

## Right To Privacy: An Overview

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**Abstract:** The concept of “privacy” can be traced out in the ancient test of Hindus. As per HITOPADESH, certain matter includes worship, sex and family matters should be protected from disclosure. This is not entirely alien to Indian Culture but some jurist like Sheetal Asrani-Dann has some doubts about the evolution in India. In 2002, the Delhi High Court held that a person who is suffering from the dreadful disease of AIDS cannot claim the right of privacy and cannot maintain the right of secrecy against his proposed bride and the laboratory which tested his blood. A year later, the above decision was upheld by the Supreme Court in Mr. ‘X’ v. Hospital ‘Z’, wherein it was reiterated that the bride has an unequivocal right to have full knowledge about her proposed husband’s health and the hospital or the doctor concerned has the lawful authority to carry out the same. The Courts have taken divergent views on the issue of mandatory medical tests violating an individual’s right to privacy. While it has been held that ordering/allowing medical examination of a woman to determine her virginity would be a gross violation of her right to privacy, the Matrimonial Courts have the power to order a spouse to undergo medical test.

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### Introduction:

Privacy is a prominently difficult concept to explain and cannot be understood as a static and one dimensional concept. It can only be construed as a group of rights.<sup>1</sup> The general idea of private can be conceptualized as the practices or act which can protect from public scrutiny.<sup>2</sup> The principle of privacy rights was first referred as a human right and elaborated in the pioneering article of Warren and Brandies, titled “The Right to Privacy”.<sup>3</sup> Before going ahead, the meaning of privacy shall be understood. According to Black’s Law Dictionary, “Right to be let alone, the right of a person to be free from any unwarranted publicity, the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned”.<sup>4</sup>

### Indian Perspective:

In Indian Constitution, Article 21 states, “No person shall be deprived of his life or personal liberty except according to the procedure established by law”, which has been interpreted as the theme “life”

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<sup>1</sup> J. L. Mills, *The Lost Right* 4 (Oxford University Press 2008).

<sup>2</sup> Cannataci, J.A., *The Individual And Privacy* (Routledge 2015)

<sup>3</sup> Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*.

<sup>4</sup> Black’S Law Dictionary.

includes all those aspects of life which go to make a man’s life meaningful, complete and worth living.<sup>5</sup>

### Origin Of Concept:

The concept of “privacy” can be traced out in the ancient test of Hindus. As per HITOPADESH, certain matter includes worship, sex and family matters should be protected from disclosure. This is not entirely alien to Indian Culture but some jurist like Sheetal Asrani-Dann has some doubts about the evolution in India. She stated that “everyday experiences in the Indian setting from the manifestations of good neighborliness through constant surveillance by next-door neighbors, to unabated curiosity at the other people’s illness or personality suggest otherwise.<sup>6</sup> But Upendra Baxi is clearly concerned with kindness, sympathy, humanity or gentleness, which is an unabated curiosity; it is not about ill-will. But Hitopadesh cannot be subject to ‘Positive Law’, even in ancient time it was related to ‘Positive Morality; so in this sense it can be said that in ancient Indian text there was vagueness about the right to privacy.

But in modern India first time the issue of right to privacy was discussed in debates of constituent assembly were K.S. Karimuddin moved an Amendment on the lines of the US Constitution, where B.R. Ambedkar gave it only reserved support, it did not secure the incorporation of the right to privacy in

<sup>5</sup> Indian Constitution of India

<sup>6</sup> <https://www.lawteacher.net/free-law-essays/constitutional-law/right-to-privacy-the-indian-perspective-constitutional-law-essay.php#fn4>

the constitution. The idea of a right to privacy as a trump against the power and might of the State to interfere with personal freedoms is first expressed in the Constitution of India Bill drawn up in 1895 by authors whose identity is not well established. Bal Gangadhar Tilak who declared: "Swaraj is my birth right" and Mrs. Annie Besant who started the Home Rule League in India are said to be the inspiring leaders behind this Bill. The text of the Bill recognized that "Every citizen has in his house an inviolable asylum" - a simple articulation of the classic English notion of privacy- for every man his home is his castle and the State could not invade it without lawful and legitimate reason.<sup>7</sup> Under the Chairmanship of Sir Tej Bahadur Sapru another Bill was drawn up for self-governance in India. Mahathama Gandhi, Bipan Chandra Pal and Mrs. Sarojini Naidu were members of the Committee that put together this Bill. This Bill recognized that "Every person shall have the fundamental right to liberty of person and security of his dwelling and property." The notion of privacy now extends to personal liberty and security for one's property apart from one's home.<sup>8</sup> Three years later the Indian National Congress constituted a committee under the Chairmanship of Motilal Nehru to draw up a plan for Swaraj (self-rule) for India. Renowned freedom fighter Netaji Subhash Chandra Bose was a member of this Committee. This Committee placed a negative obligation on the State vis-a-vis privacy: "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". The multifarious aspects of the notion of privacy recognized in Anglo-Saxon jurisprudence is quite evident in this formulation.<sup>9</sup>

#### Concept Of Privacy Post Independence:

In *M.P. Sharma v Satish Chandra* (here in after M.P. Sharma Case) were Supreme Court on the issue of 'power of search and seizure' held that they cannot bring privacy as the fundamental right because it is something alien to Indian Constitution and constitution maker does not bother about the right to privacy<sup>10</sup>. *K.R. Suraj v The Excise Inspector Parappananqadi*, and in State Rep. by Inspector of Police v N.M.T. Joy Immaculate refresh the point that in India right to privacy cannot used against the power of search seizure.<sup>11</sup>

The scope of this right first came up for consideration in *Kharak Singh's Case* which was

concerned with the validity of certain regulations that permitted surveillance of suspects. The minority decision of SUBBA RAO J. deals with this light. In the context of Article 19(1) (d), the right to privacy was again considered by the Supreme Court in 1975. In a detailed decision, JEEVAN REDDY J. held that the right to privacy is implicit under Article 21. This right is the right to be let alone. In the context of surveillance, it has been held that surveillance, if intrusive and seriously encroaches on the privacy of citizen, can infringe the freedom of movement, guaranteed by Articles 19(1) (d) and 21. Surveillance must be to prevent crime and on the basis of material provided in the history sheet. In the context of an anti-terrorism enactment, it was held that the right to privacy was subservient to the security of the State and withholding information relevant for the detention of crime can't be nullified on the grounds of right to privacy<sup>12</sup>

#### Pre-1975, Right To Privacy Not Explicitly Recognized:

In 1954, the Supreme Court in *M. P. Sharma v. Satish Chandra*<sup>13</sup>, rejected the contention that there exists a right to privacy under Article 20(3)<sup>14</sup>, due to the absence of any provision analogous to the Fourth Amendment of the US Constitution. The question of a constitutional right to privacy under Part III of the Constitution was first raised in the decision of *Kharak Singh v. The State of UP*,<sup>15</sup> where the petitioner was subjected to continuous surveillance as under Regulation 236 of the U.P. Police Regulations. The majority opinion on the question of the existence of right to privacy, was that "our Constitution does not in terms confer any like constitutional guarantee." But Justice Subba Rao, while pronouncing the minority opinion, observed that "it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty" Although, the Supreme Court began to accept certain points of the minority view<sup>16</sup>, the right to privacy was still waiting for its place in Indian constitutional jurisprudence.<sup>16</sup>

#### Position During 1975-2000: Right To Privacy Implicit In Life, Personal Liberty And Freedom:

<sup>12</sup> <http://www.legalservicesindia.com/article/article/rig-ht-to-privacy-under-article-21-and-the-related-conflicts-1630-1.html>

<sup>13</sup> Air 1954 Air 300.

<sup>14</sup> India Const., Art. 20(3).

<sup>15</sup> Air 1963 Sc 1295.

<sup>16</sup> *State Of West Bengal V. Ashok Dey*, Air 1972 Sc 1660; *Haradhan Saha V. State Of West Bengal*, Air 1974 Sc 2154; *John Martin V. State Of West Bengal*, Air 1975 Sc 77.

<sup>7</sup> Constitution of India Bill, 1985.

<sup>8</sup> The commonwealth of India Bill, 1925.

<sup>9</sup> The Nehru (Swaraj) Report, 1928.

<sup>10</sup> *M.P. Sharma v Satish Chandra*.

<sup>11</sup> *K.R. Suraj v The Excise Inspector Parappananqadi*, *Inspector of Police v N.M.T. Joy*.

In *Gobind v. State of Madhya Pradesh*<sup>17</sup>, the Supreme Court held that a “limited” right to privacy was implied within the ambit of Part III of the Constitution, which originates from the Articles 19(a), 19(d) and 21. However, it was noted that the said right is not of an absolute character, and comes with reasonable restrictions arising out of countervailing public interest<sup>18</sup>. In this decision, Justice Mathew taking the US jurisprudence<sup>18</sup> into consideration, observed that the right to privacy exists within the penumbral zones of the Fundamental rights explicitly guaranteed under Part III of the Constitution.<sup>19</sup> The Supreme Court in *Sunil Batra v. Delhi Admn*<sup>20</sup> observed that a minimal infringement of a prisoner’s privacy is unavoidable as the officers have an obligation to keep a watch and ensure that their other human rights are being duly observed. On the contrary, the Court in *Malak Singh v. State of P & H*<sup>21</sup> held that surveillance is a direct encroachment upon an individual’s right to privacy. Moreover, the Supreme Court in *R. Rajagopal v. State of Tamil Nadu*<sup>22</sup> again asserted that the right to privacy is an implicit right under Art. 21 and has acquired sufficient constitutional status. The Court noted that the said right includes a “right to be let alone” and the right “to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters”<sup>23</sup>. On a similar note, in *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>24</sup>, the Supreme Court held that even a “woman of easy virtue” is entitled to her privacy and nobody has the authority to invade her privacy at their sweet will.<sup>25</sup>

The Supreme Court in *People’s Union for Civil Liberties v. Union of India*<sup>26</sup> held that telephonic conversations are private in nature and thus, telephone-tapping would be unconstitutional unless conducted by a procedure established by law. The Court concluded by saying that “we have, therefore, no hesitation in holding that the 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 each case constitute a right to privacy, article 21 is attracted. The said right cannot be curtailed, except according to procedure established by law.” The Supreme Court in *S.P. Gupta v. President of India*,<sup>27</sup> held that a balance needs to be struck between the right to information and right to privacy. The Court reiterated the point that a right to privacy is not absolute and can be infringed to serve a serious public concern. In *Indian Express v. Union of India*,<sup>28</sup> it was thus held that - “Public interest in freedom of discussion of which freedom of the press is one aspect stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently, the decisions which may affect themselves.” Right to privacy is not absolute in nature and can be restricted through lawful means for the prevention of crime, disorder, or protection of health or moral or protection of rights of freedom of others. The Supreme Court in *Mr. ‘X’ v. Hospital ‘Z’*,<sup>29</sup> held that moral considerations cannot be kept at bay and public morality can constitute a “compelling State interest” warranting a lawful infringement of the right to privacy.

#### Recent Status:

In 2002, the Delhi High Court held that a person who is suffering from the dreadful disease of AIDS cannot claim the right of privacy and cannot maintain the right of secrecy against his proposed bride and the laboratory which tested his blood.<sup>30</sup> A year later, the above decision was upheld by the Supreme Court in *Mr. ‘X’ v. Hospital ‘Z’*,<sup>31</sup> wherein it was reiterated that the bride has an unequivocal right to have full knowledge about her proposed husband’s health and the hospital or the doctor concerned has the lawful authority to carry out the same. The Courts have taken divergent views on the issue of mandatory medical tests violating an individual’s right to privacy. While it has been held that ordering/allowing medical examination of a woman to determine her virginity would be a gross violation of her right to privacy, the Matrimonial Courts have the power to order a spouse to undergo medical test<sup>32</sup>. However, it was noted that Courts should exercise such a power with utmost care and only after due examination of the case on a prima facie basis. SEERVAI, H. M., CONSTITUTIONAL LAW OF INDIA 485 (4th ed. Universal Law

<sup>17</sup> AIR 1975 SC 1378.

<sup>18</sup> Charles Henry Alexandrowicz-Alexander, American Influence on Constitutional Interpretation in India, 5 AM. J. COMP. L. 98, 100 (1956).

<sup>19</sup> *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148; *Griswold v. Connecticut*, 381 U.S. 479. 510; *Jane Roe v. Henry Wade*, 410 U.S. 113.

<sup>20</sup> (1978) 4 SCC 494.

<sup>21</sup> *Malak Singh v. State of P&H*, AIR 1991 SC 760.

<sup>22</sup> AIR 1995 SC 264.

<sup>23</sup> *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264.

<sup>24</sup> AIR 1991 SC 207.

<sup>25</sup> *Indian Drugs and Pharmaceuticals Ltd v. Workmen*, (2007) 1 SCC 408.

<sup>26</sup> AIR 1997 SC 568.

<sup>27</sup> AIR 1982 SC 149.

<sup>28</sup> AIR 1986 Raj 515.

<sup>29</sup> *Mr. ‘X’ v. Hospital ‘Z’*, AIR (1998) 8 SCC 296.

<sup>30</sup> *‘X’ v. ‘Z’*, AIR 2002 Del 217.

<sup>31</sup> *Mr. ‘X’ v. Hospital ‘Z’*, (2003) 1 SCC 500.

<sup>32</sup> *Surjit Singh Thind v. Kanwaljit Kaur*, AIR 2003 P&H 353.

Publishing 2015). But the Delhi High Court seemed to have a contrary opinion, when it held that a party to a legal proceeding cannot be compelled to undergo any scientific or medical test against their will, which has the effect of violating the person's right to privacy.<sup>33</sup> Furthermore, the High Court also observed that Right to privacy should come into play as and when any party to a proceeding is directed to undergo any scientific or medical test for collecting evidence against their will.<sup>34</sup>

In the *Bhabani Prasad Jena v. Orissa State for Commission of Women*<sup>35</sup>, it was held that DNA test being an extremely sensitive and delicate issue, should only be directed with the greatest caution and care, as such a crude direction might be prejudicial to the parties and violate their right to privacy. Recently, in *Ram Jethmalani v. Union of India*<sup>36</sup>, the Supreme Court has held that right to privacy is an integral part of life. This is a cherished constitutional value and it is important that human beings be allowed privacy, and be free of public scrutiny unless they act in an unlawful manner. It was held by the Supreme Court in the *Avishek Goenka v. UOI*. That Right to privacy is subject to public safety.<sup>37</sup> The Court had also held that illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. However, the right of privacy may not be absolute and in exceptional circumstances, particularly when authorized by a statutory provision, the right may be infringed.<sup>38</sup>

Most recently, the Bombay High Court in *Shaikh Zahid Mukhtar v. The State of Maharashtra*<sup>39</sup> held that Section 5D of the Maharashtra Animal Preservation Act, 1976 violated the right to privacy of an individual and thus, should be struck down. Whereas, the Patna High Court in *Confederation of Indian Alcoholic Beverage Companies v. The State of Bihar*<sup>40</sup> held that Indian citizens have the right to enjoy their liquor within the confines of their house, in an orderly fashion, and that right is derived from the right to privacy under Article 21 of the Constitution.

However, the Supreme Court in Justice K.S. Puttaswamy v. Union of India<sup>41</sup> known famously as the Aadhaar Card decision has opened the debate wide on whether privacy is a fundamental right. Justice Bobde and Justice Chelameshwar have expressed concern over Aadhaar forcing people to registration who are not able to comprehend the consequences of registration on their rights. Justice Bobde has also expressed concerns over the already happened and future leaks of information concerned. The Attorney General, Mukul Rohatgi, citing the old and controversial view on Right to Privacy in M.P. Sharma and Kharak Singh<sup>81</sup>, had argued that Right to Privacy does not exist, stating that the matter should be referred to a larger bench. However, the bench is yet to be constituted.<sup>42</sup>

Intrusion into privacy may be by-

- (1) Legislative Provision
- (2) Administrative/Executive order
- (3) Judicial Orders

Legislative intrusion must be tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the Court can go into proportionality of the intrusion vis-à-vis the purpose sought to be achieved.

#### **Integral Part Test: Relation Between Right To Privacy And Right To Personal Liberty:**

The Supreme Court in *Surabh Chandni v UOI*<sup>43</sup>, noted that the Constitution is organic and ongoing in nature. In *Ashok Tanwar v State of HP*<sup>44</sup>, the Court observed that the Constitution should be flexible in nature to meet the needs and address the issues of changing times. Thus, right to privacy being a metaphysical constitutional right should be read into the right to personal liberty, otherwise, it would amount to gross constitutional anachronism. Thirty-eight years back in 1978, when the Freedom of Press wasn't a public right, Justice P.N. Bhagwati in the *Maneka Gandhi v. Union of India*<sup>45</sup> had observed that the freedom of press is an important aspect of the freedom of speech and expression. In the process, he laid down the "Integral Part Test". He opined that "even if a right is not specifically named in an Article, it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic

<sup>33</sup> Ashit Kapur v. Union of India, AIR 2004 Del 203.

<sup>34</sup> 72 Teeku Dutta v. State, AIR 2004 Del 205.

<sup>35</sup> AIR 2010 SC 2851.

<sup>36</sup> (2011) 8 SCC 1.

<sup>37</sup> Avishek Goenka v. Union of India, AIR 2012 SC 2226.

<sup>38</sup> Ramlila Maidan Incident v. Home Secretary, UOI, (2012) 5 SCC 1; Sharda v. Dharmपाल, AIR 2003 SC 3450; Bhavesh Jayanti Lakhani v. State of Maharashtra, (2009) 9 SCC 551.

<sup>39</sup> 2017 (2) ABR 140.

<sup>40</sup> 78 2016 (4) PLJR 369.

<sup>41</sup> CONMT.PET. (C) NO.844/2017 IN W.P. (C) NO.494/2012 W.P. (C) NO. 342/ 2017 AND WITH W.P.(C) NO.000372/2017.

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[file:///C:/Users/Royal/Downloads/Right to Privacy 3195287a%20\(1\).pdf](file:///C:/Users/Royal/Downloads/Right%20to%20Privacy%203195287a%20(1).pdf)

<sup>43</sup> AIR 2004 SC 361.

<sup>44</sup> AIR 2005 SC 614.

<sup>45</sup> AIR 2005 SC 614.

nature and character as that fundamental right”<sup>46</sup> He further noted that the expression “personal liberty” under Article 21 should not be read in a narrow and restricted sense, and “the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction”<sup>47</sup> This approach was adopted by the Supreme Court in *Unni Krishnan v State of Andhra Pradesh*<sup>48</sup> when they read the term ‘life’ to include ‘education’ as one of its essential element promoting good and dignified life. Thus, by applying the “Integral Part Test” we realise that right to privacy is, in consequence, and in its true essence, an integral part of the right to personal liberty. “Privacy” mirrors the integrals of “personal liberty” and thus should fall under one umbrella Article. It carries the similar nature and character as the fundamental rights under Article 21.<sup>49</sup> Hallborg considers the right to liberty as one that protects people from unreasonable state intervention in private and personal matters and restrictions on their liberties without any good reason. The restriction must be for the public benefit and there must be rational grounds for believing that the restriction will, in fact, achieve the desired result.<sup>50</sup> The right to privacy, as understood by the Indian Judiciary, is identical in its operation. For example, in *Kharak Singh v. State of Uttar Pradesh*<sup>51</sup> Subba Rao, J., while expressing the minority view observed that the right to personal liberty not only referred to freedom from restrictions on one’s movements but also to freedom from encroachments on one’s private life. This view was carried forward in *Gobind v. State of Madhya Pradesh*,<sup>52</sup> where the Court held that the right to privacy is subject to reasonable restrictions, like public benefit or compelling state interest. *Planned Parenthood v. Casey*,<sup>53</sup> provided its most elaborate explanation on the relation between “privacy” and “personal liberty. It stated that matters involving the most intimate and personal choices which are central to personal dignity and autonomy, are central to the

<sup>46</sup> AIR1978 SC 597.

<sup>47</sup> Id.

<sup>48</sup> 90 AIR 1993 SC 217.

<sup>49</sup> 5 BASU, D.D., COMMENTARY ON THE CONSTITUTION OF INDIA (9th ed. Lexis Nexis 2015):

<sup>50</sup> Hallborg, R.B, Principles of Liberty and the Right to Privacy in LAW AND PHILOSOPHY 183 (Springer Publications 2015).

<sup>51</sup> Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.

<sup>52</sup> Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148: AIR 1975 SC 1378. 17.

<sup>53</sup> Planned Parenthood v. Casey, 505 U.S. 833 (1992).

liberty protected by the Fourteenth Amendment and thus, should be protected. Therefore, the right to privacy is of the “same basic nature and character” as right to personal liberty and thus, passes the “Integral Part Test”. Moreover, in 2002, the National Commission to Review the Working of the Constitution<sup>54</sup> recommended a constitutional amendment in the form of Article 21-B, which shall make “right to privacy” a fundamental right under Part III of the Constitution. Moreover, there was also a proposed Privacy Bill in the legislature during the year 2011. The bill was drafted with the objective of creating a statutory Right to Privacy, but is yet to be adopted by the Parliament. Furthermore, Section 3 clause (xi) of the Juvenile Justice (Care and Protection of Children) Act, 2015<sup>55</sup> provides the “Principle of right to privacy and confidentiality”.

Thus, it can be duly established that not only the Judiciary, but also the Legislature at certain instances have recognized the essential Right to Privacy and the need to make it a statutory right. However, for it to become a fundamental right, the Parliament needs to make a constitutional amendment to that effect and finally give the citizens of India the unequivocal and paramount right to protect their privacy from any external interference. Right to privacy is an essential component of right to life and personal liberty under Article 21. Right to privacy is not an absolute right; it is subject to reasonable restrictions for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Where there is a conflict between two derived rights, the right which advances public morality and public interest prevails.

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