

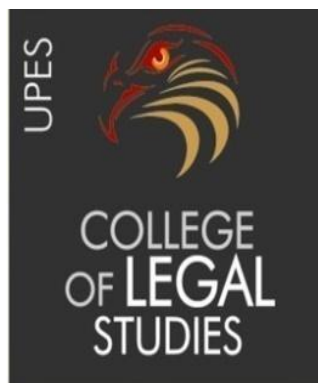
**RIGHT TO PRIVACY - FUNDAMENTAL RIGHT UNDER ARTICLE
21 OF THE CONSTITUTION OF INDIA**

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Submitted Under the guidance of Mr. Anubhav Kumar

This dissertation is submitted in partial fulfilment of the degree of

B.B.A., LL.B.



College of Legal Studies

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Dehradun

2016

DECLARATION

I declare that the dissertation titled “**Right -to Privacy - Fundamental Right under Article 21 of the Constitution of India**” is the outcome of my own work and research conducted under the supervision of, **Mr. Anubhav Kumar**, Faculty at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that this dissertation comprises only of my original work and due acknowledgement has been made with regard to any material which is used from any other source .

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Date

CERTIFICATE

This is to certify that the research work titled “**Right -to Privacy - Fundamental Right under Article 21 of the Constitution of India**” is the work done by **Urvashi Shahi** under the guidance and supervision of Mr. Anubhav Kumar for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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ABSTRACT

Right to privacy is one of the most essential human rights of the modern era. It basically is the right of individual to be protected against intrusion into his personal life or affairs. This right is neither specifically provided by any statute nor is explicitly present in Constitution of India. Till now it was considered to be the inherent part of Article 21 because in various judicial pronouncements court has declared it to be the outcome of liberty under Article 21 of the Constitution of India. Howsoever the status of this right has come to question before court in the case of Justice K.S. Puttaswamy and others Versus Union of India.

In this case the Government has contended that right to privacy is not a Fundamental right as the decision of two Constitution bench in 1954 and 1963 have yet not been overruled by a larger bench. Many cases have been decided after Kharak Singh and M P Sharma which have clearly regarded right to privacy as a Fundamental right and inherent part of Article 21 but none of it was given by a greater bench. Thus the question regarding the status still subsists and has been referred to a larger bench by Supreme Court.

This dissertation would focus on determining the status of privacy and its source. The researcher would also enumerate the importance of privacy, its development in India and recent issues dealing with privacy. The dissertation will majorly revolve around the case of Justice K.S. Puttaswamy and others Versus Union of India and other earlier judicial pronouncement which would be thoroughly researched to deduce the status of right to privacy in India.

Keywords- Privacy, Constitution, Fundamental Right, Article 21

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LIST OF CASES

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2. A K Gopalan v. State of Madras 1950 AIR 27
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14. Neera Mathur v. LIC (1992) 1 SCC 286
15. P.U.C.L. v. Union of India (1997)1 SCC 30
16. R.M. Malkani v. State of Maharashtra (1973) 1 SCC 471
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18. R.Rajagopal v. State of Tamil Nadu AIR 1995 SC 264
19. Sharda v.Dharmpal (2003) 4 SCC 493
20. Suresh Kumar Kaushal v. Naz Foundation (WP No. 7555 of 2011)
21. Rustom Cavasjee Cooper v. Union of India (1970) 3 SCR 530
22. X vs Hospital Z (1998) 8 SCC 296

RESEARCH METHODOLOGY

STATEMENT OF PROBLEM

The status of right to privacy is a much debatable topic these days. This issue has arose in the case of Justice K.S. Puttaswamy and others Versus Union of India popularly called the adhaar case. In this case the government has contended that right to privacy is not a fundamental right as the decision of two constitution bench in 1954 and 1963 have yet not been overruled by a larger bench. Many cases have been decided after Kharak Singh and M P Sharma which have clearly regarded right to privacy as a fundamental right and inherent part of Article 21 but none of it was given by a greater bench. Thus the question regarding the status still subsists and has been referred to a larger bench by Supreme Court.

OBJECTIVE AND SCOPE OF RESEARCH

The objective of this paper is to analyse the status of right to privacy under constitution of India and also to determine the ‘reasonable restrictions’ on this particular right. This paper will also put some light on the failure of legislature to materialise right to privacy bill.

KEY RESEARCH QUESTIONS

- Whether there is any “right to privacy” guaranteed under our Constitution.
- If such a right exists, what is the source and what are the contours of such a right as there is no express provision in the Constitution delineating it?
- If not, whether the right to privacy must be given the status of fundamental right under Article 21 of constitution of India.
- What must be the extent of right to privacy?
- Conflict between right to privacy and right to information

This dissertation will majorly focus on the status of right to privacy under Constitution of India and its limits. It will also put forward the need to protect this right in modern era.

HYPOTHESIS

In modern society and a much more liberal democracy, it is the duty of state to protect the privacy of every individual. Privacy is the essential ingredient to lead a basic life. So there is no doubt that right to privacy must be given the status of fundamental rights. Even if Supreme court decides vice versa in case of law as it currently stands then the court must order amendment of constitution to include such a right and more importantly it must place reasonable restrictions on this right like national security clearly stating the extent of such right. Moreover if we analyse the judicial pronouncements in the last 65 years which clearly states right to privacy to be an inherent part of Article 21, it develops a strong jurisprudence in favour of privacy and most likely the supreme court while deciding this issue in Adhaar case will consider this jurisprudence

METHODOLOGY

The methodology for research for the completion of the research paper would be doctrinal. The research methodology for this paper requires gathering relevant data from the specified documents and compiling databases in order to analyse the material and arrive at a more complete understanding of the concerned topic with the help of various statutes, norms, regulations, scholarly articles of different authors, journals and books. This project will utilize the deductive method of research as the general findings have in the end been concluded to lay about a result summing up the entire research.

LITERATURE REVIEW

BOOKS

- ***Right To Privacy Under Indian Law by Deshta K-***

This book enumerates the evolution, concept and conflicts related to right to privacy under Indian Law. It States that constitutional, customary and common law ,all of them in a way contains this right. However there is no express provision in the Constitution of India, but right to privacy has got a secure position under it. Article 21 majestically has been playing an important role in the protection of privacy as an crucial element of personal liberty.This book deduce that to properly safeguard this right it must be given a statutory protection.

- **The Value of Privacy by Beate Rossler, Rupert D. V. Glasgow-**

This book basically enumerates reasons to value privacy and importance of privacy. The authors have developed a theory in which they have linked privacy and autonomy while stating that privacy is a necessary condition to lead an autonomous life.

- **Indian Constitution Law by M.P Jain-**

This book enumerates various judicial pronouncements regarding right to privacy under Article 21 of Constitution of India.The author basically deals with status of right to privacy.

- **The Constitutional Law Of India:- By- Dr. J.N Pandey-**

This book enumerates various judicial pronouncements regarding right to privacy under Article 21 of Constitution of India. The author basically deals with status of right to privacy.

ARTICLES

- **Right of Privacy: Issues and Challenges by Hiranmaya Nanda (Assistant Professor SOA National Institute of Law, SOA University) |ISSN-2250-1991| |Volume : 4 Issue : 9|**

This article is an attempt to reflect the concept of right to privacy in India. The Supreme Court has asserted that in order to treat a right as a Fundamental Right, it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social, and economic changes in the country lead to the recognition of new rights. The researcher has discussed various issues and challenges relating to right to privacy in India.

- **Right To Privacy Under Article 21 and the Related Conflicts by Hinailiyas ,Student of B.A LLB (hons), Jamia Millia Islamia, New Delhi**

Right to privacy is one such right which has come to its existence after widening up the dimensions of Article 21. The Constitution does not specifically grant this right. However, it has been regarded by the Supreme Court to be inherently present in Art. 21 and several other provisions of the Constitution read with the Directive Principles of State Policy. In this paper we will be discussing over a new dimension of Art. 21 that is the Right to Privacy and also the conflicts related to it.

- **The Right To Privacy: Tracing The Judicial Approach Following The Kharak Singh Case ,Indian law journal for Constitutional law by Namit Oberoi, Student at the National University of Juridical Sciences, Kolkata, India.-**

In this article various judicial pronouncements regarding right to privacy are critically examined in the light of kharak singh's case. This article basically enumerate the trend of right to privacy in India.

- **The New Right to Privacy Bill 2011 — A Blind Man's View of the Elephunt by Prashant Iyengar, 09 June, 2011-**

In this article the author has analysed the right to privacy bill. the author has tried to examine the changes brought if the bill is passed and made into law and has recommended certain changes in the bill.

- **Right of Privacy: Constitutional Issues and Judicial Responses in USA and India, Particularly in Cyber Age by Tabrez Ahmad, Director of College of legal studies, U.P.E.S, dated August 5, 2009-**

This article determines various aspects of privacy in cyber age. It throws light on the inconsistency between right to privacy in general and privacy in cyberspace. This article majorly emphasise on determining whether constitutional protection of right to privacy includes privacy on cyber age.

- **The Right to Information and Privacy: Balancing Rights and Managing Conflicts-**

This article states that both the rights i.e. right to information and right to privacy are important rights of the modern era. Usually both of these rights supplement each other but at the time of conflict among both the government should develop a mechanism so as to balnce both the rights in such a way that none of them is less favoured.

- **David Banisar ,March 10, 2011, World Bank Institute Governance Working Paper-**

This Article identifies key issues to reduce contradiction between right to privacy and right to information and also focus on need for balancing the rights. This paper

examines legislative and structural means to properly explain and tries to bring stability between both these rights so that they are compatible with each other.

- **RTI AND PROTECTION OF INDIVIDUAL PRIVACY RTI Act, 2005 vis-à-vis the Right to Privacy Sri B. K. Chakraborty, IAS (Retd.) State Chief Information Commissioner Tripura Information Commission-**

This article examines the conflict between right of an individual to privacy which enables him to keep certain information confidential on one hand and right of access to public information in the hands on public authority on the other hand.

- **A Corporate Right to Privacy, Elizabeth Pollman, Loyola Law School Los Angeles ,April 1, 2014 ,Minnesota Law Review, Vol. 99, No. 1, 2014 ,Loyola-LA Legal Studies Paper No. 2014-27-**

This Article examines the extent of constitutional right to privacy and how far it is applicable on corporations. It analyses the purview of corporate constitutional rights and argues that corporate privacy rights should be assessed not just by reference to the corporate but rather by emphasising on the privacy interests of the various people involved in the corporation.

REPORT

- **Report of the Group of Experts on Privacy (Chaired by Justice A P Shah, Former Chief Justice, Delhi High Court),dated 16th October,2015-**

This report was prepared by a group of experts under the direction of planning commission. It basically provides recommendations for a separate law on right to privacy. This report covers international privacy principles, national privacy

principles, rationale and emerging issues along with an analysis of relevant legislation from a privacy perspective.

CHAPTER 1- INTRODUCTION

The protection of privacy basically means the security of individual's right to be alone and have his own private space which is not violated by anybody else. The demand to protect privacy has increased in modern era. This is because now the society has become more individualistic. The focus of the modern society has moved from we to me. Earlier only intermeddling with person or his property was restricted under law but as society progressed and became more civilised the demand for protecting intellectual, personal and religious aspects of a human personality accelerated resulting in expansion of law of privacy all over the world.

A very common misconception is that privacy is only important to those who have any wrong thing to hide or to those who are involved in any illegal doing. This is just a myth. Most of the individuals do not have as such anything to hide but still connect lot of importance to their personal life and privacy. Privacy is basically important for all individuals because this right is inherently guaranteed to all of us. We all need to maintain personal life which is distinct from our life in public. We don't share all our personal information with everyone. We only share this sensitive information with the one we trust. Thus privacy is a very crucial right of the modern life.

Right to privacy is one of the most essential human rights of the modern era. It basically is the right of individual to be protected against intrusion into his personal life or affairs. This right is neither specifically provided by any statute nor is explicitly present in Constitution of India. Till now it was considered to be the inherent part of Article 21 because in various judicial pronouncements court has declared it to be the outcome of liberty under Article 21 of the Constitution of India. Howsoever the status of this right has come to question before court in the case of *Justice K.S. Puttaswamy and others Versus Union of India*¹.

¹ (2014) 6 SCC 433

In this case the Government has contended that right to privacy is not a Fundamental right as the decision of two Constitution bench in 1954 and 1963 have yet not been overruled by a larger bench. Many cases have been decided after Kharak Singh² and M P Sharma³ which have clearly regarded right to privacy as a Fundamental right and inherent part of Article 21 but none of it was given by a greater bench. Thus the question regarding the status still subsists and has been referred to a larger bench by Supreme Court.

This dissertation would focus on determining the status of privacy and its source. The researcher would also enumerate the importance of privacy, its development in India and recent issues dealing with privacy. The dissertation will majorly revolve around the case of Justice K.S. Puttaswamy and others Versus Union of India⁴ and other earlier judicial pronouncement which would be thoroughly researched to deduce the status of right to privacy in India.

1.1 MEANING OF PRIVACY

The term Privacy has been deduced from a Latin term "*Privatus*" which means "separated from the rest" and the term Privatus itself is deduced from another term i.e. privo which means "to deprive". Privacy is capacity of the individuals to segregate themselves and their personal information from others keeping it secluded and sharing it with only selected individuals. However there is no intact definition of term privacy. Its scope differs from individual to individual and one culture to another culture. It is many a times linked with anonymity i.e. to be unrecognised by other. This term is also related with sensitive information

² 1964 SCR (1) 332

³ 1954 SCR 1077

⁴ Supra fn-1

The word Privacy does not have a clear-cut definition. It is a dynamic and a notional term. Privacy is basically the want of an individual to endure a personal space i.e. to be free from any kind of interference by any organization, state or any other individual. *The Black law dictionary* defines right to privacy as a **right to be let alone**. It is the desire of a person not to be obstructed in his private matters or those matters in which general public do not have any underlying interest.

The basis of whole concept of privacy is the restriction on Government interference in certain aspects of private life. It stands on the principle that “a chunk of information would always be beyond the jurisdiction of the Government.”⁵It exhibits the fact that an individual pertains to himself and not to any other individual or even society.

Gerety⁶ has given a very appropriate definition of privacy. He states that “privacy is an autonomy or control over the intimacies of personal identity”.⁷ He has brought to light the autonomous aspect of privacy. He has recognised three of the important legal aspects of privacy i.e. autonomy, intimacy and identity.⁸All three of them form the basic ingredients of legal definition to the term privacy.

Bostwicks⁹ definition of privacy has led to triple classification of privacy which is privacy of intimacy, leisure and sanctuary.

Solove¹⁰ in his definition has recognized essential condition and ingredients of privacy. The approach adopted by him is pragmatic in nature. He has deduced privacy

⁵ Thornburgh v. American College of Obstetricians & Gynecologists, 476 US 747, 772 (1986).

⁶ Gerety, Redefining Privacy, Harvard Law school. HARVARD CIVIL RIGHTS CIVIL LIBERTIES LAW REVIEW VOLUME 12 ISSUE 2, PG 233-296

⁷ ibid

⁸ ibid

⁹ Bostwick, A taxonomy of privacy, 64 Cal.L.Rev.1447(1976)

¹⁰ Daniel J. Solove, "Conceptualizing Privacy", (2002) 90 CAL. L. REV. 1087, 1088 (hereinafter *Solove*)

to be a collection of rights. He has given six classifications to right of privacy which are as follow.

- Right to be let alone
- Restricted access to the individual self
- Keeping certain matters as secrets from others
- Command over personal information
- Securing personality, individuality and dignity from the interference of others.
- Secrecy or restricted access to physical relation.

Privacy cannot be claimed in situations which are of public nature. Say or example if a Government officer restricts me to speak to the audience in an open space then it would not be infringement of privacy but if the same officer obstructs me or interferes while I am talking to my mother in private then it would for sure lead to invasion of right to privacy. This example demonstrates that for claiming the right to privacy the natures of the communication and for that matter any other act must be personal rather than public which is usually determined by the place in which activity takes place. Therefore the protection privacy usually extends to matters dealing with marriage, pregnancy, confidential, communications, relationship of family etc.

Howsoever if in an open bazaar while talking in personal to my parent any Government officer interferes even then it would lead to infringement of right to privacy. This demonstration explains that the nature of transaction is not determined by place. An activity happening at a public place need not always be of public nature, even such activity can be private and vice versa. The basic nature of the act or the essence of the act must be personal.

As told earlier that the definition of privacy is very much abstract and such a long discussion on definition of privacy would be useless if the abstract ends don not meet

at a concrete specific. Now for this we are broadly classifying the different areas of privacy as follow-

- Freedom of peace and isolation at one's home
- Freedom of control over our body.
- Freedom of expression and thought
- Command over personal information
- Independence from unlawful surveillance¹¹
- Security from unjustified search and seizure by the State or its agencies¹²
- Securing one dignity and reputation

This right is basically the outcome of English common law maxim which states that “every man’s house is his castle”. Right to privacy is one of the most essential human rights of the modern era. It is the right of individual to be protected against intrusion into his personal life or affairs. In modern society and a much more liberal democracy, it is the duty of state to protect the privacy of every individual. Privacy is the essential ingredient to lead a basic life

¹¹ The early Indian privacy cases dealt exclusively with police surveillance of habitual criminals. See e.g. *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 (challenging Chapter XX of the U.P. Police Regulations which placed possible criminals under surveillance); *Gobind v. State of M.P.*, (1975) 2 SCC 148 (challenging the validity of Regulations 855 and 856 of the M.P. Police Regulations, which permitted the police to keep an uncomfortable surveillance on individuals suspected of perpetrating crime).

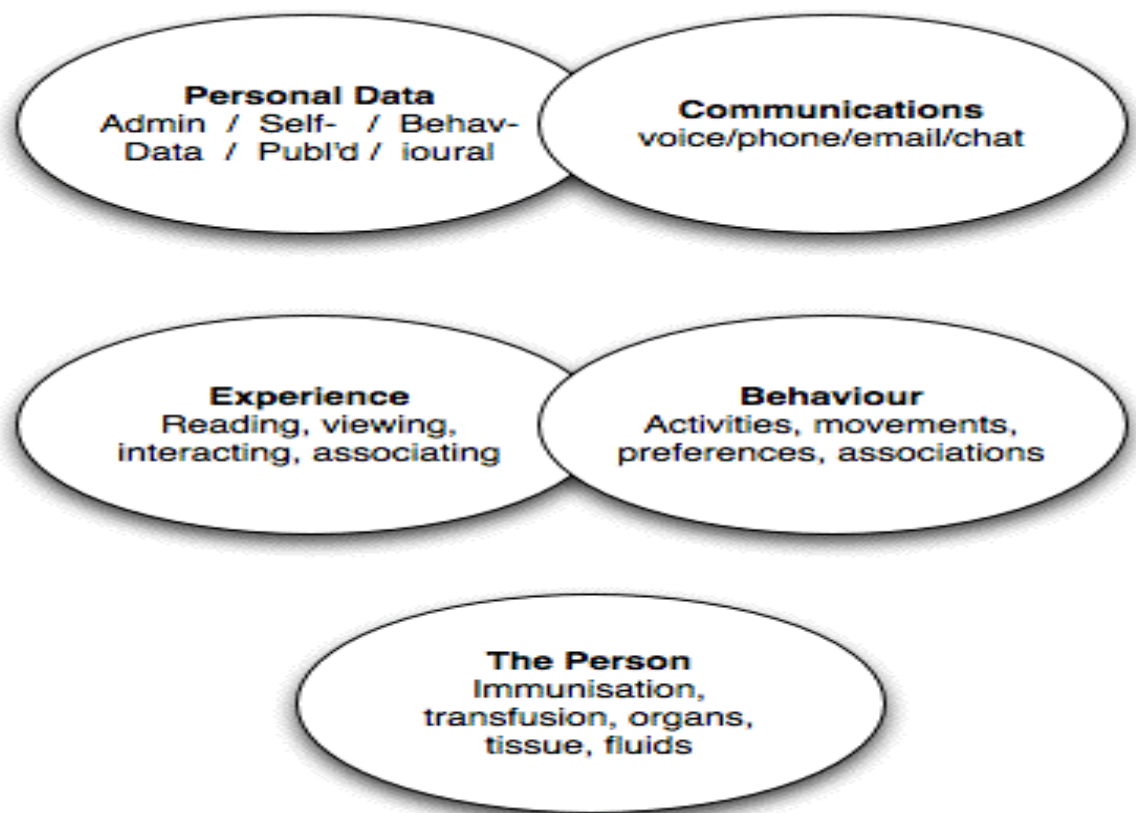
¹² The Fourth Amendment of the US Constitution provides a safeguard from unreasonable search and seizure, and no search can be carried out without a warrant issued on probable cause. The Supreme Court has not allowed Fourth Amendment developments to percolate into the Indian Constitution. See *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 (rejecting the premise that search and seizure violates the principle of self-incrimination embedded in Article 20(3) of the Constitution). But see *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496 (finding the Andhra Pradesh Amendment to Section 73 of the Stamp Act, 1899, to be unconstitutional since it permitted search and seizure on private premises). See *infra* I.B.2. Search and Seizure: The Fourth Amendment.

1.2 DIFFERENT ASPECTS OF PRIVACY

Privacy is a collection of different interests, it is a multi-dimension concept. Different aspects of privacy are as follows-

- ***Privacy of the person***-It is also known by the name of bodily privacy or privacy of the body. It mainly revolves around the integrity of the body of a person and uprightness of the individual's body. It deals with affairs concerning mandatory vaccination, blood transfusion without assent, obligatory procurement of samples of body liquids and body tissue etc.
- ***Privacy of personal behaviour***-It is concerned with different facets of behaviour particularly to sensitive issues of religious practice, sexual priorities and sexual practice. It also covers the areas dealing with media privacy and political preferences.
- ***Privacy of personal correspondence***-Privacy includes protection of personal communication of person with other persons from being monitored by other individuals or organisations. It includes issues relating to telephone tapping and interception privacy.
- ***Privacy of personal Data***-It is the right of every individual that his personal data must not be accessible by other organizations or individuals. Even in the situation where another person has possession of others personal data then that particular individual must have a right to control its usage. It is also called as Data privacy or information privacy.
- ***Privacy of personal experience***- People accumulate experience through purchasing books and daily papers and perusing the content and pictures in them, purchasing or leasing recorded video, leading discussions with different people both in individual and on the phone, meeting individuals in little

gatherings, and going to live concerts and film occasions with bigger quantities of individuals. Until as of late, none of them produced records, and henceforth every individual encounters were not noticeable to others. With the advent of the 21st century and development of technology all activities are recorded. Most of the conversations are stored in electronic form. Almost all the events are being recorded. Even the location of any individual can be traced with the help of technology. This enormous concentration of individuals' personal experience with any organisation is open to abuse and is also misused.



1.3 TYPES OF PRIVACY

The term privacy does not have any clear cut definition. Different culture and individuals describe privacy in a different way because of which it is a multi-

dimensional concept. Different nations have different criteria for judging what leads to invasion of privacy. Various types of privacy are as follows-

Physical privacy

It is the protection from interference into one's personal space. It is needed by the society due to several reasons like shyness, dignity or cultural sensitivity. It might also be demanded due to safety reasons for example protection from crimes like stalking etc.¹³

Informational privacy

It is also known as data privacy. It basically deals with protection of information shared with others either by the use of technology or by other means. Such information shared via internet is most vulnerable to be leaked so individuals need privacy regarding such information

The reason for protecting personal information is many times such information is sensitive information which one does not want to share. It may include information such as religion, intimate orientations, political affiliations etc. People also want to keep such information private from the fear of being discriminated on the basis of such information

Financial privacy

This deals with protection of information of financial nature. It includes information of financial transaction and other matters of economic nature. Such information is important to be protected from being misused and becoming a victim of identity theft or fraud.

¹³ [Security Recommendations for Stalking Victims. https://www.privacyrights.org/security-recommendations-stalking-victims.last](https://www.privacyrights.org/security-recommendations-stalking-victims.last) accessed on 12th March, 2016

Internet privacy

It is privacy dealing with control of personal information over internet. It includes capacity to withhold personal information from being revealed on internet, restrict access to personal information already present on internet and controlling the usage of such information.

Medical privacy

It is an important aspect of privacy. It deals with keeping personal medical records as secrets from other. This is important to avoid reactions of others on personal medical conditions and to hide sexual information regarding contraceptives .Sometimes people also protect medical information from the fear that it might negatively affect their employment.

Political privacy

This privacy emerged with the development of voting system. The secret ballot system evolved to maintain the secrecy in voting so that others don't come to know about your political preferences. This is don't to avoid the practice of coercion of individuals or buying votes.

Organizational Privacy

Organizational secrets need to be maintained for various reasons. Corporations, societies, Government companies and Government authorities etc. need to protect their organizational information to be revealed in public and for this they adopt many security practices.¹⁴ The also ensure legal protection for their trade secrets and other

¹⁴ Kylo v US.,121 US 354 (2003)

sensitive information. This is important for growth development and innovation of organizations and also for maintains competition.

1.4 IMPORTANCE OF RIGHT TO PRIVACY

A very common misconception is that privacy is only important to those who have any wrong thing to hide or to those who are involved in any illegal doing. This is just a myth. Most of the individuals do not have as such anything to hide but still connect lot of importance to their personal life and privacy. Privacy is basically important for all individuals because this right is inherently guaranteed to all of us. We all need to maintain personal life which is distinct from our life in public. We don't share all our personal information with everyone. We only share this sensitive information with the one we trust. Thus privacy is a very crucial right of the modern life.

- Moreover every democratic society provides its individual with liberty. Liberty is the essence of democracy. The very basic feature of liberty is autonomy of individuals. Autonomy means to be away from any kind of interference in the personal life by the state, individual or any corporation. One of the major distinction between a democratic state and a totalitarian state is that in former citizens have right to select which information to share and which information is to be kept personal. However in latter there is no such right to choose.
- The most important attribute of privacy. Privacy restricts the want of the Government and interference of private sector and also state agencies in the personal matters of individuals. Nobody can forcefully gather a personal information of an individual except in a lawful manner.

- If there is unrestricted right to claim for personal information of citizens or to enter the property of any person then the chances of abuse by State and its agencies would be very high. Thus to protect the interest of individuals especially in a democratic state, which is Government of the people, It is very important that they have right to privacy.
- There is certain correspondence which requires confidence that it would not be share further .Like the communication with doctor, consultant, counsellor, advisor etc. This information are of sensitive nature and if there is no privacy then people won't have confidence and as a result they won't be able to freely share all important information with these people.
- Economic information is also sensitive information as its misuse may cause huge loses. Many a times passing of such information in wrong hands causes fraud, identity theft and other abuse of such information. Privacy is important to ensure that our lawyer, financial manager, banker or any other individual having lawful access to such information do not pass such information to others.

The importance of privacy is divided in 4 major classifications-

- **Psychological**-psychologically it is one of the needs of the people to have their own private space with nobody's interference.
- **Sociological**-Individuals must be independent to behave the way they want and associate themselves with people they want. They must not bear the intimidation of being noticed or observed all the time.
- **Economical**- for economic growth it is important that certain economic secrets and trade secrets must not be disclosed to anybody.
- **Political**-People must be free to have their own political choices and involve in what so ever political matter they want.Surveillance is a threat to democracy and political choices.

CHAPTER 2- EVOLUTION OF RIGHT TO PRIVACY

2.1 RIGHT TO PRIVACY IN INDIA BEFORE INDEPENDENCE

Several analysts including this researcher and other scholastic researchers and specialists have noted the nonappearance of this term in the vast majority of the dialects in India that very much includes every one of the features of the idea of individual privacy. This howsoever does not contend that there was no mainstream thought of privacy in old or medieval India. The fact of the matter being made is that the local language doesn't catch features, for example, the intact privacy of one's home, correspondence, considerations, convictions, confidence as we all the need of shielding individual data from abuse by open or private offices or its business use without the assent of the individual.

Constitution of India Bill, 1895

The makers of Constitution of India bill, 1895 for the very first time envisaged the concept of right to privacy as a trump against the authority and capacity of the state to hamper personal liberty of the individuals of the state. This bill was inspired by Bal Gangadhar Tilak who declared "*Swaraj is my Birth Right*" and also by Mrs Annie Besant who was the creator of home rule league in India. This bill adopted the famous English notion i.e. for every man his home is his castle which basically means that state does not have right to interfere with personal life of individuals without the backing of law. This bill clearly declared that the foundation of India is that -

"Every citizen has in his house an inviolable asylum"

Which is based on the above mentioned age old English principle.

The Commonwealth of India Bill, 1925

Under the Chairmanship of Sir Tej Bahadur Sapru another Bill was drawn up for self-administration in India. Mahatma Gandhi, Bipan Chandra Pal and Mrs. Sarojini Naidu were individuals from the Committee that set up together this Bill. This Bill perceived that

"Every person shall have the Fundamental right to liberty of person and security of his dwelling and property."

The idea of privacy had now reached out to personal liberty and security for one's property which was earlier limited to just one's home.

The Nehru (Swaraj) Report, 1928

Three years after the fact the Indian National Congress constituted a board of trustees under the Chairmanship of Motilal Nehru to draw up an arrangement for Swaraj i.e. self-governance for India. Netaji Subhash Chandra Bose, who was an eminent freedom fighter, was also a member of this Committee. This Committee set a pessimistic commitment on the State in respect of privacy by declaring that

"No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated save in accordance with the law".

In a way it restricted state from unlawful interference with personal life and property of the citizens of India. The diverse parts of the thought of privacy recognised in Anglo-Saxon law are very obvious in this formulation and formed the major part of this Act.

Constituent Assembly (CA) debates on Right to Privacy as a part of Fundamental Right under the Constitution of India

The Constituent Assembly set up an Advisory Committee on Fundamental Rights, Minorities and so on led by Sardar Vallabhbhai Patel. Acharya J B Kripalani headed a sub-Committee on Fundamental Rights as its Chairman. Different members of the constituent assembly sent their perspectives on what crucial rights ought to be incorporated in the Constitution as Fundamental rights and why. They also debated on their extent and limitations.

K T Shah debated that security must be provided by the state against its unreasonable and unlawful seizure of citizens personal house, paper, property etc. He wanted these formulations to be included in the Constitution. In December 1946 he said

“Every citizen of India has and is hereby guaranteed security of his person, papers, property, house or effects against unreasonable searches or seizure.”

K M Munshi's required this formulation as a part of Constitution in March 1947: He formulated that each citizen should be given the privilege to the inviolability of his home. Also, Every citizen has the privilege to keep his correspondence private. Each person has the privilege that State or anybody in this respect must not interfere in his family relations. In these 3 privileges as demanded by Mr. K M Munshi two of the rights were perceived only for citizens and the third right is for everyone including non-nationals.

In March 1947, Mr. Harnam Singh, member of the Constituent assembly got inspired by the Czech Constitution and demanded that right to privacy should be extended to not just person but also property of the citizens. He said that such a crucial right must be associated to physical space also. He formulated that -

“Every dwelling shall be inviolable”

which extended this right of privacy to property also but in a limited sense by the use of term dwelling.

In March 1947, Dr. B R Ambedkar gave a more intricate detailing favouring a group of rights in relation to privacy rather than supporting a single right for all aspects of privacy. He stated

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched and the persons or things to be seized."

In this way he made a strong backing against contravention of right to privacy by the State and State agencies but this outlook of him was flexible in a way that he did not completely restrict State interference but allowed State actions where strict control by the Government and judiciary was required, by lawful means and in a lawful manner.

Later in March 1947, The subcommittee on Fundamental rights after thorough Debate on this issue of privacy accepted the following declaration to be included as a part of Fundamental rights i.e.

"The right to inviolability of his home to all persons and the right of secrecy of his correspondence to all citizens".

This was accepted as the draft and no final approval was given till then

In April, the final concept of privacy which was approved by the member of sub-committee on Fundamental rights to be formulated as a part of Fundamental rights of Constitution was as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched and the persons or things to be seized. The right of every citizen to the secrecy of his correspondence."

This formulation was the result of combining the drafts formulated by K T Shah, K M Munshi and Dr B R Ambedkar. The core values of all the three drafts were collectively combined to form the above mentioned final formulation.

However noted legal scholar Alladi Krishnaswamy Ayyar, previous Editor of Hindustan Times Sardar K M Panikkar (both of whom were the eminent members of the Constituent Assembly) and the very famous advisor of the Constituent assemble Benegal Narasingh Rau tossed a spanner underway. They contended that ensuring the privilege to privacy would obstruct law requirement and the criminal indictment of conspirators who will no doubt be caught in their residences.

They said that if this right was implicitly included as a part of Fundamental rights then it would be a great restriction for law enforcing agencies and would hinder their working. They likewise called attention to the Constitution of USA which did not unequivocally ensure the privilege to privacy howsoever USA also recognise right to privacy but not as a part of Fundamental right.

Henceforth, the Advisory Committee on Fundamental Rights dropped the proposition to perceive the privilege to privacy as an implicit part of Fundamental Right. However the right to property and right to life and liberty of the individual were incorporated in particular as Fundamental right under Article 19 and 21 of the Constitution of India.

Much later the privilege to privacy was downsized to a protected right and embedded as Article 300A in the Constitution of India. So finally after the long and thorough debate on the issue of Right to privacy, the Constitution was composed up in 1950 without an express acknowledgment of the individual's privacy as a Fundamental right.

From the debates of the Constituent assembly, one can very well judge the intention of the Constitution makers. It is a key to the mind of the makers of the Constitution of India. Thus from the fore mentioned debates can clearly be presumed that even though Constitution makers did not explicitly included right to privacy as a part of Fundamental rights, they very much wanted it to be an implicit part of Fundamental rights. It was on the verge of being explicitly included in Constitution of India when it was dropped out because of the decision of advisory committee based on the contentions of Alladi Krishnaswamy ,Sardar K M Panikkar , Benegal Narasingh Rau all of whom were the prominent representatives of the Constituent Assembly.

2.2 POST CONSTITUTIONAL DEVELOPMENT ON RIGHT TO PRIVACY

The right to privacy is an outcome of the expansion of scope of various Fundamental rights, especially Article 21 and Article 19 through interpretative skill and competency of higher Judiciary. Although in the infant stage it was not recognised as a legal right but as with the passage of time and change of circumstances it was put on a high pedestal of Fundamental rights by the higher judiciary.

This part of the research paper will put light on the judicial pronouncements related to right to privacy starting with MP Sharma case, Kharak Singh case¹⁵, Maneka Gandhi case, Rajagopal case to Adhaar case. In this chapter the cases related to right to privacy have been critically analysed.

The Indian Constitution unlike Constitutions of other country fails to recognise right to privacy. There is no explicit expression of this right under the Indian Constitution. Some scholars even argue that whole concept of privacy is alien to India and its culture. In the highlighted case of ADM Jabalpur vs. Shivakant Shukle, The Supreme court tried to throw some light on the issue regarding whether there are some other limitations which limit right to privacy or is it just limited by those explicitly mentioned in the Constitution of India and other statutory laws of the country.

Justice Khanna observed that:

“Article 21 is not the sole repository of the right to personal liberty.....no one shall be deprived of his life and personal liberty without the authority of laws follows not merely from common law, it flows equally from statutory law like the penal law in force in India.”

¹⁵ Supra fn-2

This clearly settles that to be recognised as a legal right it is not necessary that it should be expressly guaranteed by the Constitution of India. Its status as a right identified by common law is not disputable so it can also be implicitly present in Indian laws and derive its status from common law itself.

In the recent years Supreme Court has expanded the scope judicial activism and has developed the principle of “read into” the law. It states that it is not necessary that all rights are expressly mentioned in a statute, sometimes to understand its true meaning the courts have to read between the lines and determine what the legislature actually intended. The Supreme Court of India has also adopted this doctrine of ‘read into’ in various cases to adapt right to privacy as the implicit part to Article 21 and Article 19 of Indian Constitution.

As discussed earlier that finally when the Constitution of India was composed right to privacy was not explicitly included anywhere to be the part of the Constitution of India.

The very first case in which the purview of this right came to issue was the case of *Kharak Singh vs The State of Uttar Pradesh. & others*¹⁶. This case basically deals with few of the regulations related to granting of surveillance of the personal life of the accused by the State agencies. The honourable Judges in this case held that if the nature and extend of surveillance is such that it causes serious intrusion to the privacy of the accused then it would lead to infringement of Fundamental right under Article 19(1) and Article 21 of the Constitution of India. However the court said that if the Constitution makers have not explicitly included privacy as a part of Constitution of India then we must respect this decision and must not by ourselves assume it to be the part of Fundamental right.

¹⁶ 1964 SCR (1) 332

The presence of right to privacy and its existence were vehemently denied by the Supreme Court in the cases of *M.P Sharma and Kharak Singh*. However the later on the cases decided by smaller bench recognised and very much appreciated the existence of right to privacy.

Honourable judge Mathew in the case of *Govind v. State of Madhya Pradesh*¹⁷, embraced that right to privacy in India is a direct outcome of Article 19(1) (a), 19(1) (d) and Article 21 of the Constitution of India. In this way he recognised its implied connection with the abovementioned Fundamental rights. However he also stated that this right is rather a limited right.¹⁸ The interference into the privacy of individual by the State need not always be unlawful. Sometimes greater justice requires state agency to encroach this Fundamental right and at that time it is lawful to interfere with private life of individuals. However the judge limited the scope of right to privacy to persons and did not extend it to places.

Thereafter in the case of *Maneka Gandhi v. Union of India*¹⁹ and another, the honourable Supreme Court again linked this right to privacy with Article 21 of the Constitution of India. The Judges said that the term personal liberty under Article 21 of the Constitution of India has a very wide connotation. It covers a variety of rights under its scope and put them to the standards of Fundamental rights. Most of such rights usually get an additional protection under Article 19 of the Constitution of India which also has a very wide scope. The court evolved a triple test in this case to determine the infringement of personal liberty by any law. The triple test stated-

- The law must establish a mechanism to interfere with personal liberty
- The law must survive the criterion determined under Article 19 of the Constitution of India

¹⁷ 1975 SCR (3) 946

¹⁸ “Assuming that the Fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a Fundamental right, the Fundamental right must be subject to restriction on the basis of compelling public interest”

¹⁹ 1978 SCR (2) 621

- It must also satisfy the criterion of Article 14 regarding equality and should be just and fair. Finally the law to interfere with liberty of any individual must in no case be arbitrary, fanciful or oppressive.

Thereafter in the case of *P.U.C.L. v. Union of India*,²⁰ the apex Court held that right to privacy is the result of right to life as envisaged under the Constitution of India and is accessible only against State and not against private individuals. This case dealt with telephone tapping and in it standards regarding telephone tapping were declared by the court.

Earlier honourable Judge Mr. P N Bhagwati had stated that right to life has a huge scope, it also includes within its ambit right to live with human dignity which means right to avail the necessities of life i.e. food, shelter, clothes, free movement, expressing to others in any form etc. He further stated that any act which intervenes with the bare necessities of an individual would be said to infringement of Article 21 except if such an interference is in accordance with procedure established by law and is also just, fair and reasonable.²¹

For the recognitions of right to privacy under English law, Lord Denning have also made many demands. He has clearly requested that privacy must be given recognition under English law so that any infringement thereof would give the claimant a cause of action to sue for damages or injunction under the appropriate law. English law must also recognise the right of secrecy of communication made in confidence. However none of these rights should be absolute. Reasonable restrictions must be applied on all these rights but must be available only when interest of general public at large outweighs private interest of the individuals.²²

²⁰ (1997)1 SCC 30

²¹ (1981)2 SCR 516

²² Lord Denning, 'What Next in Law'

In another case of *Mr X vs Hospital Z*²³ the Supreme court stated that in the case of doctor patient relationship right to healthy life clearly outweighs right to privacy that is to say if one of the right is to be saved then right to healthy life must be given the privilege. If right to privacy of an individual interferes with right to healthy life of another individual then the doctor breaching the confidentiality to save other person's life is justified and lawful.

Later on in the case of *Directorate of Revenue vs Mohd Nisar Holla*²⁴ the Court held that life liberty can only be taken away by a procedure established by law. Every person has a right to freely live his life and to be alone. This includes the right to not to be disturbed by others.

In another case of *K.S. Puttaswamy (Retd.) and Ors. Vs. Union of India (UOI) and Ors*²⁵ the Supreme Court observed that the decisions of a larger bench cannot be overruled by a smaller bench. It stated that with regard to the number of decision rendered by this honourable court subsequent to the case of M P Sharma²⁶, Kharak Singh²⁷ in which gradually the court has recognised the status of right to privacy and put it on high standards of Fundamental right is in itself contradictory to the judgements rendered in above mentioned cases by a larger bench, and thus has resulted in a jurisprudentially unacceptable deviation of judicial opinions. It is a settled principle that pronouncements of larger benches cannot be overruled by smaller benches. They cannot deviate from the decisions of larger bench except by giving proper and satisfactory reasons.

²³ (1998) 8 SCC 296

²⁴ (2008) 2 SCC 370

²⁵ Supra fn-1

²⁶ Supra fn-3

²⁷ Supra fn-2

CHAPTER 3-DIFFERENT DIMENSIONS OF RIGHT TO PRIVACY

In India privacy is not limited to a single concept rather there are different aspects to privacy. These aspects are known by the variety of cases related to privacy filed in India. This particular right has a huge scope and has already been interpreted to involve a variety of different things. Various dimensions of privacy relate to virginity test, telephone tapping, Data surveillance, privacy in digital age Unique Identification Number, National Intelligence Grid, DNA profiling, privileged communications, Crime and Criminal Tracking Network and System, brain mapping etc. and many more.

In the famous case of **Maneka Gandhi v. Union of India**²⁸ it was held that right to privacy emerges from Article 21. This judgement clearly gave the status of Fundamental right to the right to privacy thus elaborating its scope widely. The ambit of Article 21 was also increased in this Judgement. Later on in many cases it was held to be the implicit part of Article 21 of the Constitution of India.

Different dimensions of privacy are as follows-

3.1 SURVEILLANCE

In **Kharak Singh vs. Union of India**²⁹ which is the oldest case dealing with privacy in India, the validity of various regulations which permitted police to keep a check on accused or would be criminals was in question. The court decided on the Constitutionality of these regulations. These regulations gave unrestricted power to the police which was many times misused by the authorities. The plaintiff contended and complained about many issues such as (i) police entering the residential premises without permission, (ii) police officials knocking and shouting at doors, (iii) untimely

²⁸ AIR 1978 sc 597.

²⁹ AIR 1963 SC 1295

visits by police during night time, (iv) police asking individuals to come to the station without disclosing the reasons etc.

Many of the regulations were under question but out of them regulation 236 was the most arbitrary and inhumane. Regulation 236 basically provided authority to police officials to visit the residence even during night.

In this case regulation 236 was declared unconstitutional. Justice Ayyangar whose view was similar to majority of judges stated in paragraph 20 that-

*"The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a Fundamental right guaranteed by Part III."*³⁰

The majority view in this case was that when the Constitution makers have not explicitly provided for privacy as Fundamental right then we must respect their decision and should not extend the scope of Article 21 to include right to privacy within its ambit.

Justice Subba Rao while dissenting with the majority observation stated that privacy is a very important constituent of personal liberty provided under Article 21 of the Constitution of India. He stated that right to privacy is a Fundamental right because for securing a person's liberty it is necessary to protect his privacy as the most irritation thing to a person is interference with his privacy.³¹

³⁰ *Ibid.*, at 1303

³¹ *Ibid.*, at 1306

After this case in the case of **Gobind v State of MP**³² the petitioner contended that surveillance by police has affected his dignity and reputation in the eyes of his neighbours³³. Justice Mathew on this issue observed that-“*Privacy relates to the personal life and leisure of individual, as a result it form the essence of liberty. It is also true that the scope of privacy cannot be defined. In the context of other rights we must place the interest of privacy in autonomy.*”³⁴

Privacy includes protection of personal affinities of marriage, procreation, family etc. A right protecting such an important aspects of life and liberty shall be interpreted to be the implied part of Article 21 of the Constitution of India.

3.2 SEARCH AND SEIZURE

The fourth amendment to the U S Constitution deals with search and seizure. It states-

"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."

By the above amendment the U.S Court has held that search and seizure by the U S authorities can only be done on probable cause, any unreasonable search or seizure would amount to infringement of right to privacy.

³² (1975) 2 SCC 148

³³ *Ibid.*, at 150

³⁴ *Ibid.*, at 156.

On the similar lines in the case of **M.P Sharma v. Satish Chandra**³⁵ the claimant contended that the practice of search and seizure violates Article 20(3) of the Constitution of India which deals with self-incrimination. However the Supreme Court disregarded this contention³⁶ and stated –

*"When the Constitution-makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a Fundamental right to privacy, analogous to the (American) Fourth Amendment, we have no justification to import it, into a totally different Fundamental right, by some process of strained construction. ... Therefore, issue of a search warrant is normally the judicial function of the Magistrate. When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the Fundamental right is to be assumed."*³⁷

In the case of **District Registrar and collector v. Canara Bank**³⁸ the Supreme Court redefined the boundaries of legitimate interference with one's privacy. The Judge developed certain tests to determine whether the intrusion is legitimate or not which are-

- “In case of administrative intrusions, they must be reasonable
- Judicial Intrusion is permissible only in case of necessity and “sufficient reason “ that too only after the issue of warrant

³⁵ 1954 SCR 1077 : AIR 1954 SC 300. See also *R.M. Malkani v. State of Maharashtra*, (1973) 1 SCC 471

³⁶ *Ibid.*, AIR at 304-06. The Supreme Court considered the decision of the US Supreme Court in *Boyd v. United States*, 116 US 616 (1886), and found that (SCR p. 1091): "what that decision really established was that the obtaining of incriminating evidence by *illegal* search and seizure is tantamount to the violation of the Fifth Amendment"

³⁷ AIR 1954 SC 300, page 306 para 18

³⁸ (2005) 1 SCC 496. See also *ITO v. Seth Bros.*, (1969) 2 SCC 324 (dealing with a similar question regarding Section 132 of the Income Tax Act, 1961)

- Test of proportionality³⁹

The court observed that Search and seizure of documents in possession of bank is only valid if there exists a reasonable cause or reasonable basis which helps the collector to form an opinion that search and seizure is necessary in the case for securing any duty or proving any fraud. Such search and seizure must be in accordance with other provisions of law.⁴⁰

3.3 DISCLOSURE OF INTIMATE DETAILS

The scope of privacy cannot be left open to include each and every detail which give the right to an individual to withhold from all organizations at all times all kind of details about the person. Such a wide scope would be derogatory to societal coexistence. In much institution we need to disclose our personal information like while filling up any entrance form or while making an email id on internet or while filling TDR. While taking insurance we have to disclose our medical information. Disclosing information to such institutions however does not mean disclosing it to the rest of the world.

Therefore the scope of right to privacy does not limit to controlling the disclosure of information but also extends to limiting and controlling the transfer of such information. The communication of any personal information to an institution does not mean giving consent for its unfiltered disclosure to the rest of the world.

However there is also a different type of information which can only be disclosed voluntarily and never under any mandatory requirements of any institution. The very nature of such information is personal and intimate. No other individual or institution can make a lawful claim over such information.

³⁹ *Ibid.*, at 515

⁴⁰ *Ibid.*, at 525

In the case of **Neera Mathur v. LIC**⁴¹ it was mandatory for married female ladies applying for insurance to reveal sensitive information such as abortions, pregnancies, periods etc.⁴² Mandatory requirement for filling such information was in question. The Supreme Court observed-

*"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."*⁴³

On the similar lines, mandatory requirements for disclosure of caste or religion in any form pertaining to Government job or admission in educational institution are offensive in nature and violate privacy of person.

In another case of **Sharda v.Dharmpal**⁴⁴, the issue was regarding demand for medical examination in a divorce proceeding. The petitioner contended that it would violate her privacy. However the court disregarded her contention and stated that privacy is a limited right and in a matrimonial proceeding demand for medical test of the party does not violate any privacy.

⁴¹ (1992) 1 SCC 286

⁴² *Ibid.*, at 288. (a) Are you married-Yes (b) If so, please state: (i) Your husband's name in full and occupation; (ii) State the number of children, if any, and their present ages; (iii) Have the menstrual periods always been regular and painless and are they so now? (iv) How many conceptions have taken place? How many have gone full term? (v) State the date of last menstruation; (vi) Are you pregnant now? (vii) State the date of last delivery; (viii) Have you had any abortion or miscarriage?

⁴³ *Ibid.*, at 289

⁴⁴ (2003) 4 SCC 493

*"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."*⁴⁵

3.4 RIGHT TO PRIVACY VIS A VIS RIGHT TO FREE SPEECH-

In the case of **R.Rajagopal v. State of Tamil Nadu**⁴⁶, the issue before Supreme Court was balancing right to privacy against freedom of speech. In this case the serial murderer wanted to publish its biography in Tamil newsmagazine in which he had disclosed his connection with police officials and those officers being abettor in their crime. The petitioner in this case is Tamil newspaper which is obstructed from police officers of state of Tamil Nadu from printing the autobiography.

The issue which arose in this case was whether one citizen of this country can obstruct another citizen's right to publish his own biography. Secondly whether the right of privacy of other individuals is violated by unauthorised writing and thirdly whether freedom of press extends to publishing unauthorised matter on life of a citizen and if yes under what circumstances.⁴⁷

In this case for the first time the court directly associated right to privacy with Article 21 of the Constitution of India. They stated that public records are out of the ambit of privacy. Thus they recognised right to privacy as a Fundamental right and also recognised its limitations.

⁴⁵ *Ibid.*, at 523

⁴⁶ AIR 1995 SC 264

⁴⁷ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in > rep-privacy](http://planningcommission.nic.in > rep-privacy)

“(1) the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2)The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records..”⁴⁸

The court came up with the principle that any personal matter pertaining to individual cannot be published without his consent and if any such matter is published without the assent of the person then suit for violation of privacy can be filed. The court also stated that however if the matter published is the matter of public record which also includes court records then it would not be covered under the ambit of privacy and so the protection of privacy would not extend to public records.

3.5 THE ‘RIGHT TO PRIVACY’ OF HIV (+’VE) PATIENTS

In the case of **Mr X vs Hospital Z**⁴⁹ the privacy of medical records of a blood donor was in issue. The petitioner in this case had tested positive for HIV and the hospital without obtaining the consent of the individual disclosed this fact to the fiancé of the donor. As a result the fiancé called off the marriage. The individual aggrieved by the disclosure of his private information filed case for infringement of his right to privacy.

⁴⁸ (1994) 6 SCC 632, 649-50

⁴⁹ (AIR 1999 SC 495)

The Supreme court stated that medical records are private documents and must not be disclosed but in the case of doctor patient relationship right to healthy life clearly outweighs right to privacy that is to say if one of the right is to be saved then right to healthy life must be given the privilege. If right to privacy of an individual interferes with right to healthy life of another individual then the doctor breaching the confidentiality to save another person's life is justified and lawful⁵⁰.

The judges observed 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."*⁵¹

This case settles down the issue regarding privacy of medical records. Medical records are covered under the ambit of privacy and their disclosure is punishable but in exceptional cases when life or greater interest of another person is at stake then disclosure of medical records by the doctor even without the consent of the individual would not violate right to privacy.

3.6 TAPPING OF TELEPHONE

Case of PUCL v. Union of India⁵²

There was a provision in Telegraph Act of 1885 which provided for tapping of telephone. Under this provision the state intercepted telephone calls of the petitioner. The petitioner challenged this action of interception of calls by the police as infringement of privacy of the petitioner. The court did not declared the provision of

⁵⁰ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in](http://planningcommission.nic.in) > rep-privacy

⁵¹ Ibid., at 306

⁵² (1997) 1 SCC 30)

Telegraph Act as not Constitutional but provided for procedural safeguards which are mandatory to follow.

The court stated that Telephone tapping can only be adopted if permitted under express provisions of a statute. This is because even though India is a democratic Country but this does not mean that the information pertaining to citizens in India cannot be controlled. Obviously the Government would practice a certain degree of control but it should be to such extent and in such manner that it is not abused. The court also ordered Constitution of review committee to review the standards relating to telephone tapping.

“Telephone-tapping is a serious invasion of an individual's privacy. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit, but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day.”

3.7 PRIVACY IN THE CONTEXT OF SEXUAL IDENTITIES-

In the case of **Naz Foundation v. Union of India**⁵³, Constitutionality of Section 377 was in issue which punished unnatural offence. The Delhi High Court interpreted Section 377 of IPC, 1860 which resulted in decriminalising intimate relations between adults with their consent. This case basically dealt with gay and lesbian relations. The Naz foundation contended that privacy extends to secrecy of individual's sexual relations and right to privacy is guaranteed as a Fundamental right under Article 21 of the Constitution of India.

So the State cannot intervene in the choice of intimacy or sexual relationship of Citizens unless the State is able to show imperative interest in the matter. The Court accepted this contention of the State and as the State in this case was not able to prove

⁵³ (WP No. 7555 of 2011)

its interest in sexual relation of citizens the provision was amended so as to decriminalise consensual sexual relation. However the decision was reversed by Supreme Court of India.

CHAPTER 4- INTERNATIONAL CONCEPTS OF PRIVACY⁵⁴

4.1 INTERNATIONAL CONVENTIONS ON RIGHT TO PRIVACY

Article 12 of Universal Declaration of Human Rights (1948) states that *“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to privacy of the law against such interference or attacks.”*⁵⁵

This particular Article clearly guarantee all individual right to privacy. It puts a restriction on any kind of arbitrary and unjust interference in private matters of the individual. It gives protection to family affairs, confidential communications, dignity of the individual and privacy at home.

Article 17 of International Covenant on Civil and Political Rights (to which India is a party) states *“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation”*⁵⁶

India is also a signatory to ICCPR i.e. International covenant on civil and political rights. The wordings of this Article are quite similar to Article 12 of the Universal Declaration of Human rights. However it has provided for any unlawful interference with the dignity or honour of an individual.

Article 8 of European Convention on Human Rights states *“Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national privacy,*

⁵⁴ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in](http://planningcommission.nic.in) > rep-privacy

⁵⁵ Article 17 of International Covenant on Civil and Political Rights

⁵⁶ Article 8 of European Convention on Human Rights

public safety or the economic well-being of the country, for the privacy of health or morals or for the privacy of the rights and freedoms of others."⁵⁷

This Article has limited the interference of State and its authorities in the private matters of an individual. It has also provided with exception that a state authority can interfere if any statute permits it and when the interest of nation demands it. privacy of an individual can also be infringed for the purpose of public safety and in situation when it is necessary for economic well-being of the nation. It has also provided other exception like health, morals and when privacy of other individuals is at stake.

4.2 THE RIGHT TO PRIVACY IN THE USA

In U.S.A., the basic law did not perceive any privilege to privacy. In this way, courts in the United States did not consider privacy as a privilege to be ensured until the eve of the twentieth century. The requirement for a law to ensure privacy was enunciated in 1890 when an Article titled The Right to Privacy was distributed by Warren and Brandies in Harvard Law Review⁵⁸. This Article established the framework of privacy right in the USA. In spite of the fact that several cases identified with right to privacy went to the courts, the first and foremost higher American court to manage the privilege to privacy was a New York redrafting court in 1902 in Roberson v. Rochester Folding Box Co . Boss Justice Parker all things considered said:

In that litigants had attacked what is known as a 'privilege of privacy'- - as such, the privilege to be alone. There was no existence of any such right whether by Blackstone, Kent or any other traditional jurist of Law. However its mention in an Article titled, 'The Right of Privacy'⁵⁹ led to its evolution in United States.

The supposed right of privacy basically means man has the privilege to go through this world, on the off chance that he wills, without having his photo distributed, his

⁵⁷ [Article 8](#) of European Convention on Human Rights

⁵⁸ "The Right of Privacy, Harvard Law Review (Vol. IV, page 193)

⁵⁹ "The Right of Privacy, Harvard Law Review (Vol. IV, page 193)

business undertakings talked about, his effective tests reviewed for the advantage of others, or his whimsies remarked upon either in handbills, handouts, lists, periodicals or daily papers, and, Fundamentally, that the things which may not be composed and distributed of him must not be discussed him by his neighbours, whether the remark be good or something else.

The most surely understood American cases on privacy are *Griswold v. Connecticut* and *Roe v. Wade*. In *Griswold* the legality of a law which precluded the utilization of contraceptives was tested. Maintaining the thought of privacy, Justice Douglas held:

*"... legislative reason to control or anticipate exercises intrinsically subject to State regulation may not be accomplished by means which clear pointlessly comprehensively and subsequently attack the range of ensured opportunities'. (NAACP v. Alabama) Would we permit the police to look the holy regions of conjugal rooms for indications of the utilization of contraceptives? The general thought is unpleasant to the ideas of privacy encompassing the marriage relationship."*⁶⁰

Striking down the enactment as an illegal intrusion of the privilege to conjugal privacy, it was held that the privilege of the right to speak freely and the press incorporates not just the privilege to absolute or to print additionally to disseminate, get and read and that without those fringe rights, the particular right would be imperilled.

Roe v. Wade⁶¹ dealt with issue of right of unmarried pregnant lady to a foetus removal. Maintaining the lady's entitlement to settle on that decision which influenced her private life, the Supreme Court held that in spite of the fact that the American Constitution did not expressly specify any privilege of privacy, the Supreme Court

⁶⁰ 357 U.S 449 (1958)

⁶¹ 410 U.S. 113 (1973)

itself perceived such a great assurance of specific "zones or territories of privacy" and "that the foundations of that privilege might be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights and in the idea of freedom ensured by the Fourteenth Amendment.

4.3 EU REGULATION OF JANUARY 2012⁶²

Various new standards and changes to existing standards were suggested by the European Union Regulations from January 2012. These include:

- More unequivocal articulation of the "information minimization" standard It will basically impose a strict condition on companies to restrict the collection of unnecessary Data.⁶³
- "Accountability of information controllers by requiring that individual information is handled under the obligation and risk of the controller. The information controller is moreover in charge to ensure consistence of procedure with the Regulations."⁶⁴
- Right of the subject to refuse to pass information for direct marketing.⁶⁵
- The duty is imposed on Data controllers to ensure that the subjects give free consent for the purpose for which data is collected and in case of any issue the burden is on the controller.⁶⁶

⁶² Regulation of the European Parliament and of the Council on the privacy of individuals with regard to the processing of personal data on the free movement of such data (General Data Privacy Regulation) Available at: http://ec.europa.eu/justice/data-privacy/document/review2012/com_2012_11_en.pdf

⁶³ Id. Article 4 & 7

⁶⁴ Id. Article 18-22

⁶⁵ Id. Article 19(2)

- Genetic Data and criminal convictions on the related matter is to be included under the scope of definition of Sensitive Data ".⁶⁷
- “Data controllers must have "straightforward and effectively open approaches with respect to the handling of individual information and for determination of rights of subjects"⁶⁸
- Control the utilization of "Profiling"⁶⁹
- Accountability to ensure compliance of the provisions is on Data controller⁷⁰
- Measures such as Privacy by Design which are technical in nature must be appropriately adopted by the Data Controller.⁷¹

4.4 US CONSUMER PRIVACY BILL OF RIGHTS⁷²

The US Consumer Privacy Bill of Rights expresses that customers have a privilege to:

⁶⁶ Id. Article 7(1)

⁶⁷ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in](http://planningcommission.nic.in) > rep-privacy

⁶⁸ Id. Article 9(1)

⁶⁹ Id. Article 20

⁷⁰ Id. Article 22

⁷¹ Id. Article 30(3)

⁷² Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy. Available at: <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>

- Individual Control over what individual information organizations gather and how they utilize it (Assent, Notice/Choice)⁷³
- Transparency on privacy policies and procedure adopted(Transparency/Openness)⁷⁴
- The organizations will gather, utilize, and reveal individual information only for that purpose and in that context for which the individuals have informed information(Use Limitation)⁷⁵
- The Information must be handled in secured manner (Privacy)⁷⁶
- Access and Accuracy: The Subject must have unrestricted access to the Data provided and must also have the authority to amend it in case of any wrong information provided. (Access and Correction)⁷⁷
- The information which is relevant to the purpose must only be collected. No irrelevant information must be collected.(Collection Limitation)⁷⁸
- Accountability: The information collected must be in accordance with Consumer Privacy Bill of Rights and the officers collecting Data must be made accountable.(Accountability)

⁷³ Id. Principle 1

⁷⁴ Id. Principle 2

⁷⁵ Id. Principle 3

⁷⁶ Id. Principle 4

⁷⁷ Id. Principle 5

⁷⁸ Id. Principle 6

4.5 OECD PRIVACY PRINCIPLES⁷⁹

“The amendment on OECD privacy standards has spun around three subjects:

- (1) The parts and obligations of important actors;
- (2) Geographic limitations on information streams; and
- (3) Execution and implementation.”⁸⁰

1. The role of the actors is to create awareness about privacy rights and to ensure implementation of privacy principles. The pre-condition of consent is totally fruitless if the individuals are not aware of privacy policies and privacy principles because due to absence of awareness they are totally not interested in matters dealing with consent.

2. The OECD Privacy Guidelines have made it very clear that the information can even be collected without consent. The principle relating to collection limitation states that the data must be collected in a fair manner and only relevant data must be collected. It however does not impose an obligation to take consent. It just states that where ever it is possible to take consent it's better to take it.

3. The implementation and enforcement principle also includes the principle of accountability in its ambit. It also includes the concept of notification of breach of data etc. The enforcement authorities must ensure that proper remedial measures are available which is easily accessible by the individuals.

⁷⁹ OECD Privacy Principle. Available at: <http://oecdprivacy.org/>

⁸⁰ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in](http://planningcommission.nic.in) > rep-privacy

4.6 APEC PRIVACY FRAMEWORK⁸¹

A group of 21 nations have concocted the APEC Privacy Structure to advance e-trade. Self-regulation is the outcome of the APEC Privacy Program, which has adopted such a methodology in which the a boundation is imposed on forming a self-mechanism to ensure the protection of information which flows across different countries. APEC has made an attempt to harmonise various privacy laws of different countries.

“Keeping in mind the end goal to suit distinctive privacy laws in different nations, APEC has set accentuation on the pragmatic parts of information streams, and on the way of interface between different players including organizations, controllers, and Governments. Cross-Border Privacy Rules (CBPRs), along with data sharing, examination and requirement crosswise over outskirts among controllers, counting self-administrative associations (SROs) will shape an essential part of the APEC Privacy Framework. The CBPRs are much the same as Binding Corporate Rules (BCRs) permitted to Multinationals under the EU Directive.”⁸²

Australia

The Australian Law Reform Commission created a thorough three-volume report in May 2008 referred to as ("ALRC Report") which suggested 11 UPPs to apply to both the private and the general population sector.⁸³

These are:

1. Pseudonymity
2. Gathering

⁸¹ APEC Privacy Framework. Available at: http://www.apec.org/Groups/Committeeon-TradeandInvestment/~/_media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx

⁸² Planning commission, Report of group of experts on privacy, 2012, available at [planning commission .nic.in > rep-privacy](http://planningcommission.nic.in/rep-privacy)

⁸³ For Your Information: Australian Privacy Law and Practice (ALRC Report 108). Available at: <http://www.alrc.gov.au/publications/report-108>

3. Requirement of giving Notice
4. Transparency
5. Usage and revealing of Information
6. Direct Marketing (relevant just to institutions)
7. Quality of Information
8. Information protection
9. Access and Amendment
10. Flow of Data across nation

In reaction to these suggestions, and on this premise, the Australian Government discharged an 'introduction draft' of 13 Australian Privacy Principles (two extra standards i.e. Access and Amendment standards are made different principles and a separate standard protecting unrequested information is also introduced).⁸⁴

4.7 RIGHT TO PRIVACY IN CANADA

In Canada there is no single thorough law on right to privacy or protection of privacy. In Canada the privacy is governed by Two separate Acts- one governing the general society ,which is the Privacy Act, and other Governing just the private sector, known as Personal Information Protection and Electronic Documents Act ("PIPEDA")⁸⁵ .Now both at the provincial level as well as federal level ,the For illustration: the

⁸⁴ The Exposure Draft is available at:
<http://www.smos.gov.au/media/2010/docs/Privacy-reform-exp-draft-part-1.pdf> (last visited 23 February 2016); A Companion Guide to these Principles is also available on file with the author.

⁸⁵ S.C. 2000, c. 5.

Bank Act, the Insurance Companies Act, the Telecommunications Act, and the Young Offenders Act all location protection at the Government sectoral level.⁸⁶

PIPEDA⁸⁷

The private segment of Canada is administered by two Acts the statute dealing with Personal Information Protection and Electronic Documents, called PIPEDA. PIPEDA was enforced to create a balance between the two rights rights-Firstly the right to privacy of an individual and secondly the right of the organisations to collect data from individuals for effective functioning.⁸⁸ All organizations which collect private information of the individuals and use it, are governed by the provisions of this Act but the pre-condition is that such collection or usage of information must be for Commercial purpose⁸⁹

PIPEDA unequivocally bars the accompanying from the extent of its application:

1. Government establishments to which the Privacy Act as of now is applicable;
2. Data gathered, utilized or disclosed just for private purposes; and
3. Data gathered, utilized or disclosed just for journalistic, aesthetic or scholarly purposes.⁹⁰

⁸⁶ Note that the regulation of privacy in Canada is also influenced by Ontario's Information and Privacy Commissioner's Principles of "Privacy by Design (PbD)". See <http://privacybydesign.ca/about/principles/> (Last visited 3 February, 2016).

⁸⁷ Personal Information Protection and Electronic Documents Act 2000. Available at: <http://laws-lois.justice.gc.ca/eng/acts/P-8.6/index.html>

⁸⁸ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in](http://planningcommission.nic.in) > rep-privacy

⁸⁹ Id. s. 2 (1)

⁹⁰ Id. s. 4 (2)

4.8 COMPARISON OF INTERNATIONAL PRIVACY REQUIREMENTS⁹¹

| | | | <u>OECD</u> <u>GUIDELINES</u> | <u>DATA</u> <u>PROTECTI</u> <u>ON</u> <u>FRAMEWO</u> <u>RK</u> <u>(EU)</u> | <u>APEC</u> <u>REGIME</u> | <u>PIPEDA</u> | <u>ANPP</u> |
|--|---------------------------------|--|----------------------------------|---|----------------------------------|---------------|-------------|
| P R I V A C Y R E Q U I R E M E N T | ASSENT | Pre requirement for usage, transfer and collection of personal information | ✓ | ✓ | ✓ | ✓ | ✓ |
| | IMPLEMENTA TION | Ensuring enforcement of privacy provision and proper redressal of complaints | ⊘ | ✓ | ✓ | ✓ | ⊘ |
| | DISCLOSURE | Disclosure of policies and terms of transfer of information to third parties and also disclosure of any subsequent changes | ⊘ | ⊘ | ✓ | ✓ | ✓ |
| | LIMITATION OF USAGE | Information can be used strictly for the purpose it was collected | ✓ | ✓ | ✓ | ✓ | ✓ |
| | RESTRICTION ON COLLECTION | Only relevant information for attainment of specified purpose need to be collected | ✓ | ✓ | ✓ | ✓ | ✓ |

⁹¹ Source- Planning commission, Report of group of experts on privacy, 2012, available at [planning commission .nic.in](http://planningcommission.nic.in) > rep-privacy

| | | | | | | | |
|---|-------------------------|--|---|---|---|---|---|
| N T | | | | | | | |
| P R I V A C Y | SAFEGUARD | Standard security against any unauthorised access,abuse or loss of information | ✓ | ✓ | ✓ | ✓ | ✓ |
| | NOTICE | Precise,clear and unambiguous notice for information practices and collection of information | ✓ | ✓ | ✓ | ✓ | ✓ |
| R | TRANSPAREN CY | Transparency in practice by publishing the adopted policices in clear terms. | ✓ | ✓ | ✓ | ✓ | ✓ |
| E Q U I R E M E N T S | ACCOUNTABI LITY | Answerability of organization with regard to personal information | ✓ | ✓ | ✓ | ✓ | ⊘ |
| | ACCESS AND AMENDMENT | Unrestricted access of individual to his personal information and his right to make amendments | ✓ | ✓ | ✓ | ✓ | ✓ |
| | QUALITY | Regular check to keep information accurate and complete and timely amendments to be made | ✓ | ✓ | ✓ | ⊘ | ✓ |

| | | | | | | | |
|---|-------------------------|--|---|---|---|---|---|
| A D D I T I O N A L R E Q U I R E M E N T | SENSITIVITY | Delicate information that requires special control | ⊘ | ✓ | ⊘ | ⊘ | ⊘ |
| | TRANSNATIONAL DATA FLOW | Flow of data across the border | ✓ | ✓ | ✓ | ⊘ | ⊘ |
| | ANNONYMITY | De-identification of private data | ⊘ | ⊘ | ⊘ | ⊘ | ✓ |

CHAPTER 5- STATUS OF RIGHT TO PRIVACY IN INDIA

5.1 RIGHT TO PRIVACY IN INDIA BEFORE THE ADHAAR CASE

Right to privacy is nowhere explicitly mentioned in the Constitution of India or any other statute. Article 21 of the Constitution of India⁹² dealing with right to life and liberty is said to impliedly include right to privacy within the scope of term liberty in various judicial pronouncements. In various cases judges have also regarded it to be the outcome of other Fundamental rights read with Directive principle of state policy. Howsoever the status of privacy in India is not very clear due to absence of its explicit inclusion.

The protection of privacy basically means the security of individual's right to be alone and have his own private space which is not violated by anybody else. The demand to protect privacy has increased in modern era. This is because now the society has become more individualistic. The focus of the modern society has moved from we to me. Earlier only intermeddling with person or his property was restricted under law but as society progressed and became more civilised the demand for protecting intellectual, personal and religious aspects of a human personality accelerated resulting in expansion of law of privacy all over the world.

In recent years few serious attempts have been made to regard it as a separate legal right. However some jurist favour that it should not be considered as separate legal right⁹³. The existence of right to privacy in India can be traced back to two sources- firstly common law i.e. tort and secondly Constitutional Law⁹⁴. Under Tort a suit for

⁹² (1994) 6 SCC 632, 649-50.

⁹³ [*Privacy in the Digital Environment*](#), Haifa Center of Law & Technology, (2005) pp. 1-12

⁹⁴ There are also a few statutory provisions contained in the Code of Criminal Procedure Section 327(1), the Indecent Representation of Women (Prohibition) Act, 1980 (Sections 3 and 4), the Medical Termination of Pregnancy Act, 1971 Section 7(1)(c), the Hindu Marriage Act, 1955 (Section 22), the Special Marriages Act, 1954 (Section 33), the Children Act, 1960 (Section 36), and the Juvenile Justice Act, 1986 (Section 36), all of which seek to protect women and children from unwarranted publicity

damages is maintainable in case of infringement of privacy. The case filed under Tort usually deals with publishing of personal matter in book, magazines or journals without the assent of the individual⁹⁵. The exception in the above case which does not cause infringement of privacy is when the matter in question is a public record and secondly when the matter published relates to performance of the duties of public servant and is not published with false or malicious intention.

Now coming to Constitutional law, there is no explicit provision of privacy but in many judicial pronouncements the scope of term liberty under Article 21 ⁹⁶has been expanded to include within it the right to be let alone. However this right is interpreted to be subject to reasonable restriction in which state has the authority to infringe the privacy of individuals.i.e. It is not an absolute right.

Recommendation of Venkata Chaliah Commission-

This commission recommended that a new Article i.e. Article 21 –B should be introduced in the Constitution of India which should state as follow-

“21-B. (1) Every person has a right to respect for his private and family life, his home and his correspondence.

(2) Nothing in clause (1) shall prevent the State from making any law imposing reasonable restrictions on the exercise of the right conferred by clause (1), in the interests of security of the State, public safety or for the prevention of disorder or crime, or for the protection of health or morals, or for the protection of the rights and freedoms of others”

⁹⁵ This would include his family, marriage, procreation, motherhood, child-bearing, education etc

⁹⁶ (1994) 6 SCC 632, 649-50

This was a great attempt to explicitly include right to privacy in the Constitution of India. If this Article would have been added then every individual would have got a Constitutional protection to his private matters, family matters and confidential conversations. By introduction of clause 2 the legislature could also have restricted this right by allowing State to infringe privacy when the security of state, morals, health or freedom of others is at stake.

However it is matter of regret that 10 years have passed after this recommendation being given by the commission the parliament of India has not inserted this Article in the Constitution of India. Another matter of regret is that such an important right of modern era has not been included as a part of Article 19(2) which provides reasonable restrictions on Article 19(1).

5.2 DRAFT BILL ON RIGHT TO PRIVACY

Many national programmes have been implemented which interferes with privacy of private individual such as tracking systems, brain mapping system, telephone tapping system, DNA profiling, UID number. Increasing use of such technology has brought to light many concerns regarding huge possibility of infringement of privacy of the citizens.

As a result, the department of personnel and training in the year 2011 had made a draft bill on the right to privacy .Even after thorough consideration of this draft bill it was never passed and as such converted into a legislation. Then came right to privacy bill 2014.This bill has made certain changes to the draft bill of 2011 and has regarded privacy as part of Article 21 of the Constitution of India. The main objective of these bills was to obstruct the Government from excessive interference in the privacy of nationals. The chances are that even this bill would not see the face of the day as it has completely been forgotten about.

In the year 2010, the leak of Nira Radia tapes raised serious issue regarding protection of privacy of individuals. As a result of the leakage of conversation of Mrs Nira Radia with Mr. Rata Tata, Mr. Ratan Tata had approached Supreme Court to seek justice for infringement of Right to privacy.

For the effective redressal of such a sensitive issue the planning commission recommended that a group to experts must be formed on December 26, 2011 who will recognise different issues of privacy and come forward with proper solution and recommendation in the form of draft bill on right to privacy. In fulfilment of the orders a committee called the Shah committee was formulated with Justice A.P Shah who was the former chief justice of high court of Delhi as its chairman. The committee consisted of eleven members.

The main points which Shah Committee had to consider were –They had to study the privacy laws of different countries of the world and make a comparative outlook, they had to check the various programmes passed by Government of India on the standards or privacy and determine if the led to violation of privacy. The had to prepare a draft bill on right to privacy.

The committee after long debates and discussions submitted its report on October 16, 2012 to the planning commission of India. The report on privacy was called as the committee report.

Recommendations of The Shah committee

While preparing the draft bill the committee harmonized all provisions relating to privacy in India. The important recommendations were as follows-

- Appointment of privacy commissioners as a part of regulatory framework at the centre and also at regional level.
- The organizations which are self-regulating must be given authority to develop their own privacy standards but such standards must be accepted by the privacy commissioner.
- People would be allowed to choose which information they intend to provide. The data controller⁹⁷ must first provide information regarding the practices adopted by them and only then the individuals must be asked for their consent.
- The Data controller must only collect relevant information from the individuals and also disclose the purpose for which information is collected.
- The information collected should strictly be put only to such use for which it was gathered. Any kind of changes must first be informed to individual and then only after receiving consent the information must be put to any other usage.
- Any kind of additional data which is irrelevant for the purpose or objective to be attained must not be collected.
- Specific interception orders valid for a stretch of 60 days must be given. These orders however could be renewed but only for a period of 180 days in total which means it can be renewed in two times. After two months the service

⁹⁷ The Draft Bill 2011 provides a definition for 'data controller', which means any person who processes personal data and shall include a body corporate, partnership, society, trust, association of persons, Government Company, Government department, urban local body, agency of instrumentality of the state.

provider must destroy the information and the security agencies must destroy such records within 6 months.

- It would be an offence to violate any of the provisions of the act and the defaulting party will be required to pay the compensation.

The Recommended Privacy Mechanism-

- (a) **Privacy-rule and exception-**Under the draft bill, all citizens of India are guaranteed the right to privacy. Personal data as per the draft bill is any data which can be associated by a living natural person and if with the help of said data and other information in possession the identity of the other individual can be known to whom such data belongs. Furthermore the concept of protection of Data is to be applied on all individuals processing data by the usage of equipment present in India even if they do not have their place of business in India.

A number of restrictions to be applied on this right is also identified in this regime. These are the exceptional situations in which privacy of an individual can be infringed. They are-

- Interest of the State whether it be strategic, scientific or economic in nature
- When security of nation is at stake or for protection of integrity and sovereignty of India.
- When rights and freedoms of other nationals is at stake.
- To protect and maintain harmonious relations with foreign countries

- To prohibit public disorder
- For disclosure of criminal in any offence or for detection of the crime.
- Any other purpose stated in the regime.

Additional exceptions to right to privacy as recommended by Shah committee but not included in the draft bill are as follows-

- When larger public interest demands disclosure
- For the purpose of journalism
- For historic and scientific research

To determine the validity of any exception imposed on privacy, the committee stated various parameters to measure the validity such as necessity, legality and proportionality. If the exception stands by these three parameters then it is completely valid.

(b) **Privacy principles**-principles of privacy are enumerated in the draft bill of right to privacy. Certain additional principles termed as national privacy principles which deals with other personal information are also provided by the committee. These principles basically set standards for disclosure, collection, storage and retention of private information and also regarding how it is to be processed. They also lay down particular conditions which need to be fulfilled while collection of data which are that no data should be collected without prior consent, secondly Notice must be served beforehand, the purpose of the act and if the process involves any kind of surveillance or sharing of information then even that must be disclosed beforehand.

These provisions have been made with the help of the principles laid down in IT Act, 2000 and the rules made under the act regarding private information and other sensitive information. The applicability of these principles extends all the activities relating to processing, collection and usage of private information. It does not matter from which mode information was collected, whether it be audio, visual or through interception. In situations where in compliance of certain provisions of statutes people have to pass on certain personal information even they it has to according to the standards laid under the act and such information must be protected and must not be kept on public database for a longer period of time than is necessary.

The various standards of privacy are as follow-

1. **Notice-** It is mandatory for data collector to give notice regarding the practices adopted by them in dealing with information to all individuals before taking their consent. The notice must be short and must not be vague. The purpose of the notice is that with the help of notice the data collector can be made accountable for any misuse of data which is not in accordance with the practices as written in the notice.
2. **Choice and Consent-**All individuals must be given option regarding whether to provide information or not. Then the consent must be attained before collection of any information from any individual. Consent is needed for all activities including collection, processing of Data and sharing of data with third party. However in conditions of authorized agency consent is implied and is not required. The individual whose personal information is being collected can at any time take back his consent by communicating such intention to data controller. The data controller must ensure to know clearly the extent to which the individual has given consent for his information to be passed on the third party.

3. **Collection limitation**-The collection of data must be limited on for attainment of object and purpose as stated in the notice for which the consent has been obtained by the individual. No irrelevant data must be collected. This will control the abuse of personal information of the individuals.

4. **Purpose limitation**-This deals with the adequacy and relevancy of data with respect to the purpose for which it was collected. It also laid provisions for destruction of information following prescribed procedure after the purpose for which it was collected has been attained. If there is any change in the purpose for which information was collected then it must be immediately brought to the knowledge of the subject ⁹⁸whose personal information is collected. The main objective of this provision is to make sure that the data controller destroys the information as soon as the purpose for which he collected has been achieved.

5. **Access and correction**-This principle states that the subjects must have control over the information they have provided. A copy of their personal information must be send to them .Moreover if by mistake any wrong information is given then they must have capacity to correct it, delete it or amend it as needed. The must be given complete access to their personal information

6. **Disclosure of information**-any disclosure of information must only take place after the consent of the subject whose personal information have been disclose and the consent must be taken only after serving notice. Without consent no such information must be transferred to third party. The party to whom the information has been passed must also follow the

⁹⁸A 'data subject' has been defined under the Draft Bill 2011 as any living individual, whose personal data is processed by a data controller in India

principles relating to privacy given under this Act. Even the disclosure as made mandatory under any provisions of the statute must also be in accordance with these principles.

7. **Security**-It is the duty of data controller to secure the personal information of its subjects from any leakage, misuse or other threats. The must maintain reasonable security for safeguarding the information. The information must be protected from unauthorised use, modification, disclosure, destruction etc. The information must also be protected against any accidental loss. There must be no negligence on the part of information controller while dealing with personal information.

8. **Openness**-Smart practices and policies must be adopted while dealing with personal information and they must be changed according to the sensitivity, nature and scope of Data collected. The procedure and practice implemented must be proportional to the scope and sensitivity of the Data. The policies must be described in clear term and must be written in notice served to individuals.

9. **Accountability**-It is the duty of data controller to comply with the procedure as given in the principles and for any wrong he must be made accountable. He must determine proper regime to implement privacy policies and must also perform regular audits to reduce the chance of any wrong being taking place.

Both public sector and private sector have to abide by the National principles as stated above. These principles are the base for any upcoming legislation of privacy any if

any such legislation is made in future by the parliament it would be in accordance with these principles.

(c) National Data Controller Registry-

As per the provisions of the Draft bill national data control registry has to be set up. The purpose of this registry is to ease data controllers in entering the data. It is an online Database. For the purpose of processing any data, registry of data controller is the pre requirement. The data controller can make any kind of changes to the data only as per the procedure

(d) Data protection Authority of India-

The draft bill provides for establishment of data protection authority of India by the Government of India. The object of this department to deal with the matters pertaining to security of Data in India. It also has power to penalize for any kind of infringement. It is the duty of this department to ensure that all persons comply with the provisions dealing with data protection and to keep a check on any kind of development in processing of data just to ensure that it does not have any adverse effect on whole system. The data protection authority has been given a lot of administrative responsibilities. It has also been provided with certain judicial function.

It has the authority to decide matters relating to any problem in any of the stage of data collection or processing or storage and disclosure of data provided that any decision has to be given after an investigation has been made with regard to the complaint. Any person not satisfied with the orders of this authority can appeal against the decision in cyber appellate tribunal. While investigating it has been provided with the power to render proper orders in case any security breach is found

so that interest of the affected people is safeguarded. Immediate orders must be given in such situation as any delay would negatively affect the interest of people at stake.

The data protection authority has also been given power to command any kind of inspection or records which are under the control of data controller. It can also direct for any inquiry being made to check the affairs of the data controller. It can direct the controller to provide for reasonable explanations for everything. It also has been given an advisory role as it has to review the policies for data protection and recommend any changes to the Government of India

(e) Resolution of Disputes-

At present the adjudicating officer has the authority to hear and decide complaints and any appeal from his order must lie to Cyber appellate tribunal which is formed under the information technology Act. In the draft bill howsoever the power of adjudication has been given to Data processing authority of India and any appeal from its orders lie to Cyber appellate tribunal only. A three tier structure has been evolved by the Shah committee for resolving issues related to Data protection. The three tier structure as given in the committee report is as follow-

1. Privacy commissioners-

To check whether the privacy legislation has been properly implemented a double check process must be established by placing privacy commissioners at central as well as regional level. The main purpose of the commissioner would be to ensure that the privacy legislation is properly enforced and the provisions are followed by all.

2. Courts-

The committee recommended that court must also be given jurisdiction over the matters of data protection. This will serve as an alternate redressal for those who for any reason are not able to reach out the commissioners. However the jurisdiction would be limited to matters pertaining to breach of data, violation of privacy etc. In this case the subjects would have option in case of redressal. This would also reduce the burden of commissioners making the whole process more effective.

3. Self-regulation organisation and coregulation –To reduce the burden of privacy commissioners and to supplement him in his work the committee provided for establishment of self-regulation organizations. This would lead to more efficient policy enforcement in covering a larger variety of industries and other sectors. This would create a system of co regulation. The guidelines for privacy followed by self-regulation organisation would be of same standard as those given by national privacy principles and for any kind of violation of these principles the self-regulation organisation would be held accountable. The purpose of this system is that it would help in creating a legal framework to ensure enforcement of an individual's right to privacy.

The committee also stated that if no self-regulating organization is appointed for any sector or industry then it would be the duty of the data controller to ensure compliance or privacy principles along with guidelines given by privacy commissioner in that sector or industry. He may also have to follow additional norms such as it would be his duty to appoint a privacy officer for redressal of complaints at the organization level. This is for the purpose of reducing burden on judiciary. If any complaint can be resolved at a lower level then it must be ended at that stage only.

(f) Penalisation of offences-

The present position is that, right now the provisions of It act are applicable in case of negligence on the part of any corporation or body corporate in handling personal data resulting in wrongful gain or wrongful loss. As per the act the body corporate had to pay compensation for its negligence in handles if private data. Howsoever the Draft bill provides a completely different mechanism which is based on committee report.

The provisions of the draft bill state that the data controller would be liable to pay full amount of compensation for any damages suffered by the subjects due to negligence on the part of data controller while handling their personal information or even when any of the privacy principles have been contravened

| OFFENCE | PUNISHMENT |
|--|---|
| Whoever in violation of the provision of the Act,collects,stores,handles or process any personal Information of the subjects | Compensation up to Rs. 70,000 for the first offence and up to Rs. 100000 for the second offence and Imprisonment up to 5 years. |
| Whoever in violation of provisions of this act collects, stores,handles or process any personal Data. | Compensation and Imprisonment greater for sensitive data |
| Whoever obtains personal information on false identity | Compensation up to 5 million rupees and Imprisonment up to 5 years. |
| If the service provider infringes the requirement relating to obtaining | Compensation upto Rs. 70,000 for the first offence and upto Rs. |

| | |
|---|---|
| licence in respect of maintaining confidentiality and secrecy of information and prohibiting unauthorised interception. | 100000 for the second offence and Imprisonment up to 5 years. |
| Doing surveillance in violation of law in force relating to it. | Compensation up to Rs. 70,000 for the first offence and up to Rs. 100000 for the second offence and Imprisonment up to 5 years. |
| Unauthorised disclosure of personal information by any employee or other person of service provider who due to his position has access to the personal information of the subjects. | Compensation upto Rs. 70,000 for the first offence and upto Rs. 100000 for the second offence and Imprisonment upto 5 years. |
| Contravention of directions of Data processing authority of India | Compensation up to Rs.70,000 for the first offence and up to Rs. 100000 for the second offence and Imprisonment up to 5 years. |
| Acquiring personal information from the subjects without any authority. | Compensation up to Rs. 70,000 for the first offence and up to Rs. 100000 for the second offence and Imprisonment up to 5 years. |

| | |
|---|--|
| <p>In addition to above mentioned offence if an individual violates any provisions of the draft bill having adverse effect on the privacy of other individual.</p> | <p>Compensation under civil action</p> |
| <p>Does not amend the information provided with accuracy on time, even on being request, and it results in any wrong determination with respect to character, qualification, rights or benefits issued on the basis of such record.</p> | <p>compensation under civil action</p> |
| <p>In consequence of above an adverse determination for the subject is being made.</p> | <p>compensation under civil action</p> |
| <p>Repetition of offence-If a person is convicted for the second time for violation of the same provisions of the Act for which he was convicted earlier.</p> | <p>Double the amount of penalty would be charged</p> |
| <p>When employee of telecommunication provider or Government agency causes unauthorised access to the information.</p> | <p>penalties up to 1 lakh rupees</p> |

Tentative conclusions concerning the 2014 Bill

If this draft bill of 2014 is drafted then it would protect the privacy of Indian citizens in parity with the international standards. But the chances of this bill converting into a legislation are very less as the Cyber appellate tribunal which is also the appellate tribunal under this bill has been inoperative for the past three years. In the past also India has always withheld itself from enforcing the data privacy laws. Regardless of this, the bill in itself is very effective and if in any case it is materialised then it would be a great step towards protection of privacy in India.

5.3 UNRESOLVED STATUS OF RIGHT TO PRIVACY-CASE OF JUSTICE K. S. PUTTASWAMY VS UNION OF INDIA⁹⁹

This case revolves around a scheme popularly referred as “adhaar card scheme”. It is an arrangement introduced by the Government of India regarding formation and distribution of unique identification card. This particular scheme is being questioned in this case on various grounds. It is irrelevant to get into details of adhaar card scheme of the Government of India for this particular Dissertation. This research only deals with the issue of privacy in Adhaar card case.

The collection of biometric data for preparation of adhaar card has been a ground of attack in this case. For this purpose firstly we need to discuss the meaning of biometric data. Biometric data¹⁰⁰ is any which has been formed in the biometric process which includes fingerprints, verification and identification data etc. In the scheme of preparing adhaar cards biometric data such as finger prints , eye retinas and irises' was collected. It has been attacked on the ground that such collection is a

⁹⁹ Supra fn-1

¹⁰⁰ Biometrics “means the technologies that measure and analyse human body characteristics, such as 'fingerprints', 'eye retinas and irises', 'voice patterns', 'facial patterns', 'hand measurements' and 'DNA' for authentication purposes” as per Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 under section 87 read with section 43A of Information Technology Act, 2000.

violation of right to privacy which is an implicit Fundamental right guaranteed under Article 21 of the Constitution of India.

Amidst this, the main issue which has caught everyone's eye is regarding the status of right to privacy itself. The side of petitioners allege that right to privacy is a Fundamental right implicitly guaranteed under Article 21 of the Constitution of India while the others assert that this right not only flows from Article 21 of the Constitution of India but also from other Articles guaranteeing Fundamental rights under part-III of the Constitution of India. Howsoever the side of the Government has contended that there is no such Fundamental right to privacy thus putting a huge question on the status of this right itself.

When the court considered this matter for hearing, The learned counsel from the side of the Government who is Mr. Mukul Rohatgi, submitted that the status of right to privacy as a Fundamental right is really dubious at this stage .On account of the judgement of the honourable Supreme court in *M.P. Sharma & Others v. Satish Chandra & Others*¹⁰¹, which was decided by a eight judge bench and *Kharak Singh v. State of U.P. & Others*¹⁰², which was decided by a six judges bench the authority of this right has become doubtful.

Hereafter the learned counsel submitted that with regard to the number of decision rendered by this honourable court subsequent to the above mentioned case in which gradually the court has recognised the status of right to privacy, which is in itself contradictory to the above mentioned cases, has resulted in a jurisprudentially unacceptable deviation of judicial opinions.

¹⁰¹ AIR 1954 SC 300

¹⁰² AIR 1963 SC 1295

*“A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations **by recognition of a Fundamental right to privacy**, analogous to the American Fourth Amendment, **we have no justification to import it, into a totally different Fundamental right, by some process of strained construction.**”¹⁰³*

*“... Nor do we consider that Art. 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, **the right of privacy is not a guaranteed right under our Constitution** and therefore the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a Fundamental right guaranteed by Part III”¹⁰⁴*

The learned attorney general further advanced that such a digression in perspective of the honourable court initiated with its judgement in the famous case of **Gobind v. State of M.P. & Another**¹⁰⁵. In this case the right to privacy was for the very first time affirmed by the honourable court and thus this case resulted in a series of judgements in which status of right to privacy was further advanced and accepted by the court. The most relevant of such cases are the leading case of **R. Rajagopal & Another v. State of Tamil Nadu & Others**¹⁰⁶, popularly called the *Auto Shanker's* case and **People's Union for Civil Liberties (PUCL) v. Union of India & Another**¹⁰⁷.

¹⁰³ See: *M.P. Singh & Others v. Satish Chandra & Others*, AIR 1954 SC 300, page 306 para 18

¹⁰⁴ See: *Kharak Singh v. State of U.P. & Others*, AIR 1963 SC 1295, page 1303 para 20

¹⁰⁵ (1975) 2 SCC 148

¹⁰⁶ (1994) 6 SCC 632

¹⁰⁷ (1997) 1 SCC 301

Howsoever all the above mentioned judgements, which contradicted the opinion given in case of *M.P. Sharma & Others v. SatishChandra & Others*¹⁰⁸, which was decided by a eight judge bench and *Kharak Singh v. State of U.P. & Others*¹⁰⁹, which was decided by a six judges bench, were decided by smaller benches of either two or three judges.

The respondent counsel also put forward that the contrast which the court made in **Gobind case** with regards to **M.P Sharma and Kharak Singh case** was also taken into account by many of the academicians, senior advocates of the court i.e. Shri F S Nariman also by former chief justice A.M Bhattacharjee¹¹⁰ ,High court of Calcutta and Bombay.

Having said so, to resolve the legal status of right to privacy, it is necessary to refer this matter to a larger bench of Supreme Court as this issue has raised very crucial debatable questions which can only be resolved by a larger bench.

Major important questions are-

- Whether there is any “right to privacy” guaranteed under our Constitution.
- If such a right exists, what is the source, authority and contours of this right because there is no explicit provision in the Constitution delineating it?
- If not, whether the right to privacy must be given the status of Fundamental right under Article 21 of Constitution of India.
- What must be the extent of right to privacy?

¹⁰⁸ AIR 1954 SC 300

¹⁰⁹ AIR 1963 SC 1295

¹¹⁰ A.M. Bhattacharjee , *Equality, Liberty & Property under the Constitution of India*, (Eastern Law House, New Delhi, 1997)

As per the requirement specified under Article 143¹¹¹ of the Constitution of India, these set of questions must be referred to a bench of atleast 5 judges and nothing less as these are the substantial questions of law as to the interpretation of Constitution of India.

The counsel on behalf of petitioners directly and deliriously opposed the recommendation regarding this matter to be presented before a larger bench of atleast five judges.

They submitted that the statement made by the judges in M.P Sharma case was the part of obiter dicta and not of ratio decidendi so it does not form precedent over smaller bench. Every statement made in a judicial decision is not authoritative source to be followed in a later case. Only the ration decidendi of the case is binding on lower courts or subsequent cases as the matter of general principle. Thus with regards to this principle the observations made by this court in R. Rajagopal and PUCL which accepts the status of right to privacy as a Fundamental right are legally sustainable as the observation made in M.P Sharma regarding no right to privacy does not have any binding effect on these subsequent cases, though decided by smaller bench.

Now coming to the case of Kharak Singh in which majority of judges held that as implicit part of Article 21 of the Constitution of India, the Fundamental right of a person to not to be troubled at his home or place of stay by the State authorities has been recognised. This itself forms a very important part of privacy and reflects the

¹¹¹ Article 145(3). The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this chapter other than Article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion

existence and in a way acknowledgement of right to privacy in the case of Kharak Singh also. Para 20 of the judgement of Supreme court in Kharak Singh's case can be best interpreted as to mean that the Fundamental right to privacy ceases to exist when it comes to surveillance being kept by the state authorities on the activities of an individual. The majority judges stated that no one can claim right to privacy against surveillance by state authorities.

After the decision of Supreme Court in *Maneka Gandhi v. Union of India*¹¹²¹¹³ and Another even the above conclusion of no right to privacy against state surveillance does not hold good as *Maneka Gandhi's* case decided by a seven judge bench had overridden the judgement given in *Kharak Singh's* case.

The counsel further submitted that in ***A K Gopalan vs. State of Madras***¹¹⁴ certain principles regarding interpretation of Constitution were developed which were vehemently overruled by a larger bench in the case of ***Rustom Cavasjee Cooper v. Union of India***¹¹⁵. the cases of *MP Sharma* and *Kharak Singh's* were based on the principles propounded in *A K Gopalan* case. Thus as the principles of *A K Gopalan*

¹¹² (1978) 1 SCC 2483.

¹¹³Para 5. .. It was in *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those- dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes, of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words: "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 excludes 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 has 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 satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned".

There can be no doubt that in view of the decision of this Court in *R. C. Cooper v. Union of India*, (1970) 2 SCC 298 the minority view must be regarded as correct and the majority view must be held to have been overruled.

¹¹⁴ AIR 1950 SC 27.

¹¹⁵(1970) 1 SCC 248.

case no longer stands true ,how can the judgement of M P Sharma case and Kharak singh case which were completely based on those principles be justified.That being said it is very clear that it is unnecessary to refer the present batch of issues regarding right to privacy to a larger bench.

Though in Gobind's case the judges had not clearly acknowledged the existence of right to privacy or its implicit presence in any of the Articles in part III of the Constitution of India and they did not even affirmed its authority flowing from any of the Fundamental rights, yet they contemplated that –

“Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a Fundamental right, we do not think that the right is absolute”.

This statement given by the judges in Gobind's case clearly explains that though they did not directly acknowledged right to privacy but in a hidden way this case has somewhere given spark to the growth and future existence of right to privacy and as a result in subsequent case right to privacy was clearly established by the judge to be an implicit part of Article 21 and Article 19 of the Constitution of India. This decision has been a major step in future recognition of right to privacy.

The existence of the right to privacy as Fundamental right under the Indian Constitution was emphatically recognised in the subsequent cases of R. Rajagopal and PUCL.In these cases the benches explicitly acknowledged the existence of right to privacy.In R. Rajagopal's¹¹⁶ case the bench declared it to be the implicit part of

¹¹⁶ Para 9. “Right to privacy is not enumerated as a Fundamental right in our Constitution but has been inferred from Article 21.”

Article 21 of the Constitution of India while it was regarded as a part of right to speech and was linked with Article 19(1)(a) and also Article 21¹¹⁷ in PUCL's case.

It was further submitted by the counsel that all over the world in any of the countries which follow Anglo Saxon jurisprudence as India, the term liberty is interpreted as to include privacy. Liberty is given wide connotation in such countries and right to privacy is given a lot of importance and is considered to be a crucial aspect of liberty. That being said as India also follow Anglo Saxon jurisprudence it would be too late to debate on the existence of privacy within the scope of right to liberty under Article 21 of the Indian Constitution.

Even in Kharak Singh's case though the existence of right to privacy as a part of Article 21 of Indian Constitution was denied, the right of an individual to feel safe at his house and not to be absurdly disturbed at home by state authorities or its officers is observed and recognised by the bench in this case which itself is to certain extent part of right to privacy only.

Finally it was concluded that the cases in question have raised a very crucial issue regarding status of right to privacy which also involves interpretation of various Articles in part III of the Constitution of India. The very precious and unseperable

¹¹⁷Para 18. "The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

Para 19. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution."

right of liberty and life given under Article 21 of the Constitution is also at stake because of these issues and turmoil created due to decisions given in M P Sharma case and Kharak Singh case.

If the statements in above mentioned cases are acknowledged as the settled law on the issue of privacy then the very existence and strength of Fundamental right especially right to liberty under Article 21 would be stripped off. Right to privacy is a very essential right of modern era and the need of the hour is to protect it but in spite of its importance we cannot deny the fact and judicial principle that pronouncements of larger bench are precedents for smaller bench except by giving reasonable explanations for deviating from the judgements or observations. The courts cannot deviate from this judicial principle of institutional integrity. This principle of precedents is a very settled principle of law.

The honourable judges who delivered the judgements subsequent to the case of M P Sharma and Kharak Singh deviated from this principle by giving proper status of Fundamental right and acknowledging its implicit existence as part of right to liberty. Henceforth there has been an apparent unresolved contradiction in the law declared by this Court which needs to be determined.

Having said so, the honourable court very appropriately to end this issue for one and for all referred it to be decided by the bench of appropriate size which shall comment upon the status of right to privacy and jurisprudential correctness of decisions subsequent to the case of Kharak Singh.

5.4 ANALYSIS OF M.P SHARMA¹¹⁸ CASE AND KHARAK SINGH'S CASE¹¹⁹

The attorney general of India, in the adhaar case, based his contentions regarding doubtful status of right to privacy majorly on two cases which are M.P Sharma vs. Satish Chandra and Kharak Singh vs. State of UP. Thus In this part of chapter the author will analyse both the cases so as to determine what the judges actually intended by their wordings with respect to right to privacy.

Case of M.P Sharma vs. Satish Chandra-

In the view of the researcher, this case is not at all related to the issue of privacy. In this case the major issue was regarding search warrants for 34 places issued by district magistrate of Delhi which allowed Delhi special police Establishment to search 34 places related to a company which was alleged to be involved in misappropriation of funds. The police seized a lot of documents also. The petitioner in this case contended that issue of such search warrants was violation of the Fundamental rights guaranteed to citizen under Article 19(1)(f) i.e. right to property and 20(3) i.e. Right against self-incrimination

After giving due consideration to the facts of the case and the provision of the civil procedure code, the bench constituting 9 judges held the search and seizure to be valid and lawful. They stated that it does not cause infringement of Fundamental right and while delivering this judgement they stated just one line about privacy i.e

“When the Constitution makers have thought fit not to subject such regulation to Constitutional limitations by recognition of a Fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different Fundamental right, by some process of strained construction”

In the opinion of the researcher, The honourable Supreme Court only put forward the

¹¹⁸ 1954 SCR 1077

¹¹⁹ AIR 1963 SC 1295

factual Status of right to privacy , stating that it is nowhere mentioned in chapter III of the Constitution of India which deals with Fundamental rights. Apart from this the term privacy was not mentioned in Entire Judgement. Even in the pleading this term was nowhere used nor was any issue particularly related to privacy as such.

The entire issue was based on Article 19(1) (f) and Article 20(3) of the Constitution of India. The challenge was regarding seizure of documents which according to petitioner violated the Fundamental right to hold and enjoy property. The Court held that lawful search do not violate enjoyment of property guaranteed under Article 19(1)(f) and regarding Self-incrimination Court stated that searches by police is authorise under CrPc and does not violate Article 20(3) of the Constitution of India.

Having said so it is very clear that the case had no connection at all with right to privacy and the only line stated by the judges on privacy just brought forward the factual position on privacy stating that right to privacy is nowhere explicitly present in Chapter III of the Constitution of India and they proposed not importing it until legislature adds it.This one line ,in my assessment, was not meant to set precedent on the issue of privacy disregarding its existence as a Fundamental right and rejecting the whole idea of it.It basically meant that at that point of time they did not wanted to interpret Fundamental rights to interpret or discover within it right to privacy.

Case of Kharak Singh vs. State of U.P-

In this case Kharak Singh, who was earlier, accused of Dacoit but due to in availability of proper evidence was discharged, was followed by the police after this incident. The police often visited him during night time and if had to leave the place to go to his village he had to inform the police who further gave notice to local police of the place where he had to go. The police was practicing such a strict surveillance under U. P Police Regulation. Kharak Singh finally filed a suit against U.P police

stating that they are violating his Fundamental right to move provided under Article 19(1) (d) and also due process under Article 21 of the Constitution of India.

The court held that U.P Police regulation do not violate Fundamental right to move freely because infringing Fundamental right to movement involve something physical or tangible and what the respondents were doing was only effecting his mind because of which he was restricting his movement. Police had not stopped him from going anywhere. Only the untimely visits under regulation 236 was violative of right to liberty as it was not based on any law.

The court stated-

"We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois (1), where the learned judge pointed out that "life" in the 5th and 14th Amendments of the U. S. Constitution corresponding to Art. 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs-his arms and legs etc. should the word "'personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal ? It might not be inappropriate to refer here to the words of the preamble the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution.

We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to

stretch the meaning of the phrase to square with any preconceived notions or doctrinaire Constitutional theories ¹²⁰

After citing this paragraph the court also said that it is very well aware that the decision of US Supreme Court of which this Court is basing its judgement has taken into consideration the 4th amendment which provides security to its citizens against unreasonable search and seizure and protection to privacy of citizens at home and also stated that-

*“and that our Constitution does not in terms confer any like Constitutional guarantee....”*¹²¹

In the opinion of the researcher The Court did not said that people in India do not have any Fundamental right to Privacy. Thinking so would lead to attaching totally irrelevant meaning to the words of the Court which it never meant and thus would be a complete misunderstanding. In this case the court has shown distress and thoughtfulness over the security of citizen’s freedom against unrestricted authority and power of the State. By striking down the unconstitutional regulation clarifies the opinion of Court on status of privacy which is given as personal liberty under Article 21 of the Constitution of India. They just fell short of considering it as Fundamental right which was declared after 13 years in the case of Gobind vs. State of MP.

In the famous case of Kesavananda Bharti vs State of Kerala the judges had observed that-*“The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience”*¹²²

¹²⁰ Ibid., at 1292

¹²¹ Ibid., at 1306

¹²²

The judicial pronouncements after the abovementioned cases along with the two cases have led to evolution of jurisprudence of privacy protection in India. The Supreme Court for two decades, in the post Kharak Singh phase, have very carefully and with full caution deduced right to privacy as an implied part of Article 21 of the Constitution of India.

Most of the Fundamental rights have been interpreted by judiciary to include a lot more things than it literally meant and these changes are brought to keep the rights provided under the Constitution in parlance with the increasing demand of modern society. No bench of the Supreme Court has ever placed restriction on expanding the scope of Fundamental rights and making them more meaningful by reading between the lines and interpreting them in such a way so as to increase their scope.

CHAPTER 6- ARGUMENTS ON PRIVACY

6.1 ARGUMENTS IN FAVOUR OF RIGHT TO PRIVACY¹²³

- Right to Privacy is the essence of right to personal liberty guaranteed under Article 21 of the Constitution of India. Privacy is a very important constituent of liberty. The most irritating thing which hampers a person's liberty is unwarranted interference with his family.
- There is a drastic shift in the world from "we to me". Earlier privacy was not that important but it is need of the day. People have their own private lives which they need to be protected from being revealed to public.
- India is also a signatory to the Universal Declaration of the Human Rights of the United Nations, in which the privilege to privacy is a section, thus she ought to regard it and adopt it as per Article 51 of the Constitution of India.
- India has also acceded to International Covenant on Civil and Political Rights .Article 17 of ICCPR regards privacy as a human right. Also no reservation was made by India while ratifying ICCPR so it is the duty of India to respect the convention and take all possible steps-executive as well as legislative to ensure enjoyment of human right to privacy by citizens of India.
- Its break is an utter detestation to Democracy as privacy is an utmost important and inalienable element for self-expression. As per the preamble of the Constitution of India to protect democratic rights is the main objective and basic feature of the Constitution of India.

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- As the state offices are furnished with capable and a strong apparatus for surveillance, the individual information (like bio measurements or bio data) is inclined to be abused by the high level bureaucrats who already have unfettered power.
- Despite the fact that the expectation of the Government of India to "know" their residents very much legitimate, the lower level bureaucrats might abuse the information for unimportant money related benefits. For necessary purpose reasonable restriction can always be placed on Right to Privacy.
- The jurisprudential trend of privacy in India developed by various judicial pronouncements is clearly in favour of acknowledging right of privacy as a Fundamental Right.
- Protection to privacy would also ensure dignity of individuals which is also the basic objective of the Government as per the Constitution of India. Also dignity has been declared as non-negotiable part of Article 21 of the Constitution of India.
- Privacy is an essential right which is necessary for full development of personality of the citizens.
- The Constituent assemble Debates make it very clear that the committee on Fundamental rights and also the subcommittee considered it to be a very essential right for the citizens of India. They just fell short of declaring it as Fundamental right.

- India itself has recognised right to privacy as a human right in Protection of Human Rights Act,1993.This Act states that all rights-
"relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants such as the ICCPR and enforceable by courts in India as human rights."
and ICCPR recognizes right to privacy thus by this act India also recognizes right to privacy as human right.

6.2 ARGUMENTS AGAINST RIGHT TO PRIVACY

- The privilege has no lawful source as it is nowhere specified in the Constitution of India.
- Whenever citizens/inhabitants have nothing to cover up, what is the issue in subsuming their personal information to honest establishments for more noteworthy development of the nation?
- Rather than terming it as anti-privacy, the activities ought to be comprehended as the administration's bona fide push to know their natives in a better way which is key for proficient allocation of rare resources to the destitute populace in an assorted nation such as India.
- Putting Right to privacy on such a high pedestal as Fundamental rights would mean unnecessary restriction on smooth and efficient functioning of Government.

- Constitution makers did not intend to include it as Fundamental right. This view is very clear as even after a long debate on this issue at the end they dropped the idea of including it as a Fundamental right.
- It will obstruct the implementation of various welfare schemes issued by Government such as adhaar scheme etc. This is because in all such schemes personal information is needed. Such personal information helps to know the marginalised sections of the country who are rightful owner of welfare schemes.

CONCLUSION AND RECOMMENDATIONS

After giving due consideration to Judicial pronouncements, Jurisprudential development, international laws on privacy and the arguments in favour and against privacy, the author is of the opinion that **Right to privacy must be given the status of Fundamental right** because it is an essential right of the modern era and deserves to be put on such a High pedestal of Fundamental rights. It must explicitly be included under Article 21 as its sub clause as also recommended by the Venkata Chaliah Commission so that it does not create any further doubts relating to status of right to privacy.

The Fundamental rights are those rights which preserve the basic values of the people. They are rights essential to promote overall development of an individual and create conditions which are important for growth of their personality to the fullest. Their purpose is protecting the dignity of an individual. They ensure guarantee of the basic human rights and impose duty on the State to protect these rights.

All the conditions needed for a right to be declared as Fundamental rights are present in right to privacy. It is the most essential right of the modern world. It has also been declared as Human right in many of the Convention including ICCPR to which India is a signatory. Infact in Protection of Human Rights Act, 1993 even the Indian legislature has directly imposed the status of human rights on right to privacy. Privacy is also an important condition for development of personality of an individual to the fullest and is an important aspect of protection of dignity.

Moreover, The judicial pronouncements have led to evolution of jurisprudence of privacy protection in India. The Supreme Court for two decades, in the post Kharak Singh phase, have very carefully and with full caution deduced right to privacy as an

implied part of Article 21 of the Constitution of India. Thus to clear all confusion which has emerged in the adhaar case the Supreme Court must interpret it to be the part of Article 21 of the Constitution of India and suggest that the legislature should explicitly include it to be the part of Article 21 of the Constitution of India.

This right however should not be absolute. **Reasonable restrictions must be placed on right to privacy** as are placed on all other Fundamental rights. Privacy is like a dangerous animal which if not tamed can create havoc. There is no sense in providing unbridled privacy. Reasonable restriction imposed on privacy will also reduce its drawbacks and it would then not result in unreasonable obstruction on the working of Government.

The Preamble of Constitution of India starts with the word “we the people of India”. In Democracy citizens of the country are placed at highest level and the government is always below them. Even then the citizens have to understand that no right can be provided to them absolutely. They have to give away a certain part of their right in favour of the government for its effective functioning. But proper safeguards must be taken so as to ensure that the subsumed part is not misused by the Government.

Under the social contract theory nationals have to surrender their rights in favour of Government. Privacy is not such a right which has to be surrendered under this theory but a part of it has to be. Government needs this information for better implementation of welfare schemes such as adhaar card scheme. However it is the duty of the Government to ensure any personal information is not misused. Also certain acts which are totally against the tradition and culture of Indian people like homosexuality and unrestricted display of affection even if restricted must not lead to infringement of right to privacy. Such restriction must be included under reasonable restriction.

Few of the restrictions that must be placed on right to privacy in which case the privacy of the citizen can be infringed are-

- In Interest of the State whether it be strategic, scientific or economic in nature
- When security of nation is at stake or for protection of integrity and sovereignty of India.
- When rights and freedoms of other nationals is at stake.
- To protect and maintain harmonious relations with foreign countries
- To prohibit public disorder
- For disclosure of criminal in any offence or for detection of the crime.
- When larger public interest demands disclosure
- For historic and scientific research

Secondly a **comprehensive Legislation must be formed on Right to privacy**. This is because privacy is a very sensitive right. Proper procedure must be developed for its protection. Moreover detailed scope and limitations of right to privacy must be provided under this Act.

This Act must-

- Define privacy and Give proper clarification as to its scope.
- Enumerate Constitutional basis for right to Privacy
- Adopt National Privacy principles in the provision of this Act relating to use of personal information by government and private agencies, matters related to audio and video recording, data interception, and telephone tapping etc.
- Enumerate additional limitation and exemptions on right to privacy, which would not be included under Constitution of India.

- List detailed provisions on scope of limitation on privacy and under what circumstances such limitations can be imposed. It is necessary otherwise the government and other agencies might abuse the loopholes present in the exemptions and limitations and under its cover infringe individual's right to privacy.¹²⁴
- Recommendations of Shah Committee and the provisions of Draft bill on privacy must be materialised into the legislation.
- The Act must provide for setting up efficient mechanism to ensure proper enforcement of right to privacy at different levels. Privacy commissioners must be appointed at both central and regional level and their powers and duty must be defined under this Act.
- The Act must also provide for appointment of SRO's on the line of Draft bill on privacy and also define their powers and functions.
- The Act must also provide for proper mechanism for resolution of disputes related to privacy and give proper adjudicatory powers to the authorities in that respect.
- The Act must provide for proper and detailed provisions relating to penalising in cases of infringement of privacy.

At the End the Author would like to conclude that declaration of right to privacy as a Fundamental right would infact complement the aspiration of the Constitution maker as are reflected in the Preamble of the Constitution of India. It would also correlate to the provisions of UN Charter (1945), Universal Declaration of Human

¹²⁴ Planning commission, Report of group of experts on privacy,2012, available at [planning commission .nic.in > rep-privacy](http://planningcommission.nic.in/rep-privacy)

Rights (1948) and the International Covenant on Civil and Political Rights (1966) of which India is signatory.

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