

## **RIGHT TO PRIVACY, IT'S SANCTITY IN INDIA**

*"Civilization is the progress towards a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men."<sup>1</sup>*

### **INTRODUCTION**

The idea of privacy is as old as the history of mankind itself. However, the term privacy cannot be easily conceptualized. Different scholars have given various meanings to privacy and also it has various aspects which changes with the change in the society.

Tracing back its history when we go into the debates of Constituent Assembly we find some discussions on the point of privacy and secrecy. From the Constituent Assembly Debates it can be concluded that right to privacy was deliberately not included in the Constitution. What could possibly the intention of legislature behind this is not known.

Talking about right to privacy in post-independence era in India, the Constitution does not expressly recognize right to privacy but it has been evolved through judicial precedents. For the first time it was recognized in the case of *Kharak Singh*<sup>2</sup>. Also, there are various legislations which contain some provisions which one can relate to privacy such as Indian Evidence Act, Information Technology Act, Indian Penal Code, Criminal law, Indian Telegraph Act, Indian Easement Act, Family law. These laws have been discussed in detail in this article.

Privacy is fundamental to human being and there are various aspects of privacy such as privacy of space, privacy of body, privacy of information, privacy of choice which has been evolved over time. And in today's Digital era there is greater need to protect this right. Right to privacy in today's Digital era, consequences of social media on privacy have been discussed in the article. We will also discuss the laws which protect privacy and do we have enough laws to cater to the issues of invasion of privacy which has been recognized as Fundamental Right under Article 21 of the Constitution and sanctity of right to privacy in India.

### **HISTORY OF THE RIGHT TO PRIVACY**

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<sup>1</sup> Ayn Rand, *The Fountainhead* (1943)

<sup>2</sup> *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC

The need for protection of privacy was felt by human beings from ancient times, however, the concept was not well defined. When we start discussion on the concept and basis of right it becomes necessary to trace its historical development in order to find out universally acceptable definition. The concept of privacy can be traced out in the ancient text of Hindus as well. If one look at the Hitopadesh it says that certain matter (worship, sex and family matters) should be protected from disclosure.

But, the need for privacy and its recognition as a right is the product of an increasingly individualistic society in which the focus has shifted from society to the individual. Earlier, the law afforded protection only against physical interference with a person or his property. As civilization progressed, the personal, intellectual and spiritual facets of the human personality gained recognition and the scope of the law expanded to give protection to these needs.<sup>3</sup>

The earliest recordings of 'right to privacy' in Indian jurisprudence were in the late 1800s when a local British court upheld privacy of a pardanashin woman to access her balcony without the fear of the neighborhood gaze. The jurisprudence has evolved ever since and the right to privacy was read into 'Article 21' of our Constitution by the Supreme Court as an integral part of 'personal liberty'.<sup>4</sup>

Privacy is not a fundamental right was first held by the Hon'ble Supreme Court in the year 1954. In *M.P. Sharma v. Satish Chandra*<sup>5</sup>, the Court dismissed the existence of a right to privacy on the basis that the makers of Constitution had not envisaged a fundamental right to privacy.

After nine years, in *Kharak Singh v. State of Uttar Pradesh*<sup>6</sup> majority of the Judges participating in the decision again rejected the right to privacy held that, "our Constitution does not in terms confer any like constitutional guarantee." But minority opinion of Subba Rao J. in *Kharak Singh case*,<sup>7</sup> was in favour of privacy. The silver lining was Justice Subba Rao's dissent, wherein he went on to say "...the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our

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<sup>3</sup> Madhavi Goradia Divan, Facets of Media Law, 2nd edition, at page no.165

<sup>4</sup> <https://www.theweek.in/content/archival/news/india/brief-history-right-to-privacy.html>

<sup>5</sup> AIR 1954 SC

<sup>6</sup> AIR 1963 SC

<sup>7</sup> *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1302

Constitution does not expressly declare a right to privacy as a Fundamental Right, but said right is an essential ingredient of personal liberty."

Twelve years later, the Supreme Court, when faced with a similar factual matrix in *Gobind v. State of Madhya Pradesh*,<sup>8</sup> undertook a more elaborate appraisal of the right to privacy. The Court also accepted a limited Fundamental Right to privacy "as an emanation" from Arts. 19(a), (d) and 21. However, the right was not absolute; reasonable restrictions can be placed by a procedure established by law.

Privacy jurisprudence was further strengthened. In the case of the infamous gangster, "*Auto Shanker*"<sup>9</sup> the Supreme Court asserted that in recent times the right to privacy has acquired constitutional status. Later on, after taking note of the above-mentioned cases, the Supreme Court observed: "We have, therefore, no hesitation in holding that right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law.' "<sup>10</sup>

This is how "right to privacy" evolved through judicial precedents in India. By this time, privacy had assumed an inherent role in our fundamental rights jurisprudence that helped us lead a dignified life. And it never faced such a strong challenge earlier as it is currently facing.

## **MEANING OF RIGHT TO PRIVACY**

Talking about its meaning the terms privacy can't be easily conceptualized. It has been taken in different ways in several situations. *Black's Law Dictionary* says that 'right to privacy' is a generic term encompassing various rights recognized to be inherent in concept of ordered liberty, and such rights prevent government interference in intimate personal relationship's or activities, freedoms of individual to make fundamental choices involving himself, his family, and his relationship with others. Privacy has also been described as the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to

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<sup>8</sup> AIR 1975 SC

<sup>9</sup> R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264

<sup>10</sup> People's Union for Civil Liberties v. Union of India, AIR 1991 SC 207

participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession<sup>11</sup>.

Whereas, right to privacy means "the right to be let alone; the right of a person to be free from unwarranted publicity. The term 'right of privacy is generic term encompassing various rights recognized to be inherent in concept of ordered liberty<sup>12</sup>. Right to personal liberty, and the right to move freely and speech could be described as contributing to the right to privacy<sup>13</sup>.

### **CONSTITUENT ASSEMBLY DEBATE ON PRIVACY**

There is no constitutional right to privacy as such. Why it has not been expressly mentioned in the Constitution? The Constitution of India was adopted on 26 January 1950, it nowhere mentions right to privacy. It appears that the framers of our Constitution had considered including a right to privacy in the Constitution but, for some reason they did not include it in the Constitution.

When Munshi presented the first draft articles on fundamental rights on 17 March 1947, it included Sub-Article (1), which stated that every citizen, within the limits of the law of the Union, should have:

- (e) The right to be informed within twenty-four hours of his deprivation of liberty by what authority and on what grounds he is being so deprived
- (f) The right to the inviolability of his home
- (g) The right to the secrecy of his correspondence
- (h) The right to maintain his person secure by the law of the Union from exploitation in any manner contrary to the law or public morality

Dr B.R. Ambedkar's draft of 24 March 1947 also articulated a similar formulation:

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<sup>11</sup>.AC. Breckenridge, *The Right to Privacy* (1971)

<sup>12</sup> Dr. Avtar Singh, *College Law Dictionary*, 2<sup>nd</sup> ed.

<sup>13</sup> Govind v. State of M.P., AIR, 1975 SC 1378.

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.

Based on these individual contributions, the Draft Report of the Sub-Committee on Fundamental Rights dated April 1947 included a specific mention of both the right to secrecy of correspondence as well as the right against unreasonable search and seizure.<sup>14</sup>

Hence, this proves the fact that the Indian Constitution does not mention privacy. It was not an accident but outcome of a conscious choice.

### **JUDICIAL INTERPRETATION OF RIGHT TO PRIVACY**

The Constitution of India does not grant in specific and express terms any right to privacy as such. Right to privacy is not enumerated as a Fundamental Right in the Constitution. However, such a right has been culled by the Supreme Court from Art. 21 and several other provisions of the Constitution read with Directive Principles of State Policy.<sup>15</sup> A citizen has a right to safeguard the privacy of his own, his family marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical.<sup>16</sup>

The right to privacy has several aspects. One such aspect is the right to procreate. This is also known as "the right of reproductive autonomy". The right to use condoms, the right of a woman to abort, all these falls within the ambit of right to privacy.<sup>17</sup> In *State of Maharashtra v. Madhukar Narayan Mardikar*,<sup>18</sup> the Supreme Court protected the right to privacy of a prostitute. The Court held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.

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<sup>14</sup> <https://scroll.in/article/886850/why-did-the-framers-of-the-indian-constitution-not-explicitly-include-the-right-to-privacy>

<sup>15</sup> M.P. Jain, Indian Constitutional Law of india (7th edition, 2014) page no 1168

<sup>16</sup> R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264

<sup>17</sup> M.P. Jain, Indian Constitutional Law of india (7th edition, 2014) page no 1169

<sup>18</sup> AIR 1999 SC 495

The right to privacy has now become established in India, but as a part of Art. 21, and not as an independent right. Although it has been recognized under Art. 21 the Court has however, refused to define privacy saying, "As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringement in a given case depend on the facts of the said case".<sup>19</sup>

### **Subjecting a Person to Medical Tests**

It is well settled that right to privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others.<sup>20</sup>

In *Sharda v. Dharmpal*,<sup>21</sup> Hon'ble Supreme Court ruled that a Matrimonial Court had the power to direct a party to divorce proceedings, to undergo a medical examination. A direction issued for that purpose could not be held to be violation of one's right to privacy. The Hon'ble Court referred to the state of law prevailing in some countries where collecting samples from suspects, for DNA tests, have not been found to be violation of right to privacy.

Further, in *Surjit Singh v. Kanwaljit Kaur*,<sup>22</sup> the Punjab and Haryana High Court held that allowing medical examination of a woman for her virginity amounts to violation of her right to privacy and personal liberty enshrined under Article 21 of the Constitution. Also, nobody can be compelled, without his consent to submit to D.N.A. test.<sup>23</sup>

### **Right to Privacy and Telephone Tapping**

Allegations of political opponents and even colleagues being under surveillance have been endemic in our country under all regimes over the last six decades. It has been held to be a serious inroad into the right to privacy, a facet of the right to personal liberty.<sup>24</sup>

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<sup>19</sup> M.P. Jain, Indian Constitutional Law of india (7th edition, 2014) page no 1170

<sup>20</sup> Mr. 'X' v. Hospital 'Z', AIR 1999 SC

<sup>21</sup> AIR 2003 SC 3450

<sup>22</sup> AIR 2003 P&H 353

<sup>23</sup> Banarasi Das v. Teeku Dutta, 2005 (4) SCC 449

<sup>24</sup> Dr. Narendra Kumar, Constitutional Law of India, 9<sup>th</sup> ed.

Section 5 (2) of the *Indian Telegraph Act, 1885* empowers the Central Government or the State Government or any specially authorized officer, to intercept messages if satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, or for preventing incitement to the commission of an offence. It can be done in the event of the occurrence of a public emergency or in the interest of public safety for reasons to be recorded in writing.

In *People's Union for Civil Liberties v. Union of India*,<sup>25</sup> Hon'ble Court laid down certain procedural safeguards to be observed before resorting to telephone tapping under section 5(2) of the Act. Except in cases, when the Indian Telegraph act, 1885 empowers the State to intercept messages, telephone tapping would be violation of the right to privacy.

Telephone conversation is an important 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. Tapping of telephone is a serious invasion of privacy. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. This means that telephone tapping would infract Article 21 unless it is permitted under the procedure established by law.

Further, act of tapping by the husband of conversation of his wife with others without her knowledge is illegal and amounts to infringement of her right to privacy under Article 21 of the Constitution of India.<sup>26</sup>

### **Woman's Right o Make Reproductive Choices**

In *Suchita Srivastava v. Chandigarh Administration*,<sup>27</sup> a three-Judge Bench of the Supreme Court, headed by Hon'ble Chief Justice, was moved to determine the scope of "woman's right to make reproductive choices" in view of the right to privacy secured as an important facet of right to personal liberty. Court said that it was important to recognize that reproductive choices could be exercised by the woman to procreate as well as to abstain from procreating. Stating that a

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<sup>25</sup> AIR 1997 SC 568

<sup>26</sup> Royals M. Bhuvanewari v. Nagaphamender Rayala, AIR 2008 AP 98

<sup>27</sup> AIR 2010 SC 235

woman's right to privacy, dignity and bodily integrity, was of crucial consideration, the same should be respected.

The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the state into such a decision making process of the individual is scrutinized by the constitutional Courts in this country with great care.<sup>28</sup>

### **Live-In-Relationship and Privacy**

India is a free democratic and secular country and therefore, any person who has attained majority, has the right to live freely with anyone.<sup>29</sup> Allahabad High Court in the instant case ruled that a person, he or she, who attained 18 years of age, being major according to Section 3 of Indian Majority Act, 1875, was deemed to understand his/her welfare and hence he/she could go wherever he/she liked and live with anybody. He/she could not be restrained from doing so, even by the parents. Individual liberty under Article 21, the Court ruled, had the highest place in our Constitution.

Two adult person living together of their free will has come to be termed as Live-in-relationship, Hon'ble Justice S.N. Dhingra of the Delhi High Court has recently,<sup>30</sup> defined the concept as "a walk in and walk out" relationship which entailed no obligation on the parties who enter into it. People who choose to have a Live-in-relationship, the Court ruled, could not complain of infidelity or immortality. In the instant case, the woman, a divorcee with a child was in such relationship with petitioner, a London based solicitor, who was a married person, for five years. She lodged an FIR against home to prevent him from flying to London. The Court quashed the FIR.

In appeal the Apex Court referred to the provisions of the Protection of Women from Domestic Violence Act, 2005, which was enacted to provide a remedy in Civil Law for protection of women from being victims of domestic violence. The protection under the Act, 2005 is also, among others available to person living together through a relationship in the nature of marriage

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<sup>28</sup> B.K. Parthasarathi v. State of Andhra Pradesh, AIR 2000 AP 156

<sup>29</sup> Jyoti v. State of U.P., AIR 2004 All. 45

<sup>30</sup> Indra Sharma v. K.V. Sarma, AIR 2014 SC 309



i.e. "Live-in-Relationship". Dismissing the appeal, the Apex Court held that the relationship between the appellant and the respondent as not "in the nature of marriage" for the purpose of the Act, 2005.

Hence, it can be concluded that the privacy of persons living together in a live-in-relationship has not been given due importance through the laws, laws do not protect right to privacy of these persons. There are hardly any laws which provide protection to these people even judicial precedents do not favour them besides that they have to face many hardships from the society as well. There is a dire need of strong legislation to protect the rights and privacy of people living together in a live-in-relationship.

### **Right to Privacy Is Not Absolute Right**

In Mr. 'X' v. Hospital 'Z', the question before the Supreme Court was whether the disclosure by the Doctor that his patient, who was to get married had tested HIV positive, would be violative of the patient's right to privacy, an essential component of right to life envisaged by Article 21.

Supreme Court ruled that the right to privacy was not absolute and might be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. The Court held that the doctors by their disclosure that the patient was HIV (+), could not be said to have, in any way, either violated the rule of confidentiality<sup>31</sup> or the right to privacy.

### **POSTULATES OF PRIVACY**

According to Dr. D.Y. Chandrachud, J. "Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are

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<sup>31</sup> See the Indian Medical Council (Amendment) Act, 1964

inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioral patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture."<sup>32</sup>

## **OTHER LEGISLATIVE PROVISIONS RELATED TO PRIVACY**

### **The Indian telegraph Act, 1885**

Section 5(2) of the Act permits interception of messages in accordance with the provisions of the said section. Occurrence of any public emergency or in the interest of public safety are the sine qua non for the application of the provision of Section 5(2). Unless the public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under that provision.

A leading case on Section 5(2) of the Indian Telegraph Act which came up before the Court is *People's Union for Civil Liberties v. Union of India*,<sup>33</sup> in this case it was held that occurrence of

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<sup>32</sup> Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others, writ petition (civil) No. 494 Of 2012

<sup>33</sup> AIR 1997 S.C. 568

public emergency or existence of public safety interest are sine qua non for application of provisions of Section 5(2) of the Act. It was also held that telephone tapping infracts right to life under Article 21 of the Constitution. The Supreme Court directed the observance of procedural safeguards before resorting to telephone-tapping.

### **The Indian Easement Act, 1882**

A right of privacy falls under illustration (b) of Section 18 of *The Indian Easement Act, 1882* which reads as follows:- By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A 's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A 's house.

Right of privacy is a valuable right which needs protection. There is an invasion of this right if it has been recognised by custom. The right to privacy being a customary right it is always open to the Court to see whether the custom is, in the circumstances, reasonable and whether it has ceased to be enforceable by desuetude. Be that as it may, the customary right of privacy may be said to exist only in respect of the inner courtyards.<sup>34</sup> There is no natural right to privacy recognised by law anywhere in India. It is only customary easement arising by virtue of a local custom. Thus in order to entitle the plaintiff to a decree for a mandatory injunction directing the defendant to close window put in his own property, the plaintiff must establish that there is such a customary right in the town where the properties are located, that no owner as to substantially invade his neighbour's privacy.<sup>35</sup>

The right of privacy, if at all, may be claimed as a customary right.<sup>36</sup> Thus it is not every infringement of privacy which is actionable. It must be shown that there has been substantial and material infringement of privacy. The right to privacy can be carried to an oppressive length.

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<sup>34</sup> Diwan Singh v. Inderjeet, AIR 1981 All. 342).

<sup>35</sup> Feel Chand v. Hans Raj, AIR 1971 Mys.322)

<sup>36</sup> Pir Agha Mohammed Hussain v. Elias Haji Wahiddino, AIR 1948 Sind. 36 (DB) )

Each case must be decided upon its own peculiar facts in determining whether there has or has not been a substantial infringement of right to privacy.<sup>37</sup>

### **Family Laws**

The privacy of family and friends has been mentioned in some statutes. Hearing in camera in certain marriage and divorce statutes may be said to have the aim of privacy in view. It is said that confidentiality of proceedings is sometimes desirable. This is much more so in regard to matrimonial proceedings. All the matrimonial statutes provide that at the desire of the parties, the proceedings may be heard in camera. Section 22 of the *Hindu Marriage Act, 1955* provides for this. Similar provision has been enacted in the *Indian Divorce Act, 1869*, although the provision is not as comprehensive as under the *Hindu Marriage Act, 1955*. Section 53 of the *Indian Divorce Act, 1869* provides that "The whole or any part of any proceeding under this Act be heard, if the court thinks fit, within closed doors". Under this Act discretion rests with the court, while under the other three statutes it is mandatory.

### **The Indian Evidence Act, 1872**

There are provisions under the Evidence law which protect the privacy interests of accused persons in view of the presumption of innocence appears to have been caused by any inducement, threat or promise is inadmissible in evidence.<sup>38</sup> The privacy of communication and official secrecy has been protected from disclosure as special privilege. The Judicial officers shall not be compelled to answer any questions as to his conduct in court as such.<sup>39</sup>

Further, the communication between husband and wife during marriage is regarded as private and the law accords protection to such communication. Even the person who is or has been married shall not be permitted to disclose any such communication without the consent of the other person who made it.<sup>40</sup> Further, the affairs of state are regarded as privileged and it is only the head of the department concerned who can decide either to give or withhold such permission, as he thinks fit. The communication made to the public officer in his official capacity and

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<sup>37</sup> Paras Diwan, Law of Marriage and Divorce, 851&852 (Universal Law Publishing Co. Pvt. Ltd.) 3rd Edition 1997

<sup>38</sup> Sec. 24 & 25 of Indian Evidence Act, 1872

<sup>39</sup> Section 121 Ibid

<sup>40</sup> Section 122 Ibid

confidence is also enjoined with the special privilege.<sup>41</sup> As a matter of public policy the police officer, as well as, revenue officer enjoy the privacy of source of information relating to the commission of offence. No such officer shall be compelled to disclose the source of such information.<sup>42</sup> The privilege of communication is also available to certain categories of professionals like barrister, attorney, pleader or vakil. The communication made by such professional with his clients shall not be permitted to be disclosed except with the express consent of his clients. However, this protection does not extend over the communication for any illegal purpose and any fact relating to the commission of any crime or fraud. This privilege is also available to the interpreters.<sup>43</sup>

The privilege of confidential communication is not only available to above-mentioned categories of professionals but is also available to the client and, therefore, the person cannot be compelled to disclose to the court any confidential communication between him and his legal professional. The privilege has been also made available to the person who is in possession of such deed or document.<sup>44</sup>

### **Criminal Law**

The reputation of a person is integral to one's personality and, therefore it is generally protected through legal rules in a legal system. Section 499-502 of *the Indian Penal Code, 1860* deals with the offence of defamation which make it a punishable offence. The modesty of a woman has obtained special treatment in the penal code and cases of any attempt to insult the modesty of woman just by words, sound, gesture or exhibition is severely punishable.<sup>45</sup>

There are certain provisions in *the Criminal Procedure Code, 1973*, which try to safeguard the privacy of the female. Section 51(2) states that whenever it is necessary to cause a female to be searched, the search shall be made by another female officer with strict regard to decency. Section 53(2) states that whenever the person of a female is to be examined under this Section

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<sup>41</sup> Section 132 Ibid

<sup>42</sup> Section 124 Ibid

<sup>43</sup> Section 126 Ibid

<sup>44</sup> Section 130 Ibid

<sup>45</sup> Section 509 of The Indian Penal Code, 1860

the examination shall be made only by or under the supervision of a female registered medical practitioner. Thus, special protection has been afforded to females under these provisions.

The provision relating to the recording of confessions and statements in Section 164 of *Criminal Procedure Code, 1973*, also makes stipulation with a view to protect privacy of a person. Similarly, if the provisions of Section 165 are not followed when conducting a search by a police officer, such a search would not be a valid. The provisions of Section 165 are mandatory for the conduct of a search by a police officer.

### **Information and Technology Act, 2000**

This act makes a provision to protect the information secured from any electronic record, book, register, correspondence etc. from disclosure to any other person and makes it a punishable offence. Section 72 of the Act provides- Penalty for breach of confidentiality and privacy.-Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

Although, we all these provisions and legislations which are somewhat related to privacy if not directly related. In modern times due to the development of science and technology and widespread use of computers, the problem of protecting the privacy of persons has become very complex and existing laws are not sufficient to deal with privacy related issues of digital era.

### **INVASION OF PRIVACY**

In *Puttaswamy case*<sup>46</sup>, Justice D.Y. Chandrachud laid down that following tests which are required to be satisfied for judging the permissible limits of the invasion of privacy under Article 21 of the Constitution, they are:

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<sup>46</sup> Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Others, writ petition (civil) No. 494 of 2012

- (a) The existence of a law
- (b) A legitimate State interest; and
- (c) The said Law should pass the test of proportionality

### **Privacy and Personal Data**

But, India has not yet enacted specific legislation on data protection. However, the Indian legislature did amend the Information Technology Act, 2000 to include Section 43A and Section 72A, which give a right to compensation for improper disclosure of personal information. The Indian central government subsequently issued the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 under Section 43A of the IT Act. The Rules have imposed additional requirements on commercial and business entities in India relating to the collection and disclosure of sensitive personal data or information. The IT Act and Rules do not impose any conditions regarding the usage of sensitive personal data or information for direct marketing. However, where the information is collected from a provider of information the prior consent of the provider of information must be obtained, including the purpose for which the information is being collected.<sup>47</sup>

### **Privacy and Aadhar**

Aadhar is a serious invasion into the right to privacy of persons and it has the tendency to lead to a surveillance state where each individual can be kept under surveillance by creating his/her life profile and movement as well on his/her use of Aadhaar. It is important to note that the main privacy concerns brought by the UID project are: territorial and data privacy. The risk that the UID poses to an individual's privacy is enormous, as information that is now scattered in the public domain will be brought into one point of convergence through the UID. Authorities could misuse this information. Further, there are issues of privacy infringement due to the use of

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<sup>47</sup> <https://www.linklaters.com/en/insights/data-protected/data-protected---india>

biometric information in the project. The Collection of, and identification based on biometric information could be understood as a breach of one's territorial privacy and one's data privacy.<sup>48</sup>

The current focus on the right to privacy is based on the realities of the digital age. India is rapidly becoming a digital economy problems of ID theft, fraud and misrepresentation are real concerns. In recent years, several national programmes and schemes are implemented through information technology platforms, using computerised data collected from citizens. With more and more transactions being done over the Internet, such information is vulnerable to theft and misuse. Therefore any system of data collection should factor in privacy risks and include procedures to protect citizen information

What happens if tomorrow we are told that the right to privacy is not a fundamental right? The right to privacy will lose its status amongst the Golden Trinity of Article 14, Article 19 and Article 21 of the Constitution. These rights can only be taken away from us by just and reasonable law, which is the paramount protection that our Constitution offers us. If privacy is not a fundamental right, this intrinsic right can be taken away by our legal system.<sup>49</sup> Like in Gian Kaur case,<sup>50</sup> a five judge Constitutional Bench held that the "right to life" is inherently inconsistent with the "right to die" as is "death" with "life". Later on, in Aruna Shanbaug case,<sup>51</sup> Hon'ble Supreme Court gave recognition to passive euthanasia which is more popularly referred as mercy killing.

Similarly, Right to privacy is not a fundamental right was first held by the Hon'ble Supreme Court in M.P. Sharma case.<sup>52</sup> And now it has been recognised as Fundamental Right through various judicial pronouncements. What if again Hon'ble Supreme Court declares that Right to privacy is not a Fundamental Right? Hence, this right is not secured until legislation enacts a law protecting right to privacy.

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<sup>48</sup><https://www.legalserviceindia.com/legal/article-34-aadhaar-card-an-invasion-to-privacy.html>

<sup>49</sup> <https://www.theweek.in/content/archival/news/india/brief-history-right-to-privacy.html>

<sup>50</sup> Gian Kaur v. State of Punjab, AIR 1996

<sup>51</sup> Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC

<sup>52</sup> M.P. Sharma v. Satish Chandra AIR 1954 SC



But all other legislations that we have is not enough there is great need of stringent legislation on right to privacy. The law which can tackle with the complex issues of privacy in today's Digital era.

## **SUGGESTIONS**

Although efforts have been made to define right to privacy but there is no concrete definition of "right to privacy" in Indian legislation hence the foremost step should be to define the 'right' in order to protect the right. In current scenario it becomes very important to give a definition which covers all the aspects of right to o privacy.

Also, we have several laws which protect right to privacy in one way or the other. But in reality we don't have any law which protects complex issues of privacy in today's digital age related to personal data, sensitive information etc. Hence, there is need of stringent laws which covers all the aspects of privacy

The government's basic obligation is to protect its citizens' rights. Privacy consciousness is very low in India. Hence, government should make people conscious about their personal data. The data controller should be made accountable for the collection, processing and use to which data are put. The government should also provide internal procedural safeguards with independent external monitoring for the protection of rights.

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