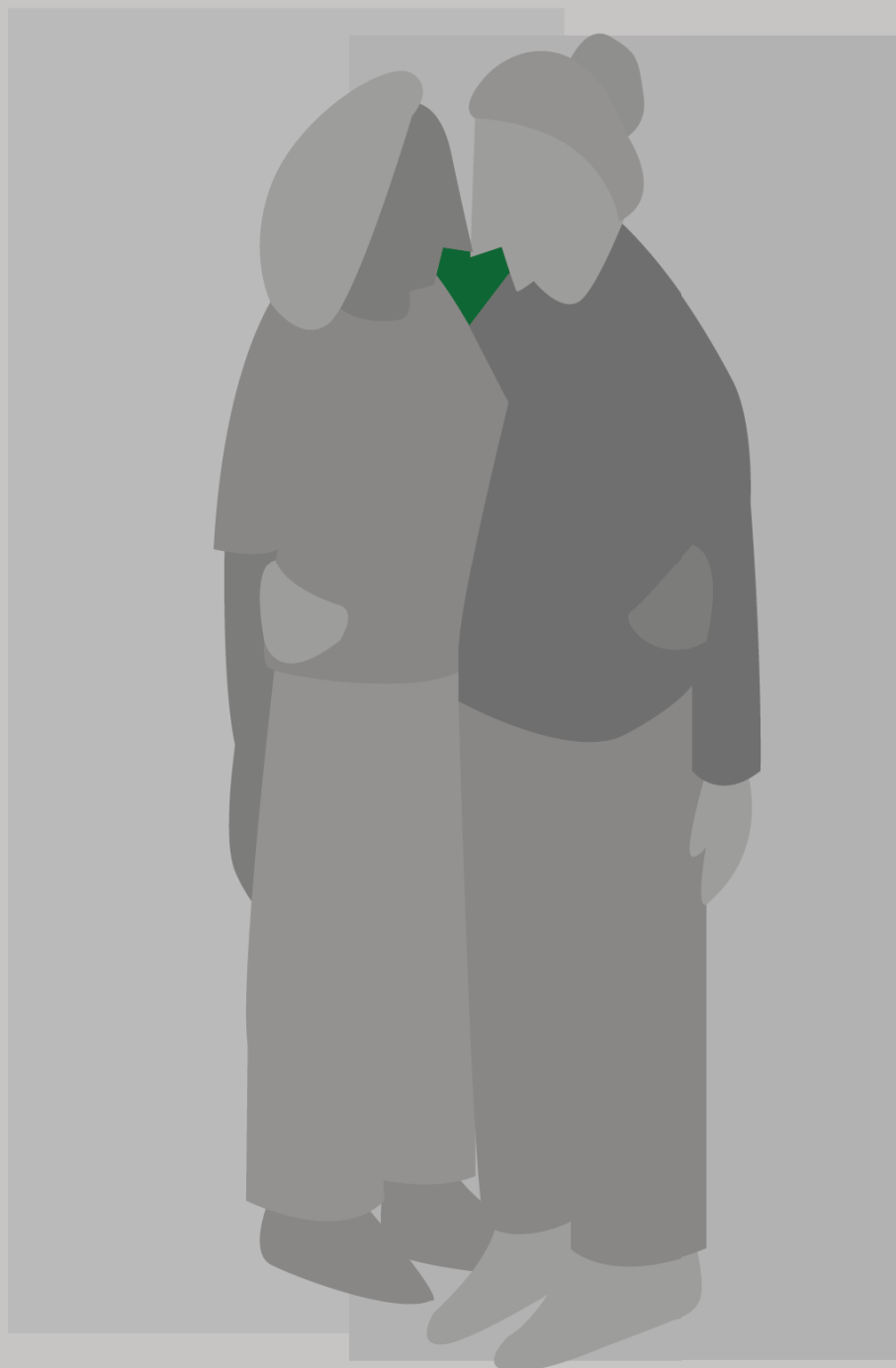
It noted that identity as a concept included internal, external, and acquired characteristics, and that a name is among the principal indicators of identity. It noted that an individual must always be able to retain complete control of their name and that the formal and legal completion of the change of identity in this context would require the State and its agencies to update their records.

However, the Court noted that a person's right

to get their name changed in public records was not absolute and was subject to reasonable restrictions. In the present case, the Court held that the Bye-laws imposed an unreasonable restriction on the right to speech and expression under Article 19 of the Constitution. It noted that the Bye-laws did not merely restrict but completely prevented a candidate from changing their name after the candidate's results were published by the CBSE.

Further, it held that imposing such a restriction on the basis of "administrative efficiency" and the "scope for abuse and misuse" was unreasonable. The Court noted that a reasonable restriction would need to balance the candidate's right to be identified in official documents with the interest of administrative efficiency and the risk of misuse.

The Court issued detailed directions to the CBSE for corrections and changes to the particulars requested by candidates. It ordered the CBSE to process applications for the correction or change of particulars in accordance with its directions. The Court also directed the CBSE to take immediate steps to amend its Bye-laws to incorporate the Court's directions.



Laxmibai Chandaragi B. vs. The State Of Karnataka

(2021) 3 SCC 360

2021

Autonomy

The Supreme Court held that the right to marry a person of one's choice was an important facet of the right to autonomy and privacy under Article 21 of the Constitution.

**Constitutional
Provision(s)**

Article 21

Case Type

Criminal Writ Petition

Case Status

Not Overruled

Bench Strength

2

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice S.K. Kaul on behalf of
Justice Hrishikesh Roy and himself.

“We are fortified in our view by earlier judicial pronouncements of this Court clearly elucidating that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock and that their consent has to be piously given primacy. It is in that context it was further observed that the choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. Such a right or choice is not is not expected to succumb to the concept of “class honour” or “group thinking”.”

Case Brief

In this case, the Supreme Court of India (“Court”) held that the right to marry a person of one’s choice was an important facet of the right to autonomy and privacy under Article 21 of the Constitution.

The parents of Petitioner 1 filed a missing person complaint before the Mulgod police station in Karnataka. The Investigating Officer (“IO”) for the case discovered that the two petitioners were consensually married, and were residing together in Ghaziabad, Uttar Pradesh. Petitioner 1 informed the IO that her parents and her uncle disapproved of her marriage and had made several threats against the petitioners. The IO compelled Petitioner 1 to record a statement before the police station in Karnataka. Furthermore, the IO indicated to Petitioner 1 that her husband could be arrested if she refused to appear at the police station.

The Court observed that two consenting adults intending to marry each other do not require the consent of their families or communities. The Court reaffirmed that the right to marry a person of one's choice forms an integral aspect of the right to life and personal liberty guaranteed under Article 21 of the Constitution. The Court further directed police authorities to lay down guidelines and implement training programmes to train police personnel on socially sensitive cases which may impact such as a person's right to marry.

Case Summary

Facts

In this case, the Supreme Court examined the obligations of police authorities and police personnel when they investigate cases involving the rights of married couples, which requires certain social sensitivity.

Petitioner 1 (the wife) travelled from Karnataka to Delhi in order to marry Petitioner 2 (the husband), following which the petitioners co-habitated in Ghaziabad as husband and wife. The parents and the uncle of Petitioner 1 had disapproved of this marriage and had made several threats against the petitioners. Subsequently, the parents of Petitioner 1 filed a complaint with the Murgod police station in Karnataka to report Petitioner 1 as missing. The IO from the police station tracked down the petitioners to their residence in Ghaziabad.

Petitioner 1 provided a copy of her marriage certificate to the IO. She informed the IO of her parents' knowledge and disapproval of her marriage, and the threats the petitioners received from her family. For these reasons, she stressed that she was unwilling to travel to Karnataka to appear at the police station.

However, the IO did not consider the sensitivity of the case and compelled Petitioner 1 to travel to Karnataka to record her statement at the police station. Furthermore, the IO indicated that if Petitioner 1 failed to appear at the police station, her parents may file false complaints against the petitioners. The IO added that, in such a case, the police officers would charge Petitioner 2 with kidnapping and arrest him.

Aggrieved by the actions of the IO, the petitioners filed a writ petition before the Supreme Court.

Issue

Whether an unwarranted interference into the petitioners' marriage by police personnel, based on a false complaint, constituted a violation of the petitioners' right to privacy under Article 21 of the Constitution.

Decision

In a unanimous opinion, the Court reaffirmed the previous decisions of the Court and observed that the consent of family or community was not necessary for two consenting adults to enter into a marriage. The Court further held that police authorities should lay

down appropriate guidelines and implement training programmes for police personnel on the protocol for investigating socially sensitive cases.

The Court referred to previous judgments, where it had established that in cases involving marriage of two consenting adults, the consent of family or community was not necessary. It noted that the right to marry a person of one's choice was an integral facet of the right to dignity guaranteed under Article 21 of the Constitution. The Court further emphasised that the "*choice of an individual is an inextricable part of [their] dignity*" and therefore, this right of choice could not be compromised in the name of class honour or group thinking. The Court also relied upon the judgement in *Justice K.S. Puttaswamy (Retd.) vs. Union of India* ((2017) 10 SCC 1), which held that the autonomy of an individual, particularly with respect to family and marriage, is integral to the dignity of the individual.

Additionally, the Court expressed its disapproval of the conduct displayed by the IO in the case and recommended the police authorities to counsel the IO on how to approach cases of a similar nature. The Court noted that the police authorities must also ensure that cases involving an individual's right to autonomy in relation to family and marriage are handled in a sensitive manner. Accordingly, it also directed the police authorities to lay down appropriate guidelines and develop training programmes for counselling and sensitisation of all police personnel regarding the protocol for better handling of such socially sensitive cases.

The Court reaffirmed that the right to choose

one's spouse forms an integral part of the rights to autonomy and dignity guaranteed under Article 21 of the Constitution. Consequently, the Court quashed the complaint filed by the parents of Petitioner 1 and directed the police authorities to implement appropriate guidelines and sensitisation training programmes for police personnel.



Ajit Mohan and Ors. vs. Legislative Assembly National Capital Territory of Delhi and Ors.

(2022) 3 SCC 529

2021

Informational Privacy

The Supreme Court of India held that being summoned to testify before a committee of the State Legislature would not curtail a person's rights to free speech and expression, and privacy under the Constitution.

Constitutional Provision(s) **Articles 19 (1) (a) and 21**

Case Type **Civil Writ Petition**

Case Status **Not Overruled**

Bench Strength

3

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice Sanjay Kishan Kaul on behalf of
Justice Dinesh Maheshwari,
Justice Hrishikesh and himself.

“The notion of individual constitutional rights and the right to privacy is sought to be expanded by the Petitioners to encompass the right of refusal even to appear in pursuance of the summons. The debates across democratic policy including some of the developments recorded by us, would show that there is a turn towards recognising the importance of an element of compulsion (if so required) for deposition/opinions relating to the present subject matter. This is more so in the context of monolithic business models having vast financial and technical powers at their disposal. As a constitutional court, we are not inclined to step into it.”

Case Brief

In this case, the Supreme Court of India (“Court”) held that being summoned to testify before a committee of the State Legislature would not curtail a person’s rights to free speech and expression, and privacy under the Constitution.

In response to communal riots in different parts of Delhi in 2020, the Legislative Assembly of the National Capital Territory of Delhi (“Delhi”) constituted the Committee on Peace and Harmony (“Committee”). The Committee was formed to assess the factors that could potentially

cause communal disharmony or riots, and suggest measures to mitigate them. It received complaints alleging that Facebook was used to spread hate speech during the riots. Hence, the Committee issued a notice to Ajit Mohan, the Vice President and Managing Director of Facebook India to testify before it as a witness.

The Petitioners approached the Court to set aside the summons of the Committee, arguing that this violated their right to freedom of speech and expression, and right to privacy. The Committee stated that the summons were issued in exercise of the Committee's parliamentary privilege to summon a person and compel them to give evidence on matters of fact.

The Court dismissed the petition, and held that the mere issuance of summons did not violate the Petitioners' right to freedom of speech and the right to privacy. The Court withheld ruling on whether the parliamentary privilege to compel a person to provide evidence would violate their rights to free speech and expression, and right to privacy. It noted that this question was pending for consideration before a larger bench of the Court.

Case Summary

Facts

In light of the violent and disruptive communal riots that occurred in different parts of Delhi during February 2020, the Legislative Assembly of Delhi constituted the Committee. The function of the Committee was to assess the factors that could potentially disrupt communal harmony, and suggest measures to mitigate them. The Committee noted the various complaints raised before it regarding Facebook being used as a platform to spread hate speech and foment communal disharmony.

The Committee issued a notice to Mr. Ajit Mohan to testify before the Committee as a witness, in his capacity as the Vice President and Managing Director of Facebook India. Facebook contended that compelling Mr. Mohan to testify before the Committee on behalf of Facebook would violate his right to freedom of speech and expression and his right to privacy guaranteed under the Constitution. The Committee responded to Facebook's notice, stating that, as a committee constituted by the Legislative Assembly, it had certain powers and privileges. It issued the summons in exercise of its parliamentary privilege to summon a person and compel them to give evi-

dence on matters of fact. It further stated that non-compliance to its summons would hinder its functions, and the functions of the Legislative Assembly. In such a case, the Committee could initiate proceedings against the Petitioners for breach of parliamentary privilege, and contempt of the Legislative Assembly.

Aggrieved by this, the Petitioners approached the Supreme Court to set aside the summons.

Issue

Whether being summoned to testify before a parliamentary or legislative sub-committee would violate a person's right to privacy and right to freedom of speech under

Decision

The Court, in a unanimous decision, held that the Committee had the power to issue summons to the Petitioners. The Court dismissed the petition, and held that individual constitutional rights and the right to privacy could not be "*expanded to encompass the right of refusal even to appear in pursuance of the summons*".

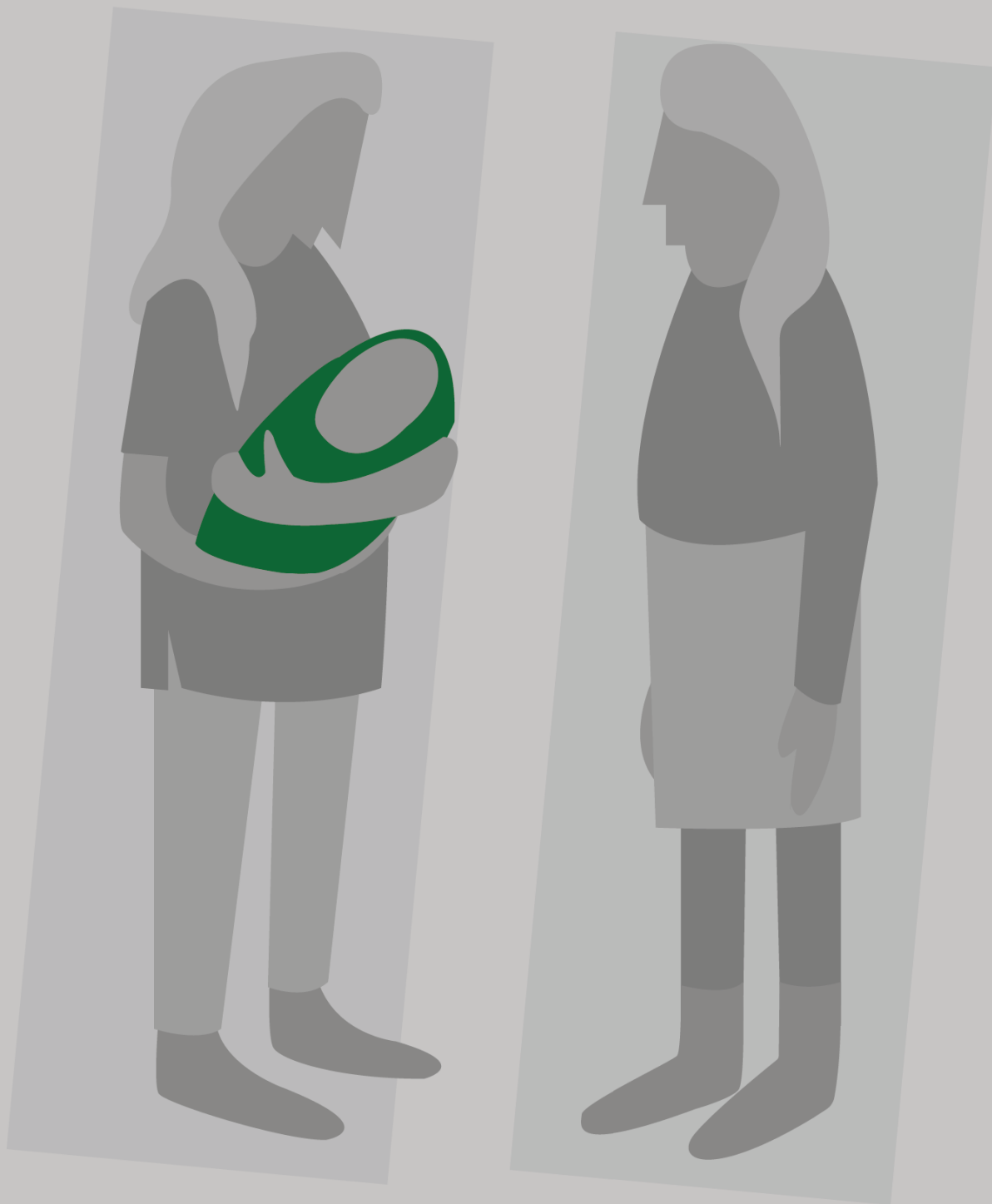
First, the Court assessed whether the Committee violated the Petitioner's rights to freedom of speech (including the right to silence) and privacy under the Constitution. The Court observed that committees established by the Parliament or State Legislatures have the power to summon and compel the attendance of a person, if necessary for the functioning of the committee. It recognised these committees as an extension of the legislature, and noted that restricting the powers and functions of the committees would diminish the powers of the legislature. The Court held that such com-

mittees would not violate an individual's fundamental rights to speech and privacy merely by exercising their constitutional and statutory powers to summon and compel individuals to testify before them. Hence, the scope of the rights to freedom of speech and expression, and privacy could not be expanded to include the right to refuse to appear in pursuance of summons of a parliamentary committee.

Moreover, the Court held that the present petition was premature, since the Petitioner had only been summoned to depose before the Committee, and there had been no breach of fundamental rights. The Court noted that the Petitioner could still exercise his rights during his deposition before the Committee, by refusing to answer any questions which were beyond the scope of the facts at hand.

The Court withheld its judgement on whether the parliamentary privilege of parliamentary committees to compel a person to provide evidence would violate their rights to free speech and expression, and privacy. It noted that this larger question was pending for reference before a seven-judge bench of the Court in *N. Ravi vs. T.N. Legislative Assembly* ((2005) 1 SCC 603).

In conclusion, the Court dismissed the present petition. It held that the Petitioner's right to freedom of speech (including the right to silence) and privacy would not allow him to refuse to appear before the Committee for a lawfully sought deposition.



Vasudha Sethi vs. Kiran V. Bhaskar

2022 SCC OnLine
SC 43

12 January, 2022

Autonomy

The Supreme Court of India held that the parent of a child cannot be compelled to relocate or travel from one country to another, as it would violate their right to privacy.

**Constitutional
Provision(s)**

Article 21

Case Type

Special Leave Petition (Criminal)

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice A.S. Oka on behalf of
Justice Ajay Rastogi and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“We may note here that a writ Court while dealing with the issue of habeas corpus cannot direct a parent to leave India and to go abroad with the child. If such orders are passed against the wishes of a parent, it will offend her/his right to privacy.”

Case Brief

In this case, the Supreme Court of India held that the parent of a child cannot be compelled to relocate or travel from one country to another, as it would violate their right to privacy.

The present case involved a dispute concerning the repatriation and custody of a minor child. The Appellant brought her child from the US to India for a medical procedure. The travel to India was authorised by both parents under terms set out in a travel consent form (“consent form”). After the medical procedure, the Appellant, contrary to the terms of the consent form, did not return to the US with her child. The child’s father, the Respondent, filed a petition at the High Court of Punjab and Haryana, where the Court directed that the child must be returned to the US. The High Court also provided the Appellant the option to accompany her child to the US.

The Appellant thereafter filed an appeal to the Supreme Court. The Supreme Court directed that the child was to return to the US, and that it would be in the welfare of the child to do so. It noted that when dealing with the custody of a minor, the well-being and welfare of a child would take precedence over the personal rights of the parent.

However, the Court also held that it could not dictate where a parent should reside, or direct a parent to leave India and travel abroad. It noted that this would be a violation of their autonomy, which is a part of their right to privacy. In this case, the Court held that the Appellant should be able to decide whether to travel to the US with her child.

Case Summary

Facts

In this case, the Supreme Court had to balance the welfare of a child with the right to privacy and autonomy of his mother in a case concerning child custody and repatriation. The Appellant and the Respondent were married in the state of New York in the United States of America. Their child was born in the country and was a US citizen.

The Appellant and her child travelled to India to undergo a medical procedure. The travel arrangements, including the duration of the stay and the date of return to the US were agreed upon between the Appellant and the Respondent in a consent form. A consent form is a mandatory travel document for allowing US citizen children to travel outside the country without being accompanied by both their parents.

After the medical procedure, the Appellant did not return to the US with her child on the date agreed to by the parties in the consent form. The Respondent thereafter filed a petition for habeas corpus seeking custody of the child before the High Court of Punjab and Haryana. The High Court allowed the petition, directed the custody of the child to the Respondent, and instructed the Appellant to return to the US along with the minor child.

The Appellant thereafter preferred an appeal before the Supreme Court. She argued that compelling her to return to the US would amount to an invasion of her fundamental right to autonomy protected under right to privacy under Article 21.

Issue

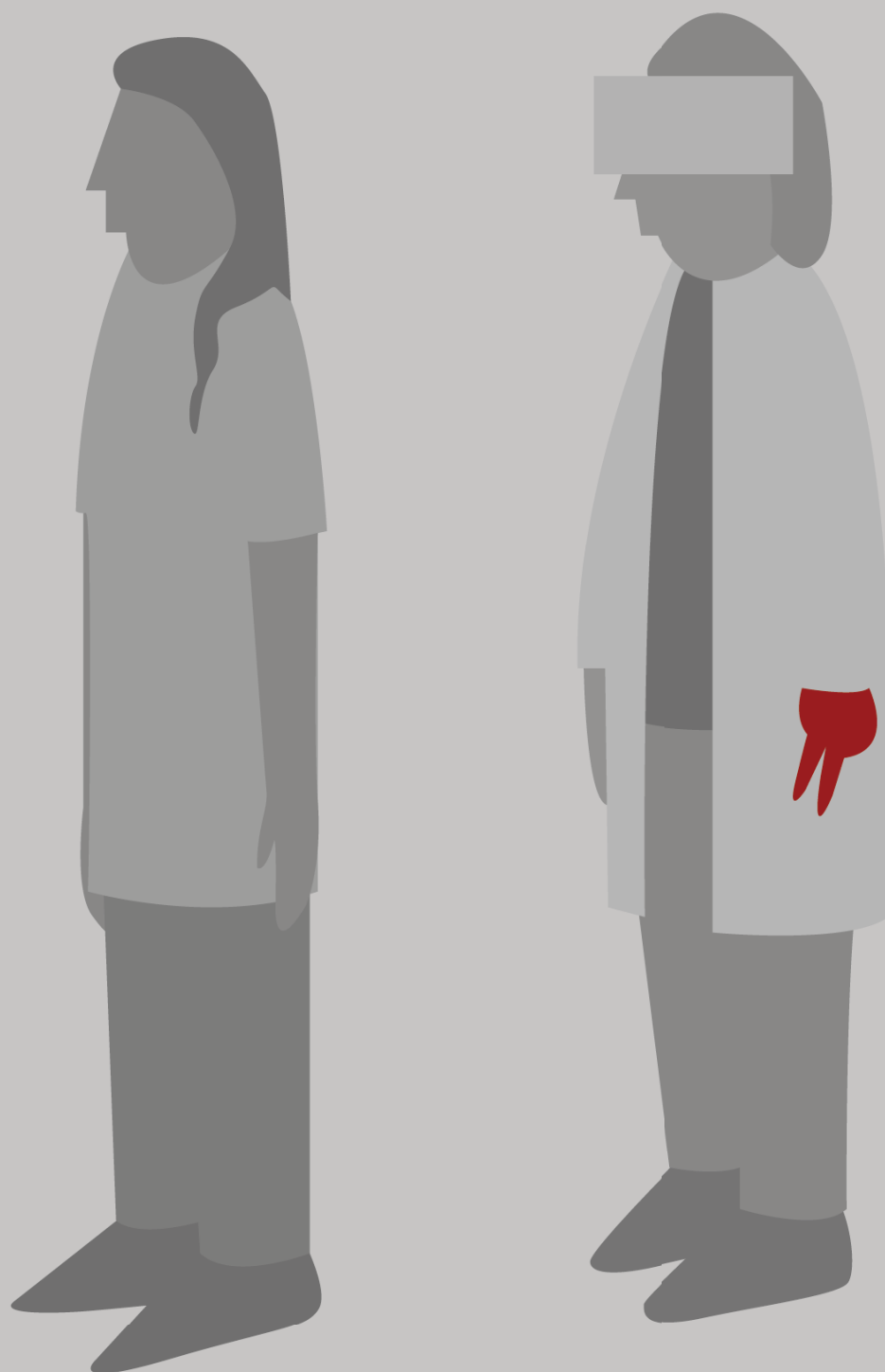
Whether compelling a parent to relocate to another country in a child custody case would amount to the violation of their right to privacy.

Decision

The Court held that in disputes concerning the custody and repatriation of a minor, the well-being and welfare of the child takes precedence over the personal rights of the parents. It noted that each case relating to the custody of a child must be decided on its own merits and that the paramount consideration would be the welfare of the child.

However, the Court separately delved into the issue of whether it could, in a case relating to the custody of a child, direct the parent to reside in or relocate from one place to another. The Court agreed with the Appellant's argument that an order compelling a parent to leave India and go abroad with the child would infringe on their autonomy protected under the right to privacy guaranteed under Article 21 of the Constitution. The Court held that the parent would ultimately have the discretion to make such a decision for themselves.

In the present case, the Court held that it was in the best interests of the child to return to the US. It assessed the order of the High Court and observed the order provided the Appellant the option to travel with her child. It reiterated that while the Appellant could not be forced to return to the US by an order of the Court, she would be given the option to do so. The Court also held that the Respondent would be able to take custody of the child if the Appellant was unwilling to go to the US.



Jacob Puliye vs. Union of India & Ors.

2022 SCC OnLine
SC 533

2 May, 2022

Bodily Integrity
Autonomy

The Supreme Court of India considered the issue of whether vaccine mandates violate the right to privacy and bodily autonomy under Article 21 of the Constitution.

**Constitutional
Provision(s)**

Article 21

Case Type

Civil Writ Petition

Case Status

Not Overruled

Bench Strength

2

1 opinion by

Justice L.N. Rao on behalf of
Justice B.R. Gavai and himself.

Number of
Opinion(s)

1/0

OPINIONS DISSENT

“Persons who are keen to not be vaccinated on account of personal beliefs or preferences, can avoid vaccination, without anyone physically compelling them to be vaccinated. However, if there is a likelihood of such individuals spreading the infection to other people or contributing to mutation of the virus or burdening of the public health infrastructure, thereby affecting communitarian health at large, protection of which is undoubtedly a legitimate State aim of paramount significance in this collective battle against the pandemic, the Government can regulate such public health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled.”

Case Brief

In this case, the Supreme Court of India considered the issue of whether vaccine mandates violate the right to privacy and bodily autonomy under Article 21 of the Constitution.

The petitioner, who filed a writ petition before the Supreme Court, was a member of the National Technical Advisory Group on Immunisation (“NTAGI”) and advised the Government of India on vaccines. He sought, *inter alia*, directions that vaccine mandates were unconstitutional and that the Government should release data for the trials undertaken for the COVID-19 vaccines administered in India.

The Court held that bodily integrity is protected under Article 21 of the Constitution and that no person can be forced to be vaccinated. It also held that the personal autonomy of an individual encompasses the right to refuse medical treatment, and recommended that all institutions review vaccine requirements in light of the evolution of the COVID-19 pandemic. However, the Court also noted that the protection of public health is a legitimate State aim and that the Government could impose reasonable and proportionate limitations, including mandatory vaccinations, on individuals in certain circumstances.

Case Summary

Facts

In this case, the Supreme Court considered whether vaccine mandates violated the right to privacy and bodily autonomy under Article 21 of the Constitution. The Petitioner argued that vaccine mandates in the absence of informed consent were unconstitutional and infringed rights protected by Article 21 of the Constitution.

The Petitioner stated in the Writ Petition that coercive vaccination interfered with the principles of bodily autonomy and informed self-determination of individuals, protected by Article 21 of the Constitution. The petitioner also argued that non-disclosure of data from clinical trials for COVID-19 vaccines resulted in a lack of informed consent, which meant that any vaccine mandates would be unconstitutional.

The petitioner filed an Interlocutory Application seeking directions restraining all private and public institutions from mandating vaccinations as a precondition for accessing servic-

es, or otherwise penalising non-vaccinations. He also sought the release of the segregated trial data (primary data) for each phase of the trials that were undertaken for the vaccines administered in India.

Issues

- A. Whether vaccine mandates violate Article 21 of the Constitution; and
- B. Whether segregated trial data from clinical trials for the COVID-19 vaccines should be published.

Decision

The Court unanimously held that though bodily integrity and personal autonomy are protected under Article 21 of the Constitution, the Government is entitled to limit individual rights in the interest of protecting public health. It also recommended that all authorities, including all private and public institutions, review existing vaccine mandates in light of reduced infection rates of COVID-19.

The Court also held that results of vaccine

trials were published in line with statutory requirements and were reviewed by expert bodies, and that primary clinical trial data did not need to be disclosed. Nevertheless, the Court reiterated that relevant data from ongoing and future clinical trials for COVID-19 vaccines would have to be made publicly available, subject to statutory requirements and the protection of the privacy of the subjects of the trial.

The Court stated that forceful vaccination would result in the violation of an individual's right to privacy, which is protected under Article 21 of the Constitution. It held that the question of violation of bodily integrity did not arise in the present case, since vaccination for COVID-19 was voluntary in India.

The Court also considered whether limitations placed by the Government on the personal autonomy of individuals could be justified on public health grounds pursuant to the COVID-19 pandemic. The Court relied on the three fold test laid down in *K.S. Puttaswamy vs. Union of India* ((2017) 10 SCC 1), of legality, necessity and proportionality. It held that any lawful restriction of an individual's bodily autonomy would have to meet this threefold test.

It also held that bodily integrity is protected under Article 21 and that no person could be forced to be vaccinated. The Court further held that personal autonomy encompasses the right to refuse medical treatment in the sphere of individual health.

However, the Court also noted that protecting public health was a legitimate aim of the State and that the State could limit individual rights as long as the restrictions conform to

the requirements set out above. It noted that the State may have to impose various measures to address the evolving pandemic and that specific limitations could be challenged before the courts to assess their compliance with *K.S. Puttaswamy*.

The Court held that in this case, vaccine mandates in light of changing transmission rates after the Delta variant of COVID-19 were disproportionate. It recommended that all institutions review vaccination requirements in light of the evolution of the pandemic. The Court reiterated that its recommendations to review COVID-19 vaccine mandates applied only to the facts of the case at hand. It emphasised that the executive was not prevented from undertaking suitable measures (including mandatory vaccination requirements) in the interest of public health in the future.



X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.

2022 SCC OnLine
SC 1321

29 September,
2022

Bodily Integrity
Autonomy

The Supreme Court of India held that unmarried women could obtain an abortion between 20 and 24 weeks of pregnancy due to a change in their marital circumstances.

**Constitutional
Provision(s)**

Articles 14 and 21

Case Type

Special Leave Petition (Civil)

Case Status

Not Overruled

Bench Strength

3

Number of
Opinion(s)

1/0

OPINIONS DISSENT

1 opinion by

Justice D.Y. Chandrachud on behalf of
Justice A.S. Bopanna,
Justice J.B. Pardiwala, and himself.

“It seems to us that to give Rule 3B a restrictive and narrow interpretation would render it perilously close to holding it unconstitutional, for it would deprive unmarried women of the right to access safe and legal abortions between twenty and twenty-four weeks if they face a change in their material circumstances, similar to married women.”

Case Brief

In this case, the Supreme Court of India held that unmarried women could obtain an abortion between 20 and 24 weeks of pregnancy due to a change in their marital circumstances.

A 25 year-old woman approached the Supreme Court on appeal from a decision of the High Court of Delhi, which rejected her plea to obtain an abortion in her 23rd week of pregnancy. She stated that while she had become pregnant out of a consensual relationship, her partner had refused to marry her. This, she argued, prompted a change in her marital status under Rule 3B of the MTP Rules, which allowed women to obtain an abortion between 20 and 24 weeks of pregnancy, based on listed criteria.

The Court held that the right to privacy included the right to reproductive autonomy, allowing pregnant women to choose to terminate their pregnancy due to change in their marital circumstances. In such a case interpreting Rule 3B of the MTP Rules narrowly in a way to exclude unmarried women would go against the constitutional mandate of the act. Consequently, the Court held that Rule 3B of the MTP Rules would have to be construed more broadly to provide unmarried women access to safe and legal abortions between 20-24 weeks of pregnancy.

Case Summary

Facts

This case dealt with the rights of unmarried women under the Medical Termination of Pregnancy Act, 2021 (“MTP Act”). This case considered section 3(2)(b) of the MTP Act which allows for the termination of a pregnancy between 20 and 24 weeks, and Rule 3B of the Medical Termination of Pregnancy Rules (“MTP Rules”), which lays down circumstances in which such an abortion may be obtained.

A 25 year-old woman approached the High Court of Delhi, seeking permission to terminate her pregnancy in the 23rd week. The appellant stated that the pregnancy had arisen out of a consensual relationship, however, there had been a change in her circumstances since her partner had refused to marry her. She did not want to carry the pregnancy to term since she was wary of the “*social stigma and harassment*” pertaining to unmarried single parents, especially women.

The appellant sought permission to terminate her pregnancy under Rule 3B of the MTP Rules which allows for the termination of a pregnancy between 20-24 weeks under the MTP Act. Rule 3B(c) of the MTP Rules allows for the termination of pregnancy due to “*change of marital status during the ongoing pregnancy (widowhood and divorce)*”. The High Court of Delhi held that this rule was only applicable to married women, and that an unmarried woman could not be considered under this provision. The court denied the procedure and the case was appealed to the Supreme Court.

Issue

Whether unmarried women were covered under Rule 3B of the MTP Rules which allows for the termination of a pregnancy between 20-24 weeks due to change in their marital status.

Decision

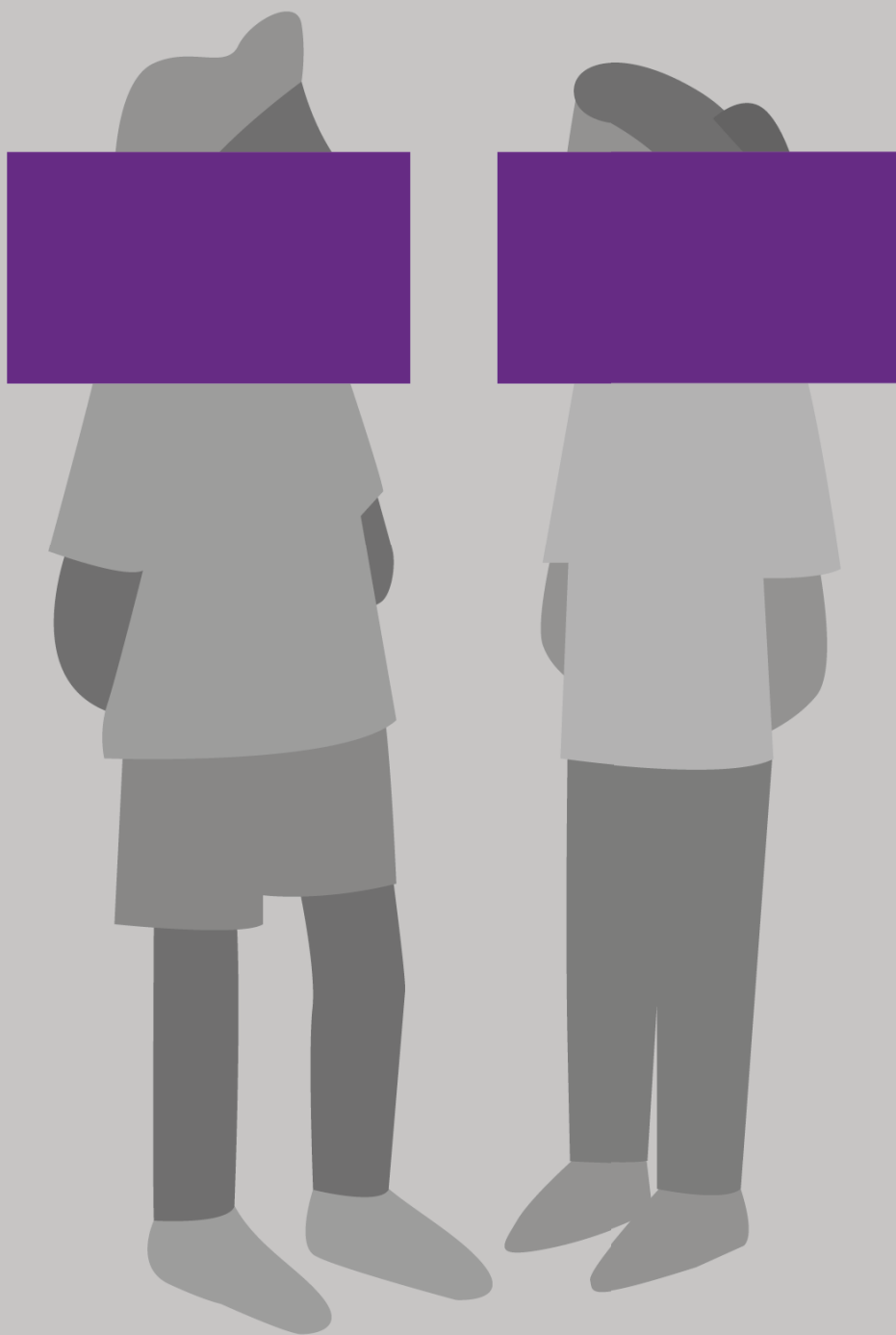
In an unanimous opinion, the Court held that unmarried women would be considered within the ambit of Rule 3B for the purpose of terminating a pregnancy due to change in marital circumstances, between 20-24 weeks. The Court allowed the appellant in this case to receive the termination procedure in accordance with the provisions of the MTP Act.

The Court held that the interpretation of the MTP Act would have to consider women’s right to reproductive autonomy, right to live a dignified life, right to equality and the right to privacy. It reiterated the decision in *K.S. Puttaswamy vs. Union of India ((2017) 10 SCC 1)* which held that the right to privacy encompassed the right to choose whether to bear a child or abort a pregnancy. The right to privacy includes decisional autonomy which is the ability to make decisions in respect of intimate relations. The Court recognised that irrespective of marital status, in the case of an unwanted pregnancy, the greater burden of the pregnancy would fall on the woman, affecting her mental and physical health. The Court held that the woman alone would have the right over her body and would be the ultimate decision-maker on the question of whether she wanted to undergo an abortion.

The Court remarked upon the necessity for laws to stay cognisant of changes in social and familial structures. The Court considered

that in 2021 the amended MTP Act replaced the term “*married woman and her husband*” with “*any woman and her partner*” in section 3② of the MTP Act. It further stated that the statement of objects and reasons of the new MTP Act were primarily concerned with increasing access to safe and legal abortions to reduce maternal mortality and morbidity. The increase in the permissible gestation limits for termination of pregnancy for the grounds under Rule 3B was a recognition of the fact that the change in marital circumstances would often result in a change of material circumstances for women.

Finally, the Court applied the rules of interpretation of statutes and held that a statute must avoid being narrowly construed in a way to make the law unconstitutional. Consequently, the Court concluded that section 3②(b) of the MTP Act, read with Rule 3B would have to be construed to advance the constitutional mandate of providing both married and unmarried women the right to access safe and legal abortions between 20 and 24 weeks of pregnancy.



Aishat Shifa vs. The State of Karnataka & Ors.

(2023) 2 SCC 1

13 October, 2019

Dignity
Autonomy

The Supreme Court examined the constitutionality of a government order which prohibited female Muslim students from wearing a headscarf or hijab inside schools and colleges.

Constitutional
Provision(s)

Articles 14, 19 (1) (a), 21 and 25 (1)

Case Type

Civil Appeal

Case Status

Under Review*

* The Court delivered a split verdict. The case has now been referred to a larger bench of the Supreme Court.

Bench Strength

2

1 opinion by

Justice Hemant Gupta

Number of
Opinion(s)

2

1 opinion by

Justice Sudhanshu Dhulia

SPLIT VERDICT

“It is necessary to have discipline in schools. But discipline not at the cost of freedom, not at the cost of dignity. Asking a pre university schoolgirl to take off her hijab at her school gate, is an invasion on her privacy and dignity. It is clearly violative of the Fundamental Right given to her Under Article 19(1)(a) and 21 of the Constitution of India. This right to her dignity and her privacy she carries in her person, even inside her school gate or when she is in her classroom. It is still her Fundamental Right, not a “derivative right” as has been described.”

Case Brief

In this case, the Supreme Court examined the constitutionality of a government order which prohibited female Muslim students from wearing a headscarf or hijab inside schools and colleges.

The Appellant was aggrieved by a government order issued by the Education Department of Karnataka (“Government Order”) which mandated educational institutions to abide by the applicable official uniform in order to ensure ‘unity, equality and public order’. The Order stated that the wearing of religious symbols, including headscarves, posed an obstacle to unity and uniformity in educational institutions. Consequently, several educational institutions denied entry to female Muslim students unless they removed their hijab prior to entering the school/college premises.

The division bench of the Supreme Court delivered a split verdict. Justice Hemant Gupta upheld the validity of the Order and opined that it reinforced the fundamental right to equality under Article 14 of the Constitution. He reasoned that the Order met the constitutional requirements to impose a restriction on the freedom of expression and right to privacy of the students. Conversely, Justice Sudhanshu Dhulia held that the Government Order was unconstitutional. Justice Dhulia reasoned that a student's rights to dignity, privacy, and freedom of expression were inalienable rights, and they could not be restricted on the basis of maintaining discipline and uniformity.

Case Summary

Facts

The primary issue in this case was whether the State can impose restrictions on the fundamental rights of students, including the right to dignity, privacy and freedom of expression, on the grounds of ensuring 'uniformity and equality'. The Appellant approached the Court to determine the constitutionality of the Government Order issued under the Karnataka Education Act, 1983. The Order stated that wearing religious symbols, including headscarves, posed an obstacle to unity and uniformity amongst students. Moreover, it claimed that the prohibition on wearing headscarves in schools and colleges was not violative of Article 25 of the Constitution.

Pursuant to the Government Order, several educational institutions denied entry to female Muslim students unless they removed their hijab prior to entering the school/college premises. Two aggrieved pre-university college students, along with other interested parties, filed appropriate writ petitions before the High Court of Karnataka, seeking reme-

dies against the Government Order. The High Court upheld the constitutional validity of the Order and the restrictions placed on the wearing of headscarves in schools/colleges.

The High Court held that the aspects of the students' rights (including the freedom of expression and the right to privacy) that were curtailed were not the substantive rights guaranteed under Article 19①(a) and Article 21 of the Constitution. Since the curtailed rights were derivative and ancillary to the rights guaranteed under Article 19①(a) and Article 21 of the Constitution, the Government Order did not violate any fundamental rights.

Aggrieved by this decision, the Appellant preferred an appeal before the Supreme Court.

Issue

Whether prescription of school uniform is violative of the students' fundamental rights inter alia, the right to freedom of expression under Article 19①(a) and the right to privacy under Article 21 of the Constitution.

Decision

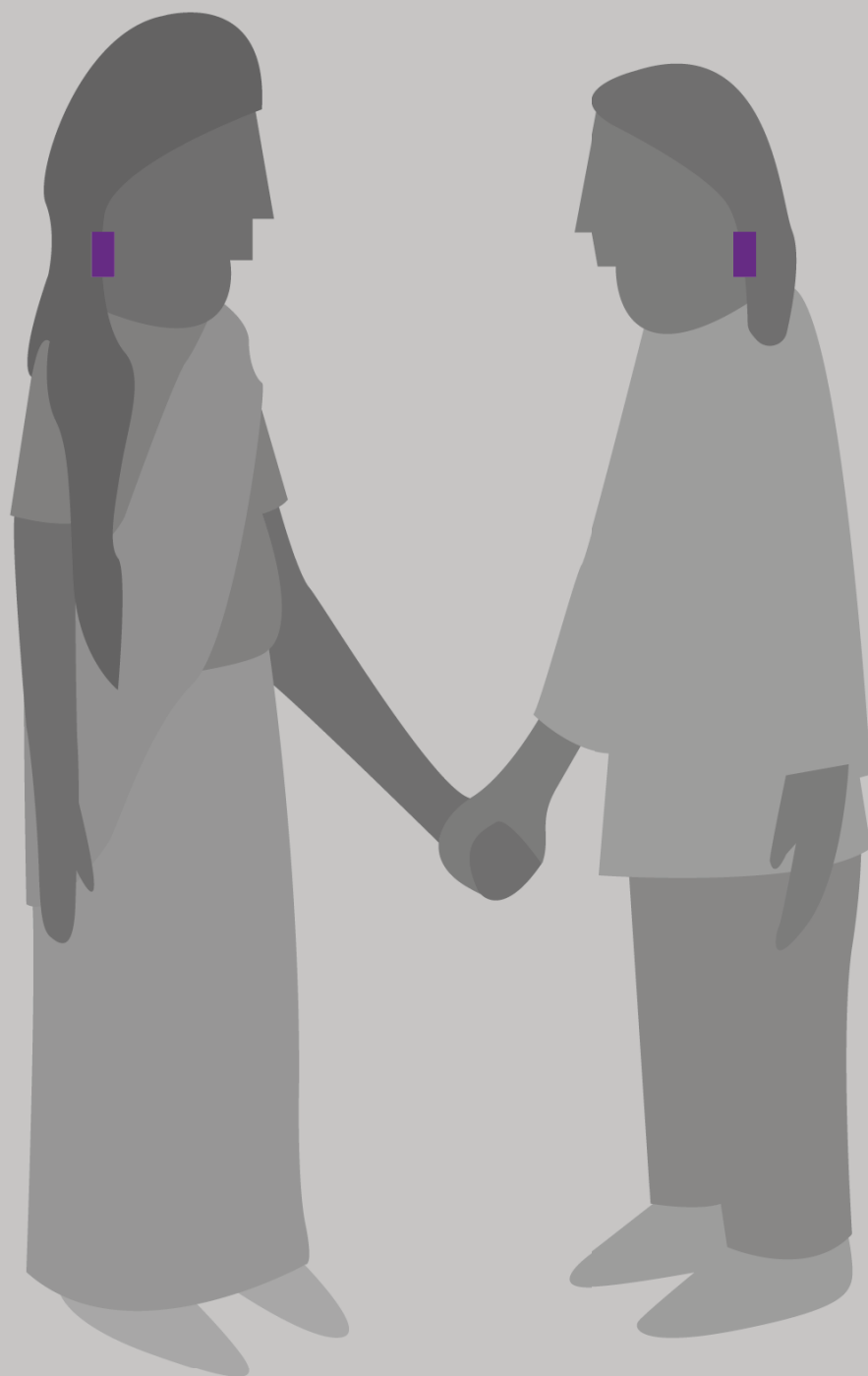
The two judges of the division bench of the Supreme Court presiding over this case, namely, Justice Hemant Gupta and Justice Sudhanshu Dhulia, delivered a split verdict. Hence, the Court sought for the matter to be placed before a larger bench of the Court which may be constituted by the Chief Justice of India.

Justice Gupta, in his opinion, concurred with the judgement of the High Court, and upheld the constitutional validity of the Government Order. Justice Gupta posited that the State did not restrict the students from exercising the right to privacy and freedom of expression, since it has only regulated the exercising of these rights during school hours on working days. Furthermore, Justice Gupta opined that the Government Order was in-line with the right to equality enshrined under Article 14 of the Constitution, as the Government Order intended to ensure uniformity, fraternity, and equality amongst the students. On these grounds, he found the Government Order to be constitutionally tenable, and not violative of the right to freedom of expression and the right to privacy guaranteed under Articles 19①(a) and 21 of the Constitution.

On the other hand, Justice Dhulia found the Government Order to be violative of Article 19①(a) and Article 21 of the Constitution. Justice Dhulia's analysis was predicated on the inalienable nature of an individual's right to privacy and dignity guaranteed under Article 21 of the Constitution. Justice Dhulia emphasised that a girl child's right to wear a hijab extended both within and beyond the confines of her house, and this right was inextricably tied to her privacy and dignity. Therefore, the Government Order, which required her to re-

move her hijab in order to enter her school, was an invasion of her privacy and dignity.

Lastly, Justice Dhulia expressly disagreed with the analysis provided by the High Court in the original petition. He stated that it was incorrect to classify the Government Order as merely regulating the exercise of the right to privacy and freedom of expression within schools. Per Justice Dhulia, it was crucial for the High Court to first examine whether the Government Order withstood the established constitutional test of reasonableness in order to find it constitutionally tenable. Since the State did not provide any valid or reasonable justifications for restricting the fundamental rights to freedom of expression and privacy of the students, Justice Dhulia found the Government Order to be unconstitutional.



Kaushal Kishore vs. State of Uttar Pradesh & Ors.

(2023) 4 SCC 1

3 January, 2023

Dignity

The Supreme Court held that the right to freedom of speech of a public functionary could not be restricted in order to safeguard fundamental rights of another individual. The Court also held that the State has a duty to protect the right to life and personal liberty even against non-State actors.

**Constitutional
Provision(s)**

Articles 19 and 21

Case Type

Criminal Writ Petition

Case Status

Not Overruled

Bench Strength

5

Number of
Opinion(s)

1/1

OPINIONS DISSENT

1 opinion by

Justice V. Ramasubramanian on behalf of
Justice S. Abdul Nazeer,
Justice B.R. Gavai,
Justice A.S. Bopanna and himself.

1 dissenting opinion by

Justice B.V. Nagarathna

“Take for instance a case where a Minister makes a statement that women are unfit to be employed in a particular avocation. It may reflect his insensitivity to gender equality and also may expose his low constitutional morality. The fact that due to his insensitivity or lack of understanding or low constitutional morality, he speaks a language that has the potential to demean the constitutional rights of women, cannot be a ground for action in Constitutional tort. Needless to say that no one can either be taxed or penalised for holding an opinion which is not in conformity with the constitutional values. It is only when his opinion gets translated into action and such action results in injury or harm or loss that an action in tort will lie.”

Case Brief

In this case, the Supreme Court of India (“Court”) held that the right to freedom of speech of a public functionary could not be restricted in order to safeguard fundamental rights of another individual. The Court also held that the State has a duty to protect the right to life and personal liberty even against non-state actors.

This case stemmed from two instances of Ministers making controversial remarks against victims of crime. The victims claimed that these remarks violated their right to life and personal liberty under Article 21.

In a 4:1 decision, the Court held that the right to freedom of speech and expression could only be curtailed by the list of reasonable restrictions laid down under Article 19② of the Constitution. The Court held that this was an exhaustive list, and that new restrictions could not be imposed in addition to these grounds. This case also dealt with the horizontal application of rights across both State and non-State actors. The Court held that ‘right to life’ has evolved over past decades to include human dignity, the right to privacy, and the right to be forgotten. Considering that non-State actors perform a number of key roles in all spheres of life, the State had a positive duty to extend protection against violation of right to life against these entities.

Case Summary

Facts

In this Case, the Court clubbed together two cases relating to derogatory statements made by State Ministers of Uttar Pradesh and Kerala in two unrelated instances. The Case involved issues relating to the conflict between the right to freedom of speech of the Ministers and the right to dignity of the Petitioners. A Minister in the Government of Uttar Pradesh (“UP”) made derogatory comments against two victims of sexual assault. He alleged that the sexual assault of a woman and her minor child was a ‘political controversy’ against the government. In the second instance, a minister in the Government of Kerala issued statements that were ‘highly derogatory to women’. Both the petitions alleged the violation of the right to dignity by the public functionaries which is protected under Article 21 of the Constitution.

The two petitions were placed before the three-judge bench of the Supreme Court. The two petitions raised similar issues and involved substantial legal questions relating to the interpretation of the Constitution. Therefore, the matter was referred to the five-judge bench of the Court.

Issues

- A. Whether the right to freedom of speech protected under Article 19 ① (a) can be curtailed to protect the right to dignity of an individual guaranteed under Article 21; and
- B. Whether the State has a positive duty to protect the rights of an individual under Article 21 against Non-State actors.

Decision

In this case, the Court, in a 4:1 verdict held that the right to freedom of speech and expression of an individual could not be restricted for violating the dignity of another individual. The Court gave two opinions, a majority opinion and another opinion by Justice BV Nagarathna which was partly concurring and partly dissenting.

The majority judgment of the Court held that in cases where two or more fundamental rights are in conflict, the Court must either strike a balance or prioritise one over the other. The Court considered that the grounds for restricting the freedom of speech and expression were listed under Article 19② of the Constitution. They held that this was an exhaustive list and that no new grounds could be added to the list to impose further restrictions. Therefore, they held that the right to freedom of speech of a public functionary could not be curtailed in order to protect the right to dignity of an individual.

The majority judgement also considered the issue of the horizontal application of fundamental rights against both State and non-state actors. The Court explained that the understanding of terms ‘right to life’ and ‘personal liberty’ under Article 21 had evolved over past decades to include the right to live with dignity, right to privacy and right to be forgotten. With science and technology intruding into all spheres of life, it has become possible for non-State actors to affect these rights. The Court held that there was an affirmative duty of the State to protect the life and personal liberty of citizens from private individuals as well.

Justice Nagarathna, in a partly dissenting

judgement, opined that dignity is a quintessential and basic constituent of the rights guaranteed under Article 21 of the Constitution. Therefore, Article 19①(a) of the Constitution cannot be cited as a reason for curtailing the rights under Article 21. She held that since the speech in the given case was disparaging, derogatory and resembled hate speech, it could not be protected under Article 19①(a). She held that facts of this case did not require balancing two fundamental rights, but rather dealt with an abuse of freedom of speech used to attack the fundamental rights of an individual.



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