

# Right to Privacy: A Constitutional Perspective

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**Abstract:** The central enquiry of this article is to understand how has the right to privacy evolved from being identified as an important Civil and Political right to be an important corollary of Right to life and liberty. It is the objective of the researcher to study in detail the expanding contour of the right to privacy as has been enunciated by the higher echelons of Judiciary and the subsequent recommendations of expert committee on privacy laws in the quest to keep up with the pace of technological developments as we are witnessing today

Right to privacy as we see today in its expanded form is manifestation of the idea that there is a strong demarcation between the public sphere and the private sphere of every individual and no one can lay any claim on the private sphere of life of an individual. This right has mainly evolved from the strong conceptions of individual liberty and libertarianism which considers individual liberty to be the greatest among all other considerations and so there remains no scope for bargaining of individual liberty.

Currently, with the expansion of science, technology and innovation and their benefits thereon has become an integral part of our lives. But its misuses are also equally rampant which if left uncontrolled infringes within private/personal spheres of our lives. Thus needed to be strongly regulated and contained before it spins out of control.)

“Every Englishman's home is his castle”<sup>1</sup>

One of the most forceful expressions of the above maxim was that of William Pitt in the British Parliament in 1763. He said: “The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter, the rain may enter - but the King of England cannot enter - all his force dare not cross the threshold of the ruined tenement.”

The above two phrases concisely and aptly illustrates the cardinal significance of privacy which is cherished by every human being. Privacy begins from the home where a human feels the most secure within the four walls. It is a legitimate expectation of every human being by the very fact of his being a rational creature that there will be no intrusion in the private sphere of his life. The distinction between the public and private sphere of everyone's life becomes important for this reason and it is expected by every human being that at the most only the public sphere of his life can be meddled with by more powerful actors in the society.

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<sup>1</sup>(1604) 5 Coke's Rep. 91.

The term privacy, as defined in the New Oxford English Dictionary stands to mean in the general sense as “absence or avoidance of publicity or display; the state or condition from being withdrawn from the society of others, or from public interest; seclusion.”<sup>2</sup> The Black’s Law Dictionary elaborates on the term ‘privacy’ in the following manner. Privacy is “the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.”<sup>3</sup> Hence, the right to privacy has a more or less uniform definition in all senses and it mainly denotes a private right of an individual.

Every individual cherishes a right to his privacy in various spheres of his life. Some instances are confidentiality of communication made to, or, by him. It includes sensitive communications which are his personal correspondence, telephonic conversations; telegraph messages, postal, electronic mail and other modes of communication. He also has a legitimate expectation of confidentiality when it comes to his private or his family life and his affairs within his home. Other than that, protection of honour and good name, protection from unwarranted search, privacy from clandestine surveillance are also equally significant. Other tertiary affairs of private life where confidentiality of sensitive information is involved are matters of banking and financial transactions, medical and legal information and protection of data relating to individual.

The development of right to privacy can be equated in the same plane as with the advancement of human rights jurisprudence. The expanding idea of universal human rights and valuing of human rights has led to the growth of the Right to Privacy. After the second world war, when many countries got independence from their colonial master, many Constitutions were drafted on the basis of these universal declaration of human rights and also the Constitutions of developed and well established states like US, Canada etc. This led to the development of Civil Political rights which included fundamental rights also and these rights came to be recognized as an inalienable part of human beings. However, even today, the right to privacy does not enjoy the status of a specific constitutional right in any country around the world. Privacy law has evolved largely through judicial pronouncement. At the international level, the International Covenant on Civil and Political Rights (of which India is a signatory), and more recently, the European Convention of Human Rights has recognized this right.<sup>4</sup> Coming to the context of the Indian Constitution also, there is a clear lack of definition of what is the Right to Privacy. It has been the hard work of the Judiciary and the expanding scope of judicial activism which has brought the Right to Privacy within the realm of Fundamental Rights.

The judiciary has also been a mast bearer in expanding the meaning and scope of right to privacy. The higher judiciary has always taken an active role in understanding and expanding the scope of right to

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<sup>2</sup>*The New Oxford Dictionary*, 11<sup>th</sup> Ed. (1993)

<sup>3</sup>*Black’s Law Dictionary*, 6<sup>th</sup> Ed.(1990)

<sup>4</sup> European Convention on Human Rights, 1953, Article 8& of the International Covenant on Civil and Political Rights, 1976, Article 17

privacy. In the process, it has widened the ambit of specifically enumerated fundamental rights. In a historical sense, Privacy is considered to be an indispensable civil liberty essential to individual freedom and dignity. The right to Privacy is the hallmark of a cultured existence, as in the words of Louise Brandeis, J “the right most valued by civilized men”.<sup>5</sup>

Article 141 of the Constitution states that “the law declared by the Supreme Court shall be binding on all courts within the territory of India.” Therefore, this important provision has ended up making the decisions of The Supreme Court of India as the Law of the Land and be as effective as any other legislation. The Supreme Court of India has been a sentinel *que-vive* and has come to the rescue of common citizen, time and again by construing “right to privacy” as a necessary corollary and part of the Fundamental Right to “protection of life and personal liberty” provided under Article 21 of the Constitution. Article 21 states that “no person shall be deprived of his life or personal liberty except according to procedures established by law.” The expansion of the definition of Article 21 first started in the *Maneka Gandhi* case and since then the Supreme Court has been unstoppable ever since then in its endeavour to expand Article 21. The first case with respect to Right to privacy was examined in the context of the Supreme Court’s ruling in the case of *Kharak Singh v. State of Punjab*.<sup>6</sup>

The present topic discusses about how intrusion upon privacy is gradually becoming the order of the day. It has therefore become a matter of great concern. The first chapter focuses on the concrete case laws which laid down the foundation of the right to privacy and its evolution with the help of Judiciary. Starting with *Maneka Gandhi* till the *Nazfoundartion* case, the progressive development of this right and its widening scope has been dealt with. It proposes to identify momentous decisions of the Indian Supreme Court in essaying to define this elusive right in the context of the Indian Constitution. Chapter two deals with the recent trends in privacy i.e. the extent to which media and information technology is responsible for blurring the line between public life and private life of the individual. Right to information act and sting operations have also been instrumental in the opening up of the private life of the individual in public domain. The Expert Committee report which is undergoing the process of further consultation since 2012 and based on which a draft bill is expected to be released is discussed. The conclusion focuses on the need of the privacy bill being formulated at the earliest as Right to privacy is one of the most important civil liberty enjoyed by the individual and is responsibility of the state to maintain it and secure every individual form unwanted intrusion. So an Act which prescribes for all the necessary provisions and permissible restrictions along with penalties and offences is the need of the hour so that every man feel safe in his home and can enjoy his life peacefully.

#### RIGHT TO PRIVACY IN INDIA

Although not specifically referred in the Constitution, the Right to Privacy is considered a ‘penumbral right’ under the Constitution i.e. a right which is not mentioned in the constitution but because of the

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<sup>5</sup> 277 U.S. 438(1928)

<sup>6</sup> AIR 1963 SC 1295

wide interpretation of Article 21 has been declared as an integral part of it by the Judiciary. This right has been read in to the constitution by the Supreme Court as a component of two Fundamental Rights: the right to freedom under Article 19 and the right to life and personal liberty under Article 21. The 'right to privacy' has been canvassed by litigants before the higher judiciary in India by including it within the fold of these two fundamental rights.<sup>7</sup>

The first case in which the scope of article 21 was widened enormously is the landmark judgment of *Maneka Gandhi v Union of India*<sup>8</sup> which included certain rights as fundamental rights even though not specifically mentioned in the article. Justice P N Bhagwati held that the expression "personal liberty" in Article 21 is of the widest amplitude and covers a variety of rights which constitute the personal liberty of man. Some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. A test was also derived if at all the legislature wants to put restrictions on the rights. The court ruled: "Any law interfering with personal liberty of a person 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 (the guarantee of equality)"<sup>9</sup>

Right to privacy is one such right developed with the help of Judicial Activism. Broadly Speaking, privacy law deals with peace and solitude in one's home, control of information regarding oneself, freedom from surveillance, protection from unreasonable search and seizure etc.<sup>10</sup> The areas within which Indian Jurisprudence has extended the ambit of privacy can be analyzed under the following domains:-

#### SURVEILLANCE

The first privacy case in Indian jurisprudence was that of **Kharak Singh v. State of U.P.**,<sup>11</sup> where the Supreme Court considered the constitutionality of police regulations that permitted the police to keep a close watch on would-be criminals. However, like all unfettered power, the provision was misused. The aggrieved complained that the police would inter alia: (i) enter his house; (ii) bang at his door; (iii) get him up during the night; (iv) ask him to go along with them to the station. In this case a majority of the judges refused to interpret Article 21 to include within its ambit the right to privacy. However the minority opinion of SubbaRao, J. and Shah, J. partly concurring with the majority, stated: "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. ... Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy."<sup>12</sup>

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<sup>7</sup>M.P. Jain, *Indian Constitutional Law* (Kanpur, Lexis NexisbutterworthsWadhwa 2003) 243.

<sup>8</sup> AIR 1978 SC 597

<sup>9</sup>Durga Das Basu, *Shorter Constitution of India* (Kanpur, Lexis NexisButterworths, 2001) 532.

<sup>10</sup>H.K. Saharay, *The Constitution of India – An Analytical Approach* (Calcutta, Eastern Law House, 1997) 392.

<sup>11</sup> AIR 1963 SC 1295

<sup>12</sup>*Id.*

Also a paragraph stated by Frankfurter, J. in *Wolf v. Colorado* was mentioned to support the judgement.

“The security of one's privacy against arbitrary intrusion by the police..... is basic to a free society. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents.”

Limitation:

However, the court in **Gobind v. State of M.P**<sup>13</sup> stated that the right to privacy is not an absolute right and can be restricted if national and state interest are involved. In the present case, the aggrieved complained that "his reputation had sunk low in the estimation of his neighbors"<sup>14</sup> as a result of similar activity. In this case the MP Police regulation was challenged which also provided for domiciliary visits by the police to prevent the commission of crime.

However, the Court stated that the right to privacy was subject to "restrictions on the basis of compelling State interest".<sup>15</sup> Thus, the regulations were upheld since they applied to a limited class of citizens i.e. habitual criminals and its aim was to prevent commission of crime. It was stated that a very broad definition of privacy will raise question about the efficiency of judiciary the right to privacy should be evolved case to case basis. The court admitted the fact that right to privacy does emanate from right to personal liberty and right to move freely throughout the territory of India, it cannot be an absolute right and subject to restrictions put by the state for the benefit of the whole society. A test called State Interest Test was developed which provided that all laws infringing right to privacy must satisfy this test.<sup>16</sup>

#### DISCLOSURE OF PERSONAL INTIMATE DETAILS

Privacy cannot be the right to withhold all possible information regarding one's self from all possible institutions at all possible times. Such a construction would render nugatory the very concept of societal coexistence. But certain information is so personal that confidentiality of such information ought to be maintained.<sup>17</sup> The details about health, financial status, bank account information can be considered to be the instances of such information. However we do need to disclose such information to certain institutions for availing certain services but the fact of a disclosure to an institution does not indicate the acquiescence of its disclosure to the general public.

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<sup>13</sup> (1975) 2 SCC 148

<sup>14</sup> *Id.*

<sup>15</sup> *Supra* note 11.

<sup>16</sup> Ranbir Singh & A. Lakshminath, *Constitutional Law* (Kanpur, Lexis Nexis Student series, 2006) 158..

<sup>17</sup> Arvind P. Datar, *Datar on the Constitution of India* (Kanpur, Lexis Nexis Butterworths, 2001) 1343.

In **NeeraMathur v. LIC**<sup>18</sup> the Life Insurance Corporation of India required married female candidates to disclose inter alia, in a form,<sup>19</sup> information regarding menstrual cycles, conceptions and pregnancies and abortions. The Supreme Court, without mentioning the right of privacy, found:

"The particulars to be furnished under columns (iii) to (viii) in the declaration are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term, etc. The Corporation would do well to delete such columns in the declaration."<sup>20</sup>

Limitation:

However, in **Sharda v. Dharmpal**<sup>21</sup>, Husband filed a divorce petition on the ground that wife is suffering from medical illness and asked the wife to undergo medical test to establish the case. Wife objected on the ground that this will constitute infringement of right to privacy and therefore denied to undergo the said test. Supreme Court considered the question of whether a party to a divorce proceeding could be compelled to take a medical examination. While acknowledging the importance of privacy and confidentiality, the Court found that the right to privacy was not absolute and a party could be asked to take a medical examination since in a matrimonial proceeding and held that:-

"If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution, then it may in most of such cases become impossible to arrive at a conclusion."<sup>22</sup>

This decision demonstrates that like all other fundamental rights, the right to privacy too is subject to reasonable restrictions.

#### PUBLICATION RIGHTS

In **R. Rajagopal v. State of T.N.**<sup>23</sup> The petitioner was a magazine which wanted to publish the autobiography of a prisoner convicted and sentenced to death for committing six murders. In his autobiography he has disclosed his contacts with the higher authorities who were also involved in the commission of the crime. The Tamil magazine wanted to publish the said biography which was contested by many politicians and high profile people. Supreme Court in favour of the politicians upheld

"A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing 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

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<sup>18</sup> (1992) 1 SCC 286

<sup>19</sup> *Id*

<sup>20</sup> *Id.*

<sup>21</sup> (2003) 4 SCC 493

<sup>22</sup> *Id.*

<sup>23</sup> (1994) 6 SCC 632

in an action for damages. The position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy."<sup>24</sup>

This case has substantially broadened the permissible legislations that can be put on right to privacy. Along with the public interest and interest of the state, interest of other individuals were also taken into consideration.

#### MARRIAGE

Marriage is the basic unit of society. It is a union which is based on mutual consent of both the parties and is based on trust and confidence in each other. This consent includes the knowledge of each other's medical and health condition otherwise the consent may be said to be obtained by force, fraud and coercion. The right to marriage is therefore a part of the fundamental right to privacy, subject, like any other fundamental right, to reasonable restrictions.

In **Mr 'X' v. Hospital 'Z'**<sup>25</sup> one Mr. 'X' donated the blood and it was found by the medical authorities that he was HIV positive. Although the medical ethics of doctors does not allow them to disclose the ailment with which the patient is suffering, knowing that Mr 'X' was getting married told his fiancé who later called off the marriage. He sued the medical authorities for infringement of his right to privacy but it was held by the Supreme Court that the health of the fiancé overrides the right to privacy of the petitioner. The Supreme Court considered the right of privacy to be subordinated inter alia to the protection of the health and morals of others.<sup>26</sup> Without being fully aware of the medical condition of Mr 'X', Ms 'Y' would not be able to fully exercise her fundamental decision of marriage. There was a danger that Ms 'Y' too would contract the disease. Thus, the Supreme Court found that:

"If that person is suffering from any communicable venereal disease or is impotent so that marriage would be a complete failure or that his wife would seek divorce from him on that ground, that person is under a moral, as also legal duty, to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to her."<sup>27</sup>

In effect it does not mean that a person with communicable disease cannot marry but they can marry only with the consent of another person and by making them aware of their health condition otherwise it can be a ground for divorce as provided under the law. It meant that if the State enacted a law preventing them from marrying, it could not be subject to challenge under the fundamental right. But the law must be warranted by the Constitution and cannot be brought about by external considerations.

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<sup>24</sup> (1994) 6 SCC 632

<sup>25</sup> (2003) 4 SCC 493

<sup>26</sup> (1998) 8 SCC 296.

<sup>27</sup> *Id.*

## RIGHT TO PRIVACY-PERMISSIBLE RESTRICTION

Right to privacy is a fundamental right and not an absolute right because certain situation requires interference by the state in the private life of individual for public interest and security of the state and maintenance of law and order. Thus it can be limited by the state through- (1) **Legislative Provision** (2) **Administrative/Executive order** (3) **Judicial Orders**.<sup>28</sup>

Law made by the state to intrude into the privacy of the individual must satisfy the requirement made by the constitution and there should be a reasonable nexus between the purpose of restriction and the object sought to be achieved. Thus it should be within the four corners of the Constitution.

Facts and circumstances of each case will be considered and taken into account for testing the legitimacy of the administrative and executive intrusion into the privacy of the individual. If the facts of the case so justifies that individual liberty can be infringed then only it is permissible.

Judiciary also has to consider that the state interest or public interest if superior to the individual rights of privacy only then it allows the state to interfere.

Too conclude it can be said that a very broad definition of privacy can question the propriety of judicial reliance on a right that is not explicit in the Constitution. The right to privacy should therefore be subject to restriction on the basis of necessary public interest. But it should also be assured that the law infringing it must satisfy the triple test laid down in Maneka Gandhi Case.

## RECENT TRENDS IN INDIA

### MODERN MEDIA AND PRIVACY

The development of the media and the growth of technology is one of the main reasons behind intrusion of public in the private life of individual. The media has made it possible to bring the private life of an individual into the public domain, thus exposing him to the risk of an invasion of his space and his privacy. At a time when information was not so easily accessible to the public, the risk of such an invasion was relatively remote. In India, newspapers were, for many years, the primary source of information to the public. Advances in computer technology and telecommunications have dramatically increased the amount of information that can be stored, retrieved, accessed and collated almost instantaneously. An enormous amount of personal information is held by various bodies, both public and private - the police, the income tax department, banks, insurance agencies, credit-rating agencies, stockbrokers, employers, doctors, lawyers, marriage bureaus, detectives, airlines, hotels and so on.<sup>29</sup> In the Internet age, information is so centralized and so easily accessible that one tap on a button could throw up startling amounts of information about an individual. This enables public authorities to keep a closer watch over the individual. It doesn't end with public authorities. There are other powerful authorities has spying on the private life of individuals.

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<sup>28</sup>Prashantlyengar, "Limits to Privacy," Centre for Internet & Society, <http://cis-india.org/internet-governance/blog/privacy/limits-to-privacy>

<sup>29</sup>SubhajitBasu, "Policy Making, Technology and Privacy in India", Indian Journal of Law & Technology, Vol 6 (2010)



“Right to privacy is basically recently developed phenomenon, in fact it is still developing. Now right to privacy is passing through a most crucial era that is the era of information and technology. The Internet has brought new concerns about privacy in an age where computers can permanently store records of everything.”<sup>30</sup>

Privacy is one of the biggest problems in this new electronic age. At the heart of the Internet culture is a force that wants to find out everything about you. And once it has found out everything about you and two hundred million others, that's a very valuable asset, and people will be tempted to trade and do commerce with that asset. This wasn't the information that people were thinking of when they called this the information age. Information obtained by private agencies is used (and misused) not only by the private sector but is easily accessed by public authorities. Police and tax authorities the world over are known to rely on the private sector for information about suspects and tax evaders.

#### RIGHT TO INFORMATION ACT

“The Act allows ordinary citizens to submit applications requesting information from government bodies, injecting a new phase of transparency in an infamously opaque bureaucracy. But in the name of transparency it is not permitted to invade the privacy of individuals. However, as RTI queries increased over the last few years, serious questions of privacy protection have also started making their way into public discourse. The Act itself excludes a number of security and police agencies from having to divulge any information, and private companies and NGOs do not fall under the Act.”<sup>31</sup>

The Act does not grant others the right to request information about an individual that is generated within fiduciary relationships, even if the doctor or researcher is a government employee and the medical or research record is housed in a government institution, unless public interests outweigh the individual's interest in the privacy of the information. Thus, the degree to which the RTI Act threatens patient or subject confidentiality depends greatly on what would count under the Act as a public activity or interest and as an unwarranted invasion of privacy. Also the meaning of public activity or interest has not been defined and is left upon the discretion of the authorities to decide.

#### STING OPERATIONS

“Television channels have started a series of investigative attempts with hidden cameras and other espionage devices. The advent of miniaturized audio and video technology, especially the pinhole camera technology, enables one to clandestinely make a video/audio recording of a conversation and actions of individuals.”<sup>32</sup>

The carrying out of a sting operation may be an expression of the right to free press but it carries with it an indomitable duty to respect the privacy of others. The individual who is the subject of a press or television ‘item’ has his or her personality, reputation or career dashed to the ground after the media

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<sup>30</sup>Dr Nehaluddin Ahmad, Privacy and the Indian Constitution: A case study of Encryption, CIBIMA Journal, Vol 7 (2009)

<sup>31</sup>Right to Information Act, 2005, Section 8.

<sup>32</sup>P. Koteswar Rao, *Prof. G.C.V. Subba Rao on Indian Constitutional Law* (Hyderabad, S. Gogia & Co., 1998)

exposure. He too has a fundamental right to live with dignity and respect and a right to privacy guaranteed to him under Article 21 of the Constitution.

#### OTHER RECENT CASES IN INDIA

##### Ram Jethmalani and Ors. v. Union of India

In this case, the Supreme court upheld the right to privacy an integral part of right to life and held that only if human being act in an unlawful manner then only this right can be intruded into by the state otherwise they be allowed full liberty to keep their information confidential and away from public domain. Unless and until there is reasonable suspicion of wrong doing on the part of individual their privacy cannot be infringed. It has to be in accordance with the procedure established by law and has to satisfy the requirement mentioned in the law. Quoting the words of Supreme Court

“Revelation of bank account details of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy. State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, unless the State itself has properly conducted investigations, within the four corners of constitutional permissibility.”

##### Naz Foundation Case

The most recent and important case relating to right to privacy was the public interest litigation brought and filed by an NGO called the NAZ Foundation in which it was prayed that section 377 of IPC which criminalizes sexual relation between Homosexuals was sought to struck down as unconstitutional. It was alleged that it infringes the right to choose partners and an intrusion into the private life of the individual which can only be infringed for a compelling as to which partner to choose for having sexual relation. The Delhi High Court initially dismissed the application as an ‘academic challenge’, but was required by the Supreme Court in 2004 to re-examine the matter.<sup>33</sup>

Delhi high court held that the said section forbids a homosexual a right to full personhood which is implied in article 21. The criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interests must be legitimate and relevant for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable.

Therefore this case broadened the scope of right to privacy beyond the purview of only search and seizure. It gave a new dimension to the definition of privacy stating that “private space in which man may become and remain himself”.

However this judgement was overturned by the Supreme Court of India on 11 December 2013, with the Court holding that amending or repealing Section 377 should be a matter left to Parliament, not the judiciary.

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<sup>33</sup>Subhajit Basu, “Policy Making, Technology and Privacy in India”, Indian Journal of Law & Technology, Vol 6 (2010)

On 6 February 2016, the final hearing of the curative petition submitted by the Naz Foundation and others came for hearing in the Supreme Court. The three-member bench headed by then the Chief Justice of India T. S. Thakur said that all the 8 curative petitions submitted will be reviewed afresh by a five-member constitutional bench

### **CHAPTER III - Report of the Group of Experts on Privacy**

After a series of infringement of privacy by the media and the technology and ample number of cases coming up in the Court for the same matter it was felt that there ought to be a privacy bill so that privacy right of individuals can be maintained.

“There is, at present, no law in India that protects the personal information of individuals. While certain provisions of the Information Technology Act, 2000 (**IT Act**) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information Rules), 2011 (**IT Rules**) exist, these merely scratch the surface as they apply only to information on computer resources. Further, the IT Rules only protect the sensitive personal information or data, and not all personal information.”<sup>34</sup>

In 2011, the Government had formed a committee, headed by former Chief Justice of the Delhi High Court AP Shah Shah to suggest legislations for the proposed Right to Privacy Bill. This committee submitted a report which may act as the conceptual foundation for the Right to Privacy Act in India.

#### **Justice K.S.Puttaswamy (Retd.) v. Union of India: An Analysis**

A nine-judge Constitution Bench of the Supreme Court on August 24 ruled that right to privacy is intrinsic to life and liberty and is inherently protected under the various fundamental freedoms enshrined under Part III of the Indian Constitution.

Reading out the common conclusion arrived at by the nine-judge Bench, Chief Justice of India J.S. Khehar said the court had overruled its own eight-judge Bench and six-judge Bench judgments of M.P. Sharma and Kharak Singh cases delivered in 1954 and 1961, respectively, that privacy is not protected under the Constitution.

However there are certain lacunas in the present judgment. The first among them is this: is the right to privacy a monolithic conception, or does it consist of different variants? There were already hints in the Indian jurisprudence that privacy is best conceptualized as consisting of clusters of rights.

Privacy in India has raised issues ranging from surveillance, search and seizure, and telephone tapping to abortion, transgender rights and narco-analysis. It is difficult to escape the conclusion that these cases raise distinct issues and demand different analyses. The Supreme Court has now confirmed this view. In acknowledging that different conceptions of privacy exist, it has significantly advanced the privacy jurisprudence in the country.

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<sup>34</sup>Prashantlyengar, “Limits to Privacy,” Centre for Internet & Society, <http://cis-india.org/internet-governance/blog/privacy/limits-to-privacy>

“Although there was near unanimity among the judges that privacy operates through different variants, there was no clear consensus on what these variants are. While Justice D.Y. Chandrachud offered a learned discussion of the different methods of classifying privacy, ultimately he chose to not embark upon an exhaustive enumeration of the privacy categories. Justice R.F. Nariman expressed a clearer view, referring specifically to physical privacy, informational privacy, and the privacy of choice. In reaching that conclusion, his reasoning was reminiscent of the privacy jurisprudence in the U.S., where distinct variants of privacy derive support from different constitutional safeguards. Finally, Justice J. Chelameswar discussed the privacy of repose, sanctuary, and intimate decision.”<sup>35</sup> It is unfortunate, though unsurprising, that the judges did not agree on what the constitutive variants of privacy are. Expressing a final view on classification was strictly not necessary to answer the reference. Nevertheless, this may have been an opportunity for the Court to delineate the broad contours within which privacy could structurally grow.

## CONCLUSION

After having dealt with the scope and the gamut of right to privacy and how it has been expanding over the past few years, it is only a mere repetition and stating the obvious that Right to Privacy is an inalienable and indispensable aspect of human life. However, even though it is an essential part of civil and political right (and a corollary of right to life and personal liberty in India) it is also enjoyed by other members of the society also at the same time. Thus, it is not an absolute right as such and there are certain limitations placed on it despite the growing gamut of right to privacy. In fact, when closely seen, it is pretty much evident that in comparison to other civil and political rights like right to freedom of speech & expression, the limitations placed on this right (by imposing restrictions on grounds of national security and safety) are much greater. The first chapter has clearly elucidated on the exercise which the courts have been carefully doing in crafting the right to privacy starting from the Kharak Singh case. However, the courts have been very careful in their elucidation of right to privacy since too broad a definition would be criticized as excessive judicial activism on something that finds no mention in the Constitution and hence from Kharak Singh onwards the expansion has been that of a gentle ascent through case by case development. The courts have had to carefully carry out a balancing exercise of moderation by taking into consideration competing factors like national interest and compelling public interests so as to arrive at a harmonious result.

Moving on, this project then has clearly brought out how privacy is wantonly violated in the various walks of our lives especially by significant actors like Government, media etc. It is a widespread phenomenon especially in India. For instance in countries like UK, Sweden, France, Netherlands, taking the photograph of any person or retouching any picture without the express consent of the

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<sup>35</sup>MariyamKamil, How Privacy stacks up, <http://www.thehindu.com/opinion/op-ed/how-privacy-stacks-up/article19571295.ece>.

person being photographed is prohibited even when he is in public sphere, unlike in India, where these kinds of breach is very common. Similarly, in other countries the method of procuring any information by the media is also put under the scanner and the method can be itself violative of right to privacy and the procurer can be easily held liable for his act. Also there are other upcoming issues of surveillance which has become a concern for all of us especially after the modern notions of libertarian society are emerging everywhere. In this backdrop the researcher has discussed the recent trends in privacy laws and their expanding contours.

Taking cue from it, the third chapter had taken on a very interesting discussion of Report of the Group of Experts on Privacy whose recommendations have yet to be codified into a Law. As of yet, in India, the right to privacy has not been any positive right or have had any pre-emptive character which could prevent others from violating the right to privacy. It would arise only after the right has been explicitly violated.<sup>36</sup>

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<sup>36</sup>Gulveen Aulakh, "India proposes to penalise invasion of privacy offences in draft bill," *The Economic Times*, Feb 18, 2014

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