

The Fundamental Right to Privacy

A Visual Guide



Research and content by **Amber Sinha**
Design and conceptualization by **Pooja Saxena**

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PRIVACY is the ability of an individual or group to seclude themselves, or information about themselves, and thereby **express themselves selectively.**

1947

CONSTITUENT ASSEMBLY DEBATES

The **Fundamental Rights Sub-Committee** deliberated on the issue of privacy. K M Munshi, Harman Singh and Dr. Ambedkar supported a right to privacy of persons, houses, papers and effects:

“ *The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause.*

DR. AMBEDKAR

Others like BN Rau and Alladi Krishnawamy Aiyar opposed it on grounds that it would impact the investigatory powers of the police:

“ *If this means that there is to be no search without a court’s warrant, it may seriously affect the powers of investigation of the police.*

B N RAU

It was eventually **decided to remove the right to privacy** from the chapter.

The story of privacy in independent India

In the early years after independence, the courts took a very textual view of the fundamental rights, refusing to read in a right to privacy. The recognition began with the dissenting judgment in Kharak Singh where Judge Subba Rao declared it an essential ingredient of liberty.

1948

ADOPTION OF UNIVERSAL DECLARATION OF HUMAN RIGHTS

“ *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

ARTICLE 12, UDHR

1954

MP SHARMA V. SATISH CHANDRA

The court refused to recognise a right against search and seizure of documents, since the constitution-makers had not provided for it.

1963

KHARAK SINGH V. STATE OF UP

The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right

In 1970, in the *RC Cooper* case, the idea that fundamental rights are water-tight compartments was discarded by the Supreme Court, agreeing with the dissenting judgment in *Kharak Singh*. It was later affirmed by the Supreme Court that the *RC Cooper* decision clearly agrees with the dissenting judgment in *Kharak Singh* and overrules the majority decision.

1975

GOVIND V. STATE OF MADHYA PRADESH

The right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing, and is subject to restriction only on the basis of compelling public interest.

RM MALKANI V. STATE OF MAHARASHTRA

The court recognised the need to protect the privacy of an innocent citizen. However, it was unwilling to extend such protection to the guilty.

1973

MALAK SINGH V. STATE OF PUNJAB AND HARYANA

The court held that surveillance has to be targeted and limited to repeat offenders or serious criminals

1982

T SAREETHA V. VENKATA SUBBAIAH

The Andhra Pradesh High Court held that a woman's choice to not cohabit with her husband, not have marital intercourse and not to bear children were a part of the right to privacy and can be infringed only upon a superior state interest.

1983

In *T. Sareetha*, the Andhra Pradesh High Court held that privacy is not a unitary concept but is multidimensional, and includes a woman's choice whether or not to live with her husband, have marital intercourse and bear children. Unfortunately, a year later, the Supreme Court overruled this decision in *Saroj Rani*.

1984

SAROJ RANI V. SUDARSHAN KUMAR CHADHA

The decision in *Sareetha* was overturned. The law permitting restitution of conjugal rights was considered to serve a social purpose (prevention of failing marriages) and was held valid.

1994

R. RAJAGOPAL V. STATE OF TAMIL NADU

The right to privacy is the right to be let alone and was also held enforceable against private actors. This is inconsistent with the jurisprudence on most fundamental rights which are only enforceable against the state.

1998

MR. 'X' V. HOSPITAL 'Z'

This is also case of application of right to privacy against private actors, and it was held that it must be balanced against public interest.

1996

PUCL V. UNION OF INDIA

The court provided interim procedural safeguards on telephone tapping and held that proper procedural safeguards must be followed.

2003

SHARDA V. DHARMPAL

The court held mental health treatment as disclosure of one most private feelings and as a part of the right to privacy, and compulsory medical examination can only be done in case of countervailing public interest.

2005

DISTRICT REGISTRAR AND COLLECTOR OF HYDERBAD V. CANARA BANK

Right to privacy concerned persons and not places. The documents of the customer must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer's house and have been shared voluntarily with another party.

R METRANI V COMMISSIONER OF INCOME TAX

Search and seizure provisions under the Income Tax Act were a 'serious invasion into the privacy of a citizen' and must be read strictly and narrowly.

2007

DIRECTORATE OF REVENUE V. MD. NISAR HOLIA

Right to privacy concerned persons and not places. A hotel is a public places but a room occupied by a person has the same protection expected from a private space.

2010

SUCHITA SRIVASTAVA V. CHANDIGARGH ADMINISTRATION

The court recognized the reproductive rights of a mentally retarded woman and includes both the right to procreate and the right not to do so.

SELVI V. STATE OF KARNATAKA

The compulsory administration of techniques such as narco analysis, polygraph examination and brain-mapping is against the right to privacy and infringes upon one's personal space.

NAZ FOUNDATION V. GOVERNMENT OF NCT DELHI

The Delhi High Court held that the sphere of privacy enables an individual to attain fulfillment, grow in self-esteem and build relationships of his or her choice and sexual orientation. Unfortunately, this decision was overruled by the Supreme Court. A curative petition to review this judgment is pending.

NALSA V. UNION OF INDIA

Everyone, regardless of sexual orientation or gender identity, is entitled to enjoy protection from unlawful attacks on their honour and reputation, which includes the choice to disclose or not to disclose information relating to their sexual orientation or gender identity.

2017

PUTTASWAMY V. UNION OF INDIA

The nine judge bench constituted in response to the claim that there was no right to privacy ruled unanimously that we have a FUNDAMENTAL RIGHT TO PRIVACY

JUSTICE SRIKRISHNA COMMITTEE

A committee of experts was constituted by the Ministry of Electronics and Informational technology led by Justice Srikrishna to provide recommendations for data protection law. A white paper on various issue related to data protection and privacy was released for comments by the committee.

2008

ANUJ GARG V. HOTEL ASSOCIATION OF INDIA

The right to privacy includes the autonomy to choose one's employment and any law restricting it should be subject to strict scrutiny.

HINSA VIRODHAK SANGH V. MIRZAPUR MOTI KURESH JAMAT

What an individual chooses to eat is their personal affair and decisional choice and part of their right to privacy.

IT ACT (REASONABLE SECURITY) RULES

Data security rules were notified under the Information technology Act. These rules provided limited protection of electronic personal data but has suffered from non-compliance.

THE RIGHT TO PRIVACY BILL

This was the first draft legislation by the government which envisaged recognising a statutory Right to Privacy.

2011

2012

REPORT OF THE GROUP OF EXPERTS ON PRIVACY

This report created the committee led by Justice A P Shah formulated nine privacy principles which should inform the privacy legislation in India.

2014

PERSONAL DATA PROTECTION BILL

A new draft privacy legislation drafted by the Department of Personnel and Training was leaked in 2014.

2015

PUTTASWAMY V. UNION OF INDIA

The Aadhaar project was challenged on a number of grounds including the violation of the right to privacy. In 2015, the Attorney General, Mukul Rohatgi argued that there was no fundamental right to privacy. His reliance was on two earlier judgments in MP Sharma v Satish Chandra (1954) and Kharak Singh v State of Uttar Pradesh (1962): decided by eight- and six-judge benches respectively which denied the existence of a right to privacy.

ABC V. THE STATE

It was held that compelling a single mother to reveal the name of her child's father is a violation of her right to privacy.

Puttaswamy v. Union of India

Why was a nine-judge bench required?

In 2012 a writ petition was filed by Justice K.S. Puttaswamy in the Supreme Court of India challenging the policy of the government in making an Aadhaar card for every person in India and its later plans to link various government benefit schemes to the same. Over time a number of other cases were been filed in the Supreme Court challenging the Aadhaar project and were linked together with the Puttaswamy petition, to be read together.

In July 2015, Mukul Rohatgi questioned the basis of the challenge to the Aadhaar project. He argued that there was no fundamental right to privacy under the Indian Constitution.

He relied on judgments in *MP Sharma vs Satish Chandra* (decided by an **eight-judge bench** in 1954) and *Kharak Singh vs State of UP* (decided by a **six-judge bench** in 1962) which contain statements denying the right to privacy. As all subsequent judgments which upheld the right to privacy were given by smaller benches, he argued that they were incorrect and the older two judgments prevailed over them, until a nine judge bench could overrule them.

Judges, while deciding cases, must pay heed the decisions in the past judicial decisions.

The doctrine of precedent requires that the decisions made by judges in higher courts (or those by larger benches) act as a precedent, so the decisions made by lower courts (or those by smaller benches) in future follow the earlier decision made in the higher courts.

However, this doctrine is not a mechanical formula. A judgment, often running into hundreds of pages, has *ratio decidendi* (the rationale for the decision) and *obiter dicta* (incidental remarks). It is the ratio decidendi that applies to future cases, and must be followed, in keeping with the evolving constitutional philosophy.

Unfortunately, there was not enough attention given to the fact whether the reference to privacy in MP Sharma was a part of the ratio decidendi or simply a stray statement. Equally, while referring the question to a larger bench, the court did not examine if the majority judgment in Kharak Singh was still binding law.

The hearings before the nine-judge constitutional bench began in July 2017 and went on for over two weeks. Next, we look into the arguments made before the court.

2009

JANUARY

Constitution of the **Unique Identity Authority of India** (UIDAI) under the Planning Commission.

2012

NOVEMBER

Justice K.S. Puttaswamy, former Karnataka High Court Judge, **files a petition before the Supreme Court challenging the Aadhaar project** contending, among other things, that it violates the fundamental right to privacy.

2013

SEPTEMBER

Supreme Court in an interim order states that no person should suffer for not having an Aadhaar card.

2014

MARCH

Supreme Court passes an order in the matter of UIDAI v. CBI that Aadhaar shall not be made mandatory availing any benefits and prohibits the UIDAI from sharing any information in their database without the data subject's consent.

2015

JULY

Mukul Rohatgi, the Attorney General of India, argues that privacy is not a fundamental right quoting an eight judge bench of 1954, and six judge bench of 1962. He argued that all subsequent judgments upholding privacy were by smaller benches and thus, incorrect.

AUGUST

Three-judge bench of Supreme Court restricts the use of Aadhaar to the LPG and PDS schemes, while holding that no one would be denied the benefits due to lack of an Aadhaar number. It also refers the question of right to privacy as a fundamental right to citizens of India to a Constitutional Bench.

2016

MARCH

The Aadhaar Act is passed a money bill by the Parliament.

2017

JULY

A five-judge Bench of the Supreme Court decides that a nine-judge Bench of the Supreme Court should first decide the question whether privacy is a fundamental right.

JULY

A nine judge bench is constituted to hear arguments about the status of privacy as a fundamental right.

AUGUST

The nine-judge bench holds unanimously that privacy is a fundamental right under the Constitution.

Puttaswamy v. Union of India

Do the *ratio decidendi* in MP Sharma and Kharak Singh mean that there is no fundamental right to privacy?

PETITIONERS

The key questions that the court had to decide in the two cases are not concerned with the right to privacy

MP SHARMA

ARTICLE 20(3)

In MP Sharma, the key questions was about search warrants to obtain evidence being infringing of right against self incrimination under Article 20(3)

KHARAK SINGH

ARTICLE 21

In Kharak Singh, a regulation was struck down on the basis of intrusion into an individual's personal dwelling being violative of personal liberty under Article 21

In both these judgements, there are stray statements about privacy. It is the legal basis of the decisions which has value as a precedent in a case, and not stray statements irrelevant to rationale followed for the decision.

RESPONDENTS

The findings on right to privacy in MP Sharma and Kharak Singh were correctly decided and have binding force as precedent

The refusal to recognize right to privacy into Article 20 (3) is directly relevant to the decision in MP Sharma

MP SHARMA

ARTICLE 20(3)

The basis for not reading down provisions dealing with shadowing and reporting of movements of the suspects in Kharak Singh was the denial of a constitutional rights to privacy

KHARAK SINGH

ARTICLE 21

Therefore, in both the above cases, the court's decision to not recognize the right to privacy was relevant, and had binding force

Puttaswamy v. Union of India

Do MP Sharma and Kharak Singh's denial of right to privacy hold after the Maneka Gandhi decision?

PETITIONERS

Right to privacy is not to be found in one provision but arises out of the entire structure of the fundamental rights

MP SHARMA

KHARAK SINGH

MP Sharma and Kharak Singh took the earlier view that fundamental rights were mutually exclusive and to be read in isolation

BANK NATIONALIZATION

MANEKA GANDHI

ARTICLE 14

ARTICLE 19

ARTICLE 21

This view was set aside by the Bank Nationalisation case (1970) and Maneka Gandhi (1978) which held that Article 14 (equality), 19 (fundamental freedoms) and 21 (life and personal liberty) were interconnected

There is no need to read privacy specifically in any one article, as there is no one to one correspondence between privacy and any one right but it is found in the totality of the fundamental rights

RESPONDENTS

Fundamental rights must be strictly and textually interpreted

The Constituent Assembly Debates can be relied upon to interpret the Constitution; the right to privacy of correspondence, privacy of home, privacy against search and seizure were included in a draft on fundamental rights; however, after discussion and dissent notes, these rights were intentionally dropped, providing evidence of the framers of Constitution's intent to exclude privacy as fundamental right

S.R. CHAUDHARY V. STATE OF PUNJAB

CONSTITUENT ASSEMBLY DEBATES

Subsequent judgments holding privacy as a fundamental right are based on an erroneous reading of Govind v. State of MP. In Govind itself, the court did not identify a fundamental right to privacy, but that a claimed right must be implicit in the concept of ordered liberty

GOVIND V. STATE OF MP

Therefore, the entire body of jurisprudence holding privacy as a fundamental right is wrong

Puttaswamy v. Union of India

What are the dimensions of privacy and how do they impact it as a right?

PETITIONERS

The fundamental right to privacy has multiple dimensions that must be adjudicated on a case by case basis

GOVIND V. STATE OF MP

Right to privacy includes spatial privacy, informational privacy, decisional autonomy, and full development of personality

REGINA V. SECRETARY OF STATE (CJEU)

Right to privacy includes informational self determination and must include control over one's data; the mere sharing of personal information does not disentitle a person of privacy, as privacy resides in dignity, and not in secrecy

Privacy is hard to strictly define not because it is an ambiguous concept but because its contours are in a constant state of evolution, therefore, the contours of privacy must be developed on a case by case basis; this, in no way, renders it untenable as a fundamental right

RESPONDENTS

Privacy is an ambiguous concept and not a homogenous right; it can only be recognized as a statutory and common law right

Privacy consists of varied and independent values; these different aspects do not automatically qualify as fundamental rights; it is impossible to formulate a high-level principle demarcating the right to privacy

WAINWRIGHT V. HOME OFFICE (UK)

It has been held that fundamental rights under Articles 14 and 21 cannot be waived; therefore, if privacy as a whole is held as a fundamental right, it would be impossible to waive it; this would make it impossible for the state to obtain any information about a person including identification, residential address, other details for provision of services

ARTICLE 14

ARTICLE 21

Some aspects of privacy may be fundamental rights, other may be common law rights; different facets of the right to privacy cannot be bunched together and declared a right; therefore, it would be erroneous to recognize a general fundamental right to privacy.

Puttaswamy v. Union of India

What are the sources of a fundamental right to privacy?

PETITIONERS

Privacy is presupposed by the Preamble and Part III of the Constitution; further it is a natural right and international human right

KESAVANANDA BHARATI

The Constitution should be read and interpreted in the light of the Preamble; the Preamble mentions the words liberty and dignity and privacy is an essential ingredient for both

IR COELHO V. STATE OF TAMIL NADU

It is a fallacy to regard fundamental rights as gift from state to citizens; natural rights are not conferred, but only recognized by the Constitutions; Part III of the Constitution does not confer fundamental rights but confirms their existence and gives them protection; Privacy is an inviolable part of personhood and a natural right

VISHAKHA V. STATE OF RAJASTHAN

ARTICLE 17 (ICCPR)

BACHAN SINGH V. STATE OF PUNJAB

There is a detailed international framework for the protection of individual privacy rights; in the absence of domestic law, international law can be applied and international human rights standards can be read into fundamental rights

RESPONDENTS

The Constitution confers fundamental rights, and only Parliament has the power to modify them

International obligations should not be used to read new rights and obligations, which did not exist beforehand in domestic law

MANLONE V. METROPOLITAN POLICE COMMISSION (UK)

In some case, an violation of privacy could lead to an infringement of other recognized rights such as liberty; privacy should be protected as a fundamental right only to the extent of such infringement; liberty comprises of many rights, some of which may overlap with privacy but this does not mean privacy is a fundamental right

Any additional rights can only be introduced by the Parliament and not interpreted by the courts; privacy is subjective and therefore, based on context, the legislature is better positioned to protect it; in the absence of legislation, it can only be protected as a common law right, not as a fundamental right

On August 24, 2017, a nine-judge bench of the Supreme Court of India ruled unanimously that citizens of the country have a **fundamental right to privacy**

Privacy of space

protects private spaces or zones where one has a reasonable expectation of privacy from outside interference or intrusion.

The right to privacy initially focused on protecting “private” spaces. These included spaces such as the home, from state interference. This drew from the belief that “a person’s home is their castle”. However, this idea of privacy is not limited simply to a person’s home. Privacy rests in ‘person’ and not in ‘places’. Therefore, even outside one’s home, other spaces could also acquire the character of private spaces, and even public spaces can afford a degree of privacy.



SEARCH AND SEIZURE

Privacy protects us from the state’s power to enter our premises and conduct search of our properties and persons, and seizure of documents etc. The right to privacy requires that such actions must always be backed by a just and fair law, with safeguards and protections for individuals.



PUBLIC PLACES

Privacy rests in persons, and not places. So, the protection of privacy exists outside one’s home also. All dwelling places like hostels, guest houses, hotels come with privacy protections similar to what one expects in their home.



SURVEILLANCE

Many actions, even while carried out in public spaces, are not meant for public consumption but are private. It is not ok to eavesdrop on people’s conversation even when they are in public spaces. Similarly, phone conversations had in public spaces, or on a public telephone is a private communication and tapping of public phones is an infringement on our privacy.

“If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from that which she expects in the sanctity of the home. Yet if dignity is the underlying feature, the basis of recognising the right to privacy is not denuded in public spaces... Privacy attaches to the person and not to the place where it is associated.”

JUSTICE CHANDRACHUD, p28

Privacy of body

protects bodily integrity, and acts against physical and psychological intrusions into our bodies and bodily spaces.

Privacy of body is fundamental to our understanding of our bodies as private. The understanding of where bodily privacy extends is contextual and our boundaries may start at our skin, or the point where we can feel breath, or even till the other side of the room. It is the point where we feel touched and physically affected by another person. Similarly, intrusions into our psychological space without consent and control violate our bodily privacy.



BIOMETRICS

Biometric data such as a photograph, fingerprints etc. contains information acquired from individuals, which can be used to identify them. Unlike other means of authentication, biometrics can be captured by high resolution cameras and used for covert authentication.



REPRODUCTIVE RIGHTS

Bodily privacy includes the right of individuals to make reproductive choices which include a woman's right to have or not have children. There should be no restriction 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.



MEDICAL EXAMINATIONS

Privacy requires that no individual can be coerced to undergo a medical examination, which are by nature, intrusive. The use of tools such as narco analysis and brain mapping to invade into an individual's mind without their consent or control violates their privacy.

“The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop.”

JUSTICE CHANDRACHUD, p242

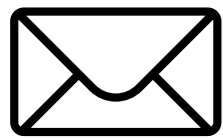
“The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.”

JUSTICE CHANDRACHUD, p244

Privacy of information

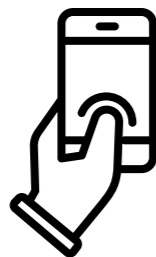
is our right to meaningful control over the sharing & use of information about ourselves without coercion or compulsion.

In the age of Big Data, the collection and analysis of personal data has tremendous economic value. However, these economic interests should not be pursued at the expense of personal privacy. Similarly, modern technology provide excessive opportunities to governments to monitor and surveil the lives of citizens. Informed Consent and meaningful choice while sharing information about ourselves is central to the idea of informational privacy.



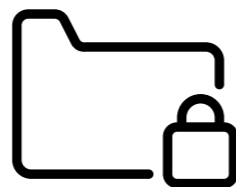
PRIVATE COMMUNICATION

Communications including phone call, emails, letters, text messages between two or more individuals are private. Privacy means that it should be protected against both surveillance by the government, and harvesting by private sector parties for financial gain.



PERSONAL DATA

Our use of electronic services constantly generates personal data, which have given rise to data driven business models, where it is used to profile individuals and make decisions about them. Privacy requires that a data protection law is created to regulate use of data and protect individuals.



SENSITIVE PERSONAL DATA

Various services collect very sensitive personal information such as biometric data, identity data about race, ethnicity, religions, caste and sexuality, healthcare and financial data which can be used to discriminate against and harm us. Privacy means a control over such data and how they are used.

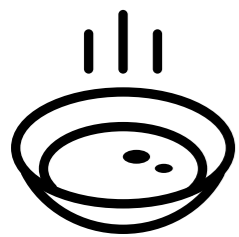
“Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state.”

JUSTICE CHANDRACHUD, p263

Privacy of choice

means our right to make choices about our own lives, including what we eat and wear, and our gender identities.

The understanding of privacy has expanded to protect intimate relationships, such as family and marriage, and to include autonomous decision making. Spatial privacy presumes access to private spaces, but this may not always be the case due to economic inability or social mores. Understanding privacy as choice allows greater protection to private acts of individuals, even if they are not protected by a spatial privacy. The right to privacy gives us a choice of preferences on various facets of life.



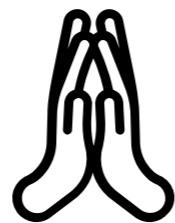
FOOD

Privacy of choice extends to what we want to eat. Therefore, laws which prevent sale or consumption of certain food and beverages may be re-examined. These laws will have to be tied to a legitimate public purpose and restrict the choice only to extent to serve that purpose.



GENDER IDENTITY

The right of a person to identify as male, female or a blend of both or neither, and their choice to determine their sexual orientation is fundamental to our ability to make decisions on matters intimate to human life.



FAITH

A person's right to observe religious practices as well as abstain from them is a matter of both our personal faith and our public assertions of that faith. Privacy of choice must grant us the ability to do both without any undue interference from others.

“The concept [of privacy] is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality... Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself.”

JUSTICE CHANDRACHUD, p242

“Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”

JUSTICE CHANDRACHUD, p242