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Right to Privacy in India: A Critical Analysis

Shruti Singh & Aditi Singh

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INTRODUCTION

Privacy has a long history of development; it is as old as mankind and has ever since evolved along with us. It is indispensable to understand the meaning of 'privacy' as it has always been different across times and spaces. The concept of Privacy is, fundamentally founded on the autonomy of oneself and the definition of private and to what extent it can be legally protected can, also differ[1]. Thomas Cooley, for the first time, adopted the phrase "the right to be let alone", in his Treatise on the Law of Torts[2]. Cooley stated, while discussing personal immunity:

"the right of one's person may be said to be a right of complete immunity; the right to be let alone."[3]

RIGHT TO PRIVACY- ORIGIN

The origin of Right to Privacy can be traced, traditionally from the difference between "public" and "private" when the distinction was made between oneself and the outer world for an individual. Ofcourse the limits between private and public differ according to the given era and society[4], which will cause the on- going change throughout history of what people consider private.[5] Such division was also explained by the Greek philosopher Aristotle, who termed the public sphere of political affair as '*polis*' and personal sphere of human life as '*oikos*'. Aristotle made a well distinction between public and private matters and established a basis for curtailing the power of the government to control one's activities in the public sphere. The distinction between public and private was followed throughout the evolution of the right to privacy. William Blackstone gave expression to the distinction in his *Commentaries on the Laws of England* (1765) in which he explained that private wrongs are always in the nature of civil injuries and breach of

[1]For example- a person can find physical touch of all manners, a mere physical contact in a bus, an encroachment of one's private space. Such physical contact, although cannot be considered privacy infringement of a private person.
[2] Thomas Cooley, *Treatise on the Law of Torts* (1888), 2nd edition
[3] Ibid, at page 29
[4] Szabo 2005. p. 45
[5] American law professor *Daniel Solove* made an illustrative example to present the on- going change regarding what people consider private: even the aspects of life that nowadays are commonly considered as private (the family, the body and the home, etc.) had been through considerable changes as initially they were far from being private. For example, marriage was initially considered to be a contract, while nowadays it is one of the most intimate decisions made by the individual. See more: Solove, D. J.: *Conceptualizing privacy*.
California Law Review Vol. 90, No. 4. (2002) pp. 1132- 1140.

individual rights only but public wrongs are crimes and infringement of public and general rights in a society.

John Stuart Mill wrote an essay, '*On Liberty*' (1859) describing the importance to preserve a space free from any governmental authority or restriction for the unhindered exercise of liberty. According to Mill[6]:

> *"The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."*

John Mill proposed, speaking of a "struggle between liberty and authority"[7], that the absolutism of the majority can be regulated by recognizing the civil rights of an individual, for instance, free speech, freedom of assembly and expression, and right to privacy.

In the year 1890, Louis Brandeis and Samuel D Warren published an article, which helped built a foundation of law to assimilate within it, the right to life as "a recognition of man's spiritual nature, of his feelings and his intellect"[8]. The scope of legal rights was enlarged and the right to life had "come to mean the right to enjoy life- the right to be left alone". Brandeis and Warren explained the impact of technology on the right to be let alone as:

> *"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house- tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons …*
>
> *The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."*[9]

Brandeis and Warren observed that:

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[6] John Stuart Mill, *On Liberty*, Batoche Books (1859), at page 13
[7] Ibid, at page 6
[8] Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1860), Vol.4, No 5, at page 193
[9] Ibid, at pages 195- 196

> *"The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."*[10]

Roscoe Pound explained the article of Brandeis and Warren as having done "nothing less than add a chapter to our law"[11]. However, another writer observed:

> *"The right to privacy was not new. Warren and Brandeis did not even coin the phrase, "right to privacy," nor its common soubriquet, "the right to be let alone".*[12]

The right to be let alone forms a part of the right to enjoy life and the right to enjoy life is a part of the fundamental right to life guaranteed to an individual.

Lord Denning has forcefully argued for the recognition of a right to privacy thus:[13]

> *"English law should recognise a right to privacy. Any infringement of it should give a cause of action for damages or an injunction as the case may require. It should also recognise a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance it is a balancing exercise for the Courts. As each case is decided, it will form a precedent for others. So a body of case-law will be established."*

INTERNATIONAL CONCEPTS OF PRIVACY

Article 12- Universal Declaration of Human Rights (1948)- "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."[14]

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[10] Ibid, at page 205
[11] Dorothy J Glancy, "The Invention of the Right to Privacy", *Arizona Law Review* (1979) Vol. 21, No. 1, at page 1.
[12] Ibid, at pages 2-3
[13] Lord Denning, '*What Next in Law*' (1982)
[14] http://www.un.org/en/universal-declaration-human-rights/

Article 17- International Covenant of Civil and Political Rights (India is a party to)- "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."[15]

Article 8- European Convention on Human Rights- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well- being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[16]

PRIVACY LAWS IN US

Justice Brandei's dissent from the judgment on the subject of Privacy, in *Olmstead* v *United States*[17] has been quoted frequently as "famous dissent" and cited affirmatively in various cases including *Carpenter* v *United States*[18] in which he observed:

> *"The makers of our Constitution understood the need to secure conditions favourable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope, and include the right to life and an inviolate personality- the right to be left alone- the most comprehensive of rights and the right most valued by civilized men. The principle underlying the Fourth and Fifth Amendments is protection against invasions of the sanctions of a man's home and privacies of life. This is a recognition of the significance of man's spiritual nature, his feelings, and his intellect."*

Right to Privacy is not enumerated as a Fundamental Right in the U.S. Constitution and it contains no express provision. The Bill of Rights and the fourteenth Amendment, however, deals with specific provisions relating to the Right to Privacy, such as the privacy of beliefs in respect of

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[15] http://www.cirp.org/library/ethics/UN-covenant/

[16] https://human-rights-law.eu/echr/article-8-echr-right-to-private-life-family-life-correspondence-and-home/

[17] *Olmstead* v *United States* 277 U.S. 438 (1928)
Evidences of a conspiracy were obtained by government by secretly tapping telephone lines and it was held that such method of obtaining evidences did not violate the Fourth Amendment.

[18] *Carpenter* v *United States* 585 U.S. (2018)
A U.S. Supreme Court landmark decision which held accessing past records of physical locations of cell phones without a warrant violative of the Fourth Amendment.

religion, freedom of speech, press (1st Amendment)[19], privacy of home against demands that it be used for soldiers (3rd Amendment)[20], privacy of the person and possessions (4th Amendment)[21], right against self- incrimination (5th Amendment), and the rights within the Bill not to deny other retained rights (9th Amendment)[22]. In addition to these, the liberty clause of the fourteenth Amendment states, "No State shall … deprive any person of life, liberty, or property, without due process of law."

The meaning of the ninth amendment has been analysed in several cases and interpreted precisely by Justice Goldberg in his concurrence opinion with the Court in *Griswold* v. *Connecticut*[23] in which the U.S. Supreme Court, in the year 1965, decided that the birth- control lawsof Connecticut caused unconstitutional intrusion upon the right of marital privacy and reversed the impugned judgment in which the appellants were found guilty on the ground of violating the Fourteenth Amendment by giving information, medical advice to married persons as to the means of preventing conception, and prescribing contraceptive devices.

Justice Goldberg referred to the arguments written by Mr. Justice Story against a bill of rights and the meaning of the Ninth Amendment:[24]

> *"In regard to … a suggestion, that the affirmative of certain rights might disparage others, or might lead to argumentative implications in favour of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis …. But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people."*

Further, Justice Goldberg opined[25]:

> *"To hold that a right so basic and fundamental and so deep- rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight*

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[19] 1st Amendment- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[20] 3rd Amendment- No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[21] 4th Amendment- The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[22] 9th Amendment- The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[23] *Griswold* v. *Connecticut* 381 U.S. 479 (1965)

[24] *Griswold* v. *Connecticut* 381 U.S. 479 (1965)

[25] *Griswold* v. *Connecticut* 381 U.S. 479 (1965)

amendments to the Constitution is to ignore the Ninth Amendmentand to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people…."

In *Meyer* v *State of Nebraska*[26], the right to study German or any other foreign language in a private, denominational, parochial or public school before successfully passing the eighth grade was recognized within the liberty of Fourteenth Amendment by the Supreme Court.

Justice McReynolds delivered the opinion[27]:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts ….."

In a similar case of *Pierce* v *Society of Sisters*[28], the obligation of every parent or guardian of a child (8-16 years old) to send him to only a public school to study was held to be violative of the Fourteenth Amendment as an unreasonable interference with the liberty of such parent or guardian by directing the upbringing of their children.

In the year 1969, in the case of*Stanley* v *Georgia*[29], the question, the U.S. Supreme Court had to decide was whether "a statute imposing criminal sanctions upon mere possession of obscene matter" is constitutional. The respondent contended that the freedom of speech or press under the First Amendment does not recognize obscenity and that the State is free to deal with the

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[26]*Meyer* v *State of Nebraska* 262 U.S. 390 (1923)
[27]*Meyer* v *State of Nebraska* 262 U.S. 390 (1923)
[28]*Pierce* v *Society of Sisters* 268 U.S. 510 (1925)

[29]*Stanley* v *Georgia* 394 U.S. 557 (1969)

subject- matter, in limitation to the other provisions of the Constitution and further, argued that if the State can protect the body, then why not the mind of such citizen?

The U.S. Supreme Court held that mere private possession of obscene material is not a crime by virtue of the First and Fourteenth Amendments. Justice Marshall observed[30]:

> *"It is now well established that the Constitution protects the right to receive information and ideas. This freedom of speech and press … necessarily protects the right to receive …. This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. Moreover, in the context of this case- a prosecution for mere possession of printed or filmed matter in the privacy of a person's own house- that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy."*

One of the most celebrated judgments of all times in the judicial history of U.S. in the context of Right to Privacy is *Roe* v *Wade*[31] in which Jane Roe, a pregnant single woman instituted a federal action against the district attorney of Dallas County challenging a Texas criminal abortion law which made aborting a fetus, a felony unless "on medical advice for the purpose of saving the life of the mother". The law was challenged on the grounds that it violated the guarantee of liberty under the Fourteenth Amendment and right to privacy under First, Fourth, Fifth and Ninth Amendments.

Justice Blacknum delivered the majority opinion of the Court and observed that[32]:

> *"State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term."*

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[30] *Stanley* v *Georgia* 394 U.S. 557 (1969)
[31] *Roe* v *Wade* 410 U.S. 113 (1973)
[32] *Roe* v *Wade* 410 U.S. 113 (1973)

Justice Harlan, in *Moore* v *East Cleveland*[33] explained the meaning and significance of liberty, guaranteed under the Constitution, accurately and observed that no law can curtail the right to privacy on arbitrary and meaningless grounds. It was observed in this regard that[34]:

> *"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, … and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state neds asserted to justify their abridgment."*

In this case, Mrs. Moore lived in her East Cleveland home together with her son and two grand-sons. In the year 1973, she received a notice, from the city, for violation of an ordinance which limited the occupancy of a dwelling unit to only the members of a family and that it did not recognize one of her grandsons as her family as a result of which the city had charged a criminal charge against her. The question before the Supreme Court was whether the Due Process Clause of Fourteenth Amendment violated the ordinance of East Cleveland. The Court held the Constitution excluded any general power of State to force all to live in defined narrow family patterns and observed[35]:

> *"… Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family …*
>
> *Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State …"*

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[33] *Moore* v *East Cleveland* 431 U.S. 494 (1977)
[34] *Moore* v *East Cleveland* 431 U.S. 494 (1977)
[35] *Moore* v *East Cleveland* 431 U.S. 494 (1977)

The Court, in *Cruzan* v *Missouri Department of Health*[36] recognized the right of an individual within the definition of liberty, to make decisions … when the parents and co guardians of Nancy Cruzan sought the order from the Court to withdraw their daughter's artificial nutrition and hydration procedures after it was confirmed by the doctor that their was no chance of recovery from her persistent vegetative state. The Supreme Court of Missouri held that Nancy's parents did not have the rightful authority to make such a decision because there was no convincing evidence of the patient's desire for the withdrawal of her life- support system and relied on a Missouri Living Will statute which embodied a state policy strongly favouring life preservation. The issue to be decided by the U.S. Supreme Court was whether the United States Constitution grants an individual "right to die" within the meaning of liberty in the Fourteenth Amendment. To decide the competency of a person for his constitutionally protected right of liberty to refuse unwanted medical treatment, the Court referred to various decisions, for instance, in *Jacobson* v *Massachusetts*[37], the Court decided in favour of individual's liberty of refusing an unwanted smallpox vaccine against State's interest in preventing disease.

The U.S. Supreme Court held that, in the present case, the testimony adduced at the trial and the evidences taken on record did not prove the consent of the patient to withdraw her life support system in any manner and therefore the judgment of the Supreme Court of Missouri was affirmed.

Justice Kennedy delivered the opinion of the Court[38]:

> *"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."*

In *Lawrence* v *Texas*[39]police officers,in Houston (Texas) were sent to a private residence due toreported weapons disturbance where they found the petitioners involving in some sexual

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[36]*Cruzan* v *Missouri Department of Health* 497 U.S. 261 (1990)
[37]*Jacobson* v *Massachusetts* 197 U.S. 11 (1905)
[38]*Lawrence* v *Texas* 539 U.S. 558 (2003)

[39]*Lawrence* v *Texas* 539 U.S. 558 (2003)

activity. Both the petitioners were arrested, held in police custody over- night and charged and convicted under a Texas penal code which provided that any person engaging in certain intimate sexual conduct with another person of the same sex would be committing an offence. Following were the three issues to be decided by the U.S. Supreme Court[40]:

> *"1. Whether Petitioners' criminal convictions under the Texas "Homosexuality Conduct" law- which criminalizes sexual intimacy by same- sex couples, but not identical behaviour by different- sex couples- violate the Fourteenth Amendment guarantee of equal protection of laws?*
>
> *2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?*
>
> *3. Whether Bowers v Hardwick,* 478 U.S. 186 (1986)*, should be overruled?"*

While discussing its own decision in *Bowers v Hardwick*[41]*,* the Court concluded its own failure to appreciate the extent of the liberty at stake. It also observed that to state that the question before the Court in *Bowers* case was only to adjudicate upon the right of individuals of the same sex to engage in sexual activity undignifies the claim of an individual, just as it would demean a married couple if it would be said that the aim of a marriage is only to obtain the right to have sexual intercourse. It was held by the Court[42]:

> *"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."*

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[40] *Lawrence* v *Texas* 539 U.S. 558 (2003)
[41] *Bowers v Hardwick,* 478 U.S. 186 (1986)
[42] *Lawrence* v *Texas* 539 U.S. 558 (2003)

DEVELOPMENT OF RIGHT TO PRIVACY IN INDIAN CONTEXT

For the first time, the question whether the right to privacy is a Constitutionally protected right was adjudicated by the Supreme Court when an investigation was orderd by a search warrant into the affairs of a company on grounds of attempt to embezzle funds, concealment of the true state of its affairs from state- holders, fraudulent transactions and falsification of records. The search-warrants issued were challenged on the grounds that they violated the Fundamental Right under Arts 19(1)(f) and 20(3) of the Constitution. Reference was made to U.S. Supreme Court judgment[43] in which it was observed that incriminating evidence found by illegal searches and seizure violated the Fourth and Fifth Amendments of the American Constitution. It was held that the Fundamental Right against self- incrimination was not offended by search and seizure and the following observation was made by Justice Jagannadhadas:[44]

> *"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law.* ***When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right****. by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under article 20(3) would be defeated by the statutory provisions for searches."*

In the year 1963, in *KharakSingh* v *State of Uttar Pradesh*[45], a writ petition under Article 32 of the Constitution was filed challenging the constitutional validity of the surveillance, the petitioner had been subjected toby virtue of the power conferred upon police officials under the provisions of U.P. police Regulations. The challenge was raisedon the ground thatsuch provisionsviolated the Fundamental Rights guaranteed to the citizens. In *Kharak Singh*, the Supreme Court had the occasion to decide whether the right to privacy can be inferred from the existing Fundamental Rights in the constitution, such as Arts. 19(1)(d), 19(1)(e) and 21. The six- judge bench adjudicated the petitionfor the right to privacy as,[46]

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[43]*Boyd* v. *United States*, 116 US 616 (1886)
[44]*M. P. Sharma* v *Satish Chandra* 1954 AIR 300
[45]*Kharak Singh* v *State of Uttar Pradesh* AIR 1963 SC 1295

[46]*Kharak Singh* v *State of Uttar Pradesh* AIR 1963 SC 1295

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

Justice Subba Rao, however,held that the Fundamental Rights enshrined in Part III of the Constitution have over lapping areas and hence, dissented from the majority view for if a man is shadowed, and his movements are under the scrutinising gaze of a policeman, it cannot be described as a free movement and the whole country is his jail. Thus, it was observed that:[47]

"No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excluded that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the state can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law to satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Article 19(1)(d) and Article 21 are infringed by the State."

Justice Subba Rao realised the need for recognizing right to privacy as Fundamental Rights declared in Part III of the constitution and further observed:[48]

"Further, 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……."

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[47] *Kharak Singh* v *State of Uttar Pradesh* AIR 1963 SC 1295, at pages 356-357
[48] *Kharak Singh* v *State of Uttar Pradesh* AIR 1963 SC 1295, at pages 356-357

CONTEMPORARY EVOLUTION OF RIGHT TO PRIVACY

In *Govind Singh* v *State of Madhya Pradesh*[49], the Supreme Court appraised the right to privacy in a more detailed and elaborate manner when the validity of the provisions of Madhya Pradesh Police Regulations empowering District Superintendent to lead domiciliary visits both at day and night and to place a person under regular surveillance if such person shows the conduct of leading a life of crime, were challenged on the ground that the provisions of domiciliary visits offended Arts. 19(1)(d) and 21 of the constitution. The Court contemplated the issue of privacy by way of several measures and upheld regulations in question for the regulations were "procedure established by law", in terms of Article 21. JusticeMathew, speaking for the bench, thus observed:[50]

> *"The right to privacy in any event will necessarily have to go through a process of case- by- case development. Therefore, even assuming that the right to personal liberty, the right to move freely through out the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a Fundamental Right, we do not think that the right is absolute."*

Further, it was observed:

> *"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."*[51]

The Supreme Court, in *R. Rajagopal* v *State of Tamil Nadu*[52], undertook to determine whether a citizen of this country can prevent another person from writing his life story or biography and does such unauthorised writing infringe the citizen's right to privacy. The court, while delivering the judgement went over to the constitutional protection of privacy decided in Kharak Singh[53] and Govind[54] case which appears from the following[55]:

> *"… The first decision of this Court dealing with this aspect is Kharak Singh v. State of U.P. [(1964) 1 SCR 332: AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] A more elaborate appraisal of this right took place in a later decision in Gobind v. State of M.P. [(1975) 2 SCC 148: 1975 SCC(Cri)468] wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. Traced the origins of this right and also*

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[49] *Govind Singh* v *State of Madhya Pradesh* AIR 1975 SC 1378
[50] *Govind Singh* v *State of Madhya Pradesh* AIR 1975 SC 1378
[51] *Govind Singh* v *State of Madhya Pradesh* AIR 1975 SC 1378
[52] *R. Rajagopal* v *State of Tamil Nadu* AIR 1995 SC 264
[53] *Kharak Singh* v *State of Uttar Pradesh* AIR 1963 SC 1295
[54] *Govind Singh* v *State of Madhya Pradesh* AIR 1975 SC 1378
[55] *R. Rajagopal* v *State of Tamil Nadu* AIR 1995 SC 264

pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold v. Connecticut [381 US 479: 14 L Ed 2d 510 (1965)] and Roe v. Wade [410 US 113: 35 L Ed 2d 147 (1973)] …"

The Court asserted that right to privacy has acquired a constitutional status[56]; it 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 left 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.[57]

The right to privacy has several aspects. One such aspect is the right to procreate. This is also known as "the right of reproductive autonomy". The right to use condoms, the right of a woman to abort, all these fall within the ambit of the right to privacy.[58]

Cases that arise at the junction of medical jurisprudence and right to privacy have been, also dealt by the Supreme Court at various times, one among them being *Mr X* v *Hospital Z*[59].In this case, the appellant, who was a doctor in the health service of state, was detected to be HIV+ at the time he was tested for a blood donation. The status of his HIV+ status was unauthorizedly disclosed by the hospital without taking into account their duty to maintain the privacy of a patient. Justice Saghir Ahmad delivered the judgment, which was based on the right to privacy under Article 21 and the Directive Principles[60]:

"Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."

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[56] *R. Rajagopal* v *State of Tamil Nadu* AIR 1995 SC 264

[57] In an American case, *Jane Roe* v *Henry Wade*, 410 US 113, the U.S. Supreme Court has observed regarding the right to privacy:

"Although the Constitution of the U.S. does not explicitly mention any right of privacy, the U.S. Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the XIV Amendment and that the "right to privacy is not absolute."

The Supreme Court of India has taken into consideration the U.S. position and Article 8 of the European Convention on Human Rights.

[58] These matters have been discussed in the U.S.A. In *Roe* v *Wade*,the U.S. Supreme Court observed that: "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however…… the court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."

[59] *Mr X* v *Hospital Z* (1998) 8 SCC 296

[60] *Mr X* v *Hospital Z* (1998) 8 SCC 296, at page 305 (para 21)

The Supreme Court made reference to the above- mentioned cases and in *People's Union of Civil Liberties* v *Union of India*[61], observed:

"We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law."

The right to privacy is a constitutionally protected right with a bundle of several other rights, one of which is the "Right to productive autonomy" which was interpreted as apart of Article 21 and was amalgamated in the Indian Jurisprudence in the case of *B. K. Parthasarthi* v *State of Andhra Pradesh*[62]. It was observed that 'the right of reproductive autonomy' means the personal decisions of the individual about the birth and babies, and that it is a facet of a 'right of privacy.'

Justice K S Radhakrishnan, in *National Legal Services Authority* v *Union of India*[63] explained the ambit of Article 21 as follows:

> *"Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. UT of Delhi[(1981) 1 SCC 608 : 1981 SCC (Cri) 212] (SCC pp. 618-19, paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings…* [64]
>
> *Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In Anuj Garg v. Hotel Assn. of India [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the*

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[61] *Peope's Union of Civil Liberties* v *Union of India* AIR 1997 SC 568

[62] *B. K. Parthasarthi* v *State of Andhra Pradesh* AIR 2000 AP 156

In *Skinner* v. *Oklahoma*, 316 US 535, the U.S. Supreme Court characterised the right to reproduce as a "one of the basic civil rights of man."

In *Griswold* v *Connecticut*, 381 US 479, the constitutionality of a statute which sought to restrict the right of married persons to use contraceptive devices fell for the consideration of the Court. The majority of the American Supreme Court held that this statute impermissibly limited the 'right of privacy' of the married persons.

[63] *National Legal Services Authority* v *Union of India* (2014) 9 SCC 1

[64] Ibid, at page 490 (para 73)

positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India[65]*"*

FUNDAMENTAL RIGHT TO PRIVACY

ISSUE

The Government of India, in the year 2009 operationalized the Unique Identification Authority of India ("UIDAI") as an attached office of the Planning Commission (now NITI Aayog) by a notification in the official gazette. In 2015, UIDAI was attached to the Department of Electronics & Information Technology of the then Ministry of Communication and Information Technology. Finally, the UIDAI was established as a statutory authority under the Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 on 12 July 2016.

UIDAI was created with the objective to issue Unique Identification numbers (UID), named as "Aadhaar", to all residents of India that is (a) robust enough to eliminate duplicate and fake identities, and (b) can be verified and authenticated in an easy, cost-effective way.[66]

In the year 2012, Justice K. S.Puttaswamy(retired) filed a petition in the Supreme Court challenging the constitutional validity of Aadhar card scheme of the Union Governmenton the ground that it violated the Right to privacy which was a constitutionally protected value, by aiming to build a database of every individual's identity and biometric information.The registration of one's identity had become mandatory for filing tax returns, opening bank accounts, securing loans, buying and selling property or even making purchases of 50,000 rupees and above.

REFERENCE TO A LARGER BENCH

The Attorney- General representing the government, in the opposition argued that there, in fact was no Fundamental Right to privacy manifested in the Constitution of India which was, also

[65] Ibid, at page 491 (para 75)
[66] https://www.uidai.gov.in/about-uidai/about-uidai.html

unanimously decided by a eight- judges bench in *M. P. Sharma* v *Satish Chandra*[67]and a majority of four judges in *Kharak Singh* v *State of Uttar Pradesh*[68]. Hence, observing a crisis of constitutional interpretation,a three- judges bench adjudicating the matter, on 11 August 2015, decided that since, the caseenabled the court to re-visit the basic principles of the Constitution hence, to maintain the institutional integrity and judicial discipline, the matter should be referred to a larger bench.Hence, the Bench of three learned judges observed in its order dated 11 August 2015:[69]

> *"12. We are of the opinion that the cases on hand raise far reaching questions of importance involving interpretation of the Constitution. What is at stake is the amplitude of the fundamental rights including that precious and inalienable right under Article 21. If the observations made in* ***M. P. Sharma*** *(supra) and* ***Kharak Singh*** *(supra) are to be read literally and accepted as the law of this country, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 would be denuded of vigour and vitality. At the same time, we are also of the opinion that the institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncement made by larger Benches. With due respect to all the learned Judges who rendered to their Lordships concern for the liberty of human beings, we are of the humble opinion that there appears to be certain amount of apparent unresolved contradiction in the law declared by this Court.*
>
> *13. therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all, it is better that the ratio decidendi of* ***M. P. Sharma*** *(supra) and* ***Kharak Singh*** *(supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength."*

Finally, in 2017, a five- judges Constitutional Bench considered it appropriate that the matter be referred to be heard to a Constitutional Bench of nine- judges. The order dated 18 July 2017 of the Constitutional Bench read as:[70]

> *"During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by this Court in* ***M. P. Sharma and Ors. vs. Satish Chandra, District Magistrate****, Delhi and Ors. – 1950 SCR 1077 by an eight- Judge Constitution Bench, and also, in* ***Kharak Singh vs. The State of U. P.*** *and Ors. – 1962 (1) SCR*

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[67]*M. P. Sharma* v *Satish Chandra* (1954) SC 1077
[68]*Kharak Singh* v *State of Uttar Pradesh* AIR 1963 SC 1295
[69]*Justice K. S. Puttaswamy (retd)* v *Union of India* (2015) 8 SCC 735
[70]*Justice K. S. Puttaswamy (retd)* v *Union of India*- Order dated 18-07-2017

332 by a six- Judge Constitution Bench, that there is no such fundamental right, is the correct expression of the constitutional position.

Before dealing with the matter any further, we are of the view that the issue noticed hereinabove deserves to be placed before the nine-Judge Constitution Bench. List these matters before the Nine- Judge Constitution Bench on 19.07.2017."

The nine-Judge of the Constitutional Bench of the Supreme Court under took the responsibility to decide the jurisprudential correctness of the previous decisions of the Supreme Court and whether right to privacy is a constitutionally protected value and hence, delivered six separate opinions to conclude the landmark judgment.

CRITICISM OF PRIVACY DOCTRINE

The Attorney General of India, Mr. K. K. Venugopalan, on behalf of Union of India submitted in the Court and argued his criticism for the recognition of the general right to privacy as a Fundamental Right in the below given manner:

(i) the Constitution does not define right to privacy as a fundamental right;

(ii) no Fundamental Right includes whole of the right to privacy and where any constituting facet of privacy is covered by a Fundamental Right, such facet shall be protected;

(iii) if facets of privacy are covered by the protection of liberty under Article 21, such rights falls within the scope of reasonable restrictions in public interest;

(iv) privacy does not have any peculiar definition or meaning; and

(v) the drafting committee of the Constitution consciously did not enumerate right to privacy in the Fundamental Rights of Part III and the scope of liberty was cut off to personal liberty.

FINAL DECISION

VIEW OF COURT ON PRIVACY

Various observations were made by different judges, who comprised the bench in the Court. Justice Chandrachud, in his judgment, held that no Fundamental rightsguaranteed by Part III of the Constitution, including Right to Privacy can be contained in water- tight compartments and

that they are not independent of each other. He discussed about the positive and negative aspect of the right to privacy; positive aspects places in motion the legislative framework to work properly and that it can bar others from interfering in one's personal space whereas the negative aspect curtails the limit of unfair approach. He has, also made several observations about the status of privacy and its interconnection with the dignity of human life and the freedom of self-determination and its role in digitalized economy.

For Justice Chelameswar, the right to privacy has three aspects, first is repose (freedom from unwarranted stimuli), second is the sanctuary (protection from observation) and, last is intimate decision (freedom for making one's own personal decisions). Justice Nariman further substantiates the concept observed by Justice Chelameswar by endorsing Gary Bostwick's conceptual interpretation of privacy. He classified it into three categories namely invasion of the physical body of an individual by State, use of unauthorised personal information and, privacy of making a choice by oneself.

Justice Bodbe, on the other hand, grounds two fundamental aspects of the right to privacy: (1) restriction on the exercise of legislative powers and, (2) conditions for individual's development. In this manner, he recognizes and acknowledges both the negative and positive aspects of implementation of any fundamental right under Part III of the Constitution.

Justice Kaul recognized the right to exercise the claim against the State and non- State individuals and identified surveillance, profiling and general data generation and collection as a breach of such right to privacy by both State and non- State actors. He, also observed that it may also effect the freedom of speech and expression as a resultant. Thus, Justice Kaul suggested, in his observation the need to protect such private information from both. Justice Sapre made his observation around the four corners of the Preamble of the Indian Constitution and the principles of fraternity, dignity and, liberty.

TEST FOR INFRINGEMENT OF PRIVACY

The Supreme Court has, after its majority decisions in cases of MP Sharma and Kharak Singh against the recognition of right to privacy as a fundamental aspect of the Constitution itself, helped evolve privacy as an important part of the Indian jurisprudence by interpreting Article 21 of the Constitution as its origin and that such right can be denied only on the ground of "*procedure established by law*" which is fair, just and reasonable.

Justice Chelameswar, in his judgment highlighted the need of reasonableness while dealing with the Fundamental rights, guaranteed under part III although every different rightcan be handled in

a different fashion. He suggested an enumeration of tests that can be well used in cases which can be put to test privacy infringement taking into account other rights that are affected simultaneously. Therefore, an enquiry of "*reasonableness*"implicating Article 14 for the privacy violation due to arbitrary action of the State would beput through its paces;the violation of privacy within the meaning of freedoms guaranteed under Article 19would attract specific restrictive provisions like obscenity, public order etc; and the principle of just, fair and reasonable are put to play when there is any intrusion to one's life or personal liberty which is the foundation of privacy guarantee in the Indian Constitution.

Significantly, Justice Chelameshwar suggested the fourth test for privacy infringement which is the "*highest standard of scrutiny*" and applies in compelling state interest cases. This scrutiny standard is borrowed from the U.S. where standard is contained for discrimination cases in which one has to not only go through and satisfy the test of "just, fair and reasonable" within the meaning of Article 21,but an outstanding level of importance in respect of the interest of government in case of infringement of privacy.

Justice Nariman compliments to the above analysis by observing that the limitation on the right to privacy can be put through its paces by a set of rights being violated. He suggested that the test of unreasonableness and arbitrariness shall apply if the infringement of Article 21 (right to life and personal liberty) read with Article 14 (right to equality) took place; or the provision given under Article 19(2) shall apply if the violation of Article 21 read with Article 19(1)(a) occurs. In this manner, Justice Nariman clarified and observed that every case should be analysed on its individual merit within the circumference of the jurisprudence under the important significant rights.

Justice Sapre brought another perspective to the restrictions on the right to privacy mentioned in Article 8 European Convention on Human Rights with variation to some degree. He stated that the State has the authority to put reasonable restrictions on the exercise of right to privacy on the grounds of compelling social, moral and public interest within the ambit of law. Since a number of fundamental rights, for instance right to equality, right to freedom of speech and expression do not acknowledge public interest to be a well grounded reason of restriction, therefore such restrictions do not have any textual basis and hence, lack clarity of standards of tests.

Justice Chandrachud, in his judgment borrowed the concept of proportionality which is used to balance the rights of an individual and the compelling interests of public under the European law and observed that any violation of the provisions of Article 21, in order to be valid must meet the following three essentials: (1) legality, i.e. the law must be in existence; (2) reasonable object, i.e.

the object of such restriction must be legitimate like national security, public interest; and (3) proportionality of the object with the aim sought to be achieved.

Justice Kaul observed "*proportionality*" test as the check on restrictions on the exercise of right to privacy with a slight difference from Justice Chandrachud. He necessitated (1) legality, (2) necessity, (3) proportionality and (4) procedural safeguards to prevent unreasonable restriction on the exercise of right which is concurrent to "*procedure established by law*" under Article 21.

Therefore, it was unanimously observed by the nine judges of the bench that the privacy right cannot be an absolute right, although we do not have a clear test to assess and check the unreasonableness of the violations. It was made clear that the claims of the violations of right to privacy shall be put to its paces under the available standards under the Indian Constitution to determine its legality and that the concept of proportionality shall develop with the subsequent decisions of the Court.

CONCLUSION

With the large interpretation of the ambit of right to privacy, the Court has manifested its willingness to accept a wider range of claims. The Court has peculiarly observed that the circumference to exercise one's right to privacy shall be subject to the merits of the case and that the claims shall be decided against other compelling public interests. The decisions of such cases, *in absentia* of peculiar restrictions to Fundamental Rights shall lie in the hands of judiciary. For example, whether a law on marital rape to protect the personal affairs of a family constitute an infringement to the dignity of a married women guaranteed under Article 21 of the Constitution? Whether criminalisation of any sexual act between two consenting adults amounts to the violation of their right to life and personal liberty along with other Fundamental Rights? Does restitution of conjugal rights under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 infringe right to privacy? The actual test of the right to exercise privacy would be dependent on the decisions of the Courts to decide above and like matters involving varied questions by the application of the decision taken in Puttaswamy case.

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