THE CURIOUS CASE OF RIGHT TO PRIVACY IN INDIA*

Anubhav Khamroi and Anujay Shrivastava
Jindal Global Law School, O. P. Jindal Global University, Haryana

“All human beings have three lives: public, private, and secret.”
— Gabriel García Márquez

ABSTRACT

“Privacy” is one of the most nebulous terms our society has ever chanced upon. In the recent years, there have been debates on Right to Privacy, its safeguards, reasonable restrictions against this right, various positions and non-recognition of this right by some courts, and the ongoing debate on the existence of a constitutional Right to Privacy. Many Indian jurists have raised the question that – “While there is a right to life, is there a right to privacy?” This raises a very difficult conundrum for constitutional jurists that while one has the right to life, does that also entail the right to enjoy a life of their own choice, devoid of any public scrutiny. There is no clear understanding of the different paradigms of the right to privacy, and there exists a lack of a theoretical framework to help us in this respect. This paper tries to draw out such a theoretical framework by identifying the three paradigms of privacy rights or the “Triangle of Privacy” - Zonal, Rational and Decisional. Further, the authors have also tried to deploy the “integral part test”, derived from Maneka Gandhi decision, to establish the relationship between the right to personal liberty u/a 21 and right to privacy. It is contended that at the heart of liberty is the right to define one’s own concept of existence and thus, “privacy” is of the same basic nature and character as “personal liberty”. Finally, the paper calls for a constitutional amendment by the parliament adopting the judicially carved out right to privacy as a fundamental right under Part III of the Indian Constitution.

INTRODUCTION

“Privacy” is a notoriously difficult concept to define and cannot be understood as a static and one-dimensional concept. It can only be construed as a group of rights.1 The general idea of “private” can be conceptualized as the practices or acts which we want to protect from public scrutiny.2 The principle of privacy rights was first referred to as a human right and elaborated in

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the pioneering article of Warren and Brandies, titled "The right to privacy"\(^3\). Numerous philosophers have indirectly referred to the concept of privacy in their work. A classic example would be Aristotle’s identification of two spheres of an individual’s life namely the ‘polis’ or the public sphere, and ‘oikos’ or the private sphere.\(^4\) Jeremy Bentham had also recognised the existence of a “private” element in an individual’s life\(^5\). Even Shakespeare had his own notions of “private”, which he said was the “undeclared” and included a sense of social secrecy\(^6\).

However, a concern that the opposition to the right to privacy immediately raises, is how do we define “privacy” and the scope of application of a “right to privacy”? A good approach through which privacy can be defined is to strike a balance between the reductionist and the anti-reductionist attempts at defining privacy.\(^7\) The reductionist philosophy would state that the ambit of privacy and its violation should be specified by the legislature.\(^8\) The advantage of this approach would be that it would allow the legislature to operationalize privacy and thus include privacy as a fundamental right. However, it would end up limiting the scope of privacy and the extent to which judicial review can improve it.

On the other hand, the anti-reductionist philosophy would take a broader approach through which a wider range of interferences with persons and personal spaces are viewed as raising.\(^9\) An advantage of this approach would be that it will widen the ambit of the right. However, it would end up in leaving vague interpretations of privacy. Therefore, it is our view that a balance should be struck between these two approaches. The Indian legislature should provide a wide scope of the various kinds of privacy and its violations. Further, they should provide a definition of privacy which allows the judiciary to encompass any changes and further review the right to privacy.

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\(^6\) Huebert, Ronald, Privacy in the Age of Shakespeare (University of Toronto Press 2015).
\(^9\) Id.
The said right has attracted different interpretations, the most important of which is the “notion of personhood”. Jed Rubenfield tried to conceptualize the notion of personhood as “some acts, faculties or qualities which are so important to our identity as [persons-as-human beings] that they must remain inviolable.”\textsuperscript{10} Privacy has also been considered a “type of social isolation\textsuperscript{11}; “right against unwarranted intrusion by the state”\textsuperscript{12}; a “right against the intrusion on an individual’s personal life or affairs”\textsuperscript{13}.

Moreover, the right to privacy principally lacks both precise historical antecedents and conceptual limits\textsuperscript{14}. To understand the scope and type of rights protected under the right to privacy, it is necessary to identify the nature of this elusive right. Thus, in Section I, the authors have tried to explore the triangular understanding of privacy and has made a distinction between the different paradigms of privacy.

In Section II of the paper, the authors attempt a detailed analysis of the Judicial understanding of the right to privacy over the years. Although the Courts have failed to perceive the said right in a harmonious manner, they have increasingly started recognising it in the context of a maturing Indian society. Finally, in Section III, the authors argue that there exists a right to privacy under the Indian Constitution, by virtue of being an “integral part” of right to personal liberty u/a 21, and the Parliament should bring in a constitutional amendment to that effect.

THE TRIANGLE OF PRIVACY: ZONAL, RELATIONAL AND DECISIONAL PARADIGMS

The Constitutional Privacy jurisprudence has been derived from a triangular understanding of “Privacy”- Zonal, Rational and Decisional\textsuperscript{15}. The classification was also evinced from the

\textsuperscript{11} MANNHEIM, KARL & JOHN STEPHEN EROS, ED., \textit{AN INTRODUCTION TO THE STUDY OF SOCIETY BY KARL MANNHEIM} (Literary Licensing, LLC 2013).
\textsuperscript{13} GREAT BRITAIN AND DAVID CALCUIT, \textit{THE CALCUTT REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS 7} (Stationery Office Books 1970).
\textsuperscript{14} Tom Gerety, Redefining Privacy, 12 HARV. C.R.C. L. L. REV. 233, 241 (1977).
writing of *Gary L. Bostwick* where he defined three attributes of privacy to be - Repose, Sanctuary and Intimate decisions\(^\text{16}\).

The **Triangle of Privacy** is a structural manifestation of the concept of privacy and through this paper, we are trying to establish it in the field of Indian constitutional law. Now to understand the working of this concept, let’s take a hypothetical situation, where a couple wants to engage in a certain type of sexual activity within the intimacies of their bedroom, but one of them is in favour of using contraceptives while the other is sternly against it. Also, take note that the State doesn’t appreciate any form of sexual intercourse other than procreative sex. Here, there are three interconnected yet a conflicting set of interests working – Bedroom vs State; Couple vs State; and finally, Individual A vs Individual B (ones taking part in the sexual intercourse) vs State.

Here, the type of privacy fortifying the individuals’ private spaces, like the bedroom, from State interference is the **Zonal** paradigm. Now, the one that is responsible for protecting and preserving all private and intimate relationships, like the relationship shared by the two individuals in the scenario, from any State intrusion, is the **Relational** paradigm. Finally, the form of privacy that shields all independent choices of individuals from any type of external interference (Not only State but also intrusion by other actors) and imparts the required autonomy on private matters, such as decisions regarding body and personal conduct, is the **Decisional** paradigm.

**ZONAL PRIVACY**

The Zonal form of privacy was first recognised in the Third and Fourth Amendments to the United Stated Constitution. While the Third Amendment\(^\text{17}\) stated that “No soldier shall, in time of peace be [quartered in any house], without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law”\(^\text{18}\); the Fourth Amendment\(^\text{18}\) upheld the “The right of the people

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\(^\text{17}\) U.S. CONST., amend III.

\(^\text{18}\) U.S. CONST., amend IV.
to be [secure in their persons, houses, papers, and effects] against unreasonable searches and seizures shall not be violated.”

The zonal paradigm was also addressed by Justice Harry Blackmun, when he concluded in his dissent\(^9\) that “the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.” This was also tacitly recognised by the Supreme Court of India in *Gobind v. State of Madhya Pradesh*, where it noted that “any right to privacy must encompass and protect the [personal intimacies of the home], the family marriage, motherhood, procreation and child rearing.”\(^{20}\)

However, the scope of the zonal paradigm is yet to be decided. There has been no clear demarcation made between the protected and unprotected activities under this right. On that note, Robert Bork\(^{21}\) observed that "we may confidently predict [...] is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor in the home." Moreover, the US Supreme Court in its *Bowers v. Hardwick*\(^{22}\) decision criticized the coherence of the zonal argument and stated that activities such as adultery or incest were not protected even when they occurred within those four walls. Similarly, the Supreme Court of India in *Suresh Kumar Koushal v. NAZ Foundation*\(^{23}\), held that any said activity criminalised by the IPC cannot be protected under the right to privacy, even if it occurs with the personal intimacies of home.

Thus, the argument of zonal privacy is not legally tenable, when there exists a countervailing State interest like cases of adultery, drugs, domestic violence, sex with a minor etc. The Supreme Court in its *Gobind*\(^{24}\) decision, noted that privacy-dignity claims can only be denied when a superior countervailing State interest is present. The Court also partially delved into the question of “morality as a compelling as well as a permissible state interest” warranting an infringement of the right to privacy, but refused to address the threshold to be met in that regard. Thus, due to

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\(^{22}\) 478 U.S. 186 (1986).

\(^{23}\) AIR 2014 SC 563.

\(^{24}\) AIR 1975 SC 1378.
the absence of any set standards for application of a zonal right to privacy, is to be decided on a “case-to-case” basis as held in the *Gobind* decision.

**RELATIONAL PRIVACY**

In contrast to the zonal paradigm, the relational paradigm "focuses on persons rather than places." This aspect of right to privacy protects a set of associations from any arbitrary state interference, because of "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." However, even this paradigm of privacy rights lacks clarity in its scope and application.

The inception of this paradigm of constitutional right to privacy can be traced back to 1965, when the US Supreme Court pronounced its decision in *Griswold v. Connecticut*. The Court overturned a law of the State of Connecticut which made the use of contraceptives by married couple’s illegal. The Court stated that this would amount an unconstitutional invasion into “the sacred precincts of marital bedrooms”. But the same Court in *Bowers v. Hardwick*, convicted Hardwick and upheld the constitutionality of the Georgia Sodomy statute. However, 17 years later, through a 6:3 majority judgement the US Supreme Court in *Lawrence v. Texas*, struck down the law criminalizing homosexual acts as unconstitutional. This overturned the Court’s decision in *Hardwick*. Justice Anthony Kennedy, while writing for the majority, noted that every individual’s private life shall be respected and the State cannot demean their very existence or police their decisions by declaring their private sexual activity to be a crime.

However, one can find a differing stance on the relational form of privacy in other parts of the world. The decriminalisation of homosexuality in Britain was primarily due to the prominent

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26 *Id.*
27 381 U.S. 479 (1965).
Wolfenden Committee Report\textsuperscript{30}, published in 1957. The Report noted that "it is not the function of the law to interfere in the private lives of citizens, or to seek to enhance any particular pattern of behaviour". The European Court of Human Rights, in Dudgeon v. United Kingdom\textsuperscript{31}, held that the law criminalising homosexual acts between consenting adults in Northern Ireland was in violation of Article 8 of the European Convention of Human Rights and Fundamental Freedoms. In Toonen v. Australia\textsuperscript{32}, the UN Human Rights Committee held that the privacy protections under the ICCPR bar the criminalisation of sodomy.

Interestingly, the Indian view in this regard is against such interpretation of right to privacy. The Supreme Court in Suresh Kumar Koushal v. NAZ Foundation\textsuperscript{33} held that Section 377 of the Indian Penal Code, criminalising any form of “carnal intercourse”, does not suffer from any vice of unconstitutionality. Moreover, elaborating on the relational aspect of privacy, the Supreme Court in Directorate of Revenue v. Mohd. Nisar Holia\textsuperscript{34}, held that “right to privacy deals with persons and not places”.

However, in Bharat Shanti Lal Shah case\textsuperscript{35}, the court held that a statute can authorise the interception between two individuals even when it is a direct violation of their right to privacy, if the procedure authorizing such violation is just, fair and reasonable and not arbitrary or oppressive. It has been noted that any act claimed under the relational form of privacy should be -firstly, principally and fundamentally private and intimate in nature and secondly, in accordance with the law of the land\textsuperscript{36}.

Thus, the Relational paradigm of privacy cannot be used to shield every association, as then the provisions in the IPC regarding “unlawful assembly”, “criminal conspiracy” and “adultery” would automatically become unconstitutional. There is an imminent need for some clear

\textsuperscript{30} Great Britain, Report of Committee on Homosexual Offences and Prostitution (Her Majesty's Stationery Office 1957); Saptarshi Mandal, 'Right To Privacy' In Naz Foundation: A Counter-Heteronormative Critique, 2 NUJS L. REV. 525 (2009).

\textsuperscript{31} (1981) 4 E.H.R.R. 149.

\textsuperscript{32} Toonen v. Australia, (1994) 1 INT. HUM. RTS. REPORTS 97 (No. 3).

\textsuperscript{33} AIR 2014 SC 563.

\textsuperscript{34} AIR 2009 SC 1032.


demarcation between the protected and unprotected forms of association. As for example, under s.377 of IPC, no individual would be penalised because he was trying to associate with another person, but because of the criminal nature of the act of their association

DECISIONAL PRIVACY

The decisional paradigm is the most intricate form of privacy right. It upholds the right of every individual to make decisions regarding the “the sphere of private intimacy and autonomy.” Rubenfield while elucidating on the decisional aspect of privacy noted that "the right to make choices and decisions” primarily constitutes "the 'kernel' of autonomy".

In 1920, the US Supreme Court in its famous decision of *Meyer v. Nebraska* overturned a law of State of Nebraska which made English the mandatory language in schools and prohibited teaching in any other language. The Court noted that the right to educate your child is a basic liberty and every person should have the freedom to decide the language of their child’s education. Although, the decision did not specifically use the word “Privacy”, it had an implicit idea of decisional privacy and created a group of rights existing within the family free from any state interference.

Several years later, the same Court in *Jane Roe v. Henry Wade*, captured the “Decisional” aspect and upheld the sole right of a woman to make decisions regarding her body. The US Supreme Court built on the concept of a constitutional right to privacy in *Griswold* and held that the State cannot interfere with the right of a woman to terminate her pregnancy by abortion if she wishes. It can be argued that it falls within the ambit of decisional privacy that a person has every right to make their own personal and intimate choices, without any arbitrary State interference.

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39 262 U.S. 390 (1923).
40 410 U.S. 113 (1973).
On a similar note, the Yogyakarta Principles, a universal guide on existing human rights law on SOGI, recognizes the “decisional” right to privacy. The sixth principle gives a protection to “decisions and choices regarding both one’s own body and consensual sexual and other relations with others.” It also puts forth the idea that forming intimate ties with other individuals, irrespective of gender, is an inalienable part of one’s personal liberty and the right to autonomy.

The Supreme Court of India has time and again upheld the decisional right to privacy of individuals, and has even gone to the extent of upholding an individual’s decision to take vegetarian or non-vegetarian food as a paramount personal affair protected under the right to privacy.42

However, the mere existence of such a right, does not protect it from State’s scrutiny. Otherwise, there would exist a constitutional right to suicide, not just for terminally ill patients, but in all possible circumstances. The right to have individual autonomy in personal and intimate decisions does not entail a right to any specific opinion, which is not in compliance with the law of the land. This should again be decided by the Court on a case-to-case basis.

RIGHT TO PRIVACY IN INDIA: STATUS QUO

PRE-1975 POSITION: RIGHT TO PRIVACY NOT EXPLICITLY RECOGNIZED
In 1954, the Supreme Court in M. P. Sharma v. Satish Chandra43, rejected the contention that there exists a right to privacy under Article 20(3)44, 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 UP45, where the petitioner was subjected to

43 AIR 1954 AIR 300.
44 INDIA CONST., art. 20(3).
45 AIR 1963 SC 1295.
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.”46 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”47 Although, the Supreme Court began to accept certain points of the minority view48, the right to privacy was still waiting for its place in Indian constitutional jurisprudence49.

POSITION DURING 1975-2000: RIGHT (TO PRIVACY) IMPLICIT IN LIFE, PERSONAL LIBERTY AND FREEDOM

In Gobind v. State of Madhya Pradesh50, 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 interest51. In this decision, Justice Mathew taking the US jurisprudence52 into consideration, observed that the right to privacy exists within the penumbral zones of the Fundamental rights explicitly guaranteed under Part III of the Constitution53.

The Supreme Court in Sunil Batra v. Delhi Admn54 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

46 Id.
47 Id.
50 AIR 1975 SC 1378.
51 Id., at 22.
54 (1978) 4 SCC 494.
v. State of P&H\textsuperscript{55} 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\textsuperscript{56}, again asserted that the right to privacy is an implicit right under Art. 21\textsuperscript{57} 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"\textsuperscript{58} On a similar note, in State of Maharashtra v. Madhukar Narayan Mardikar\textsuperscript{59}, 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.\textsuperscript{60}

The Supreme Court in People’s Union for Civil Liberties v. Union of India\textsuperscript{61} 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.”\textsuperscript{62}

The Supreme Court in S.P. Gupta v. President of India,\textsuperscript{63} 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,\textsuperscript{64} 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

\textsuperscript{55} Malak Singh v. State of P&H, AIR 1991 SC 760.
\textsuperscript{56} AIR 1995 SC 264.
\textsuperscript{57} INDIA CONST., art. 21.
\textsuperscript{58} R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.
\textsuperscript{59} AIR 1991 SC 207.
\textsuperscript{60} Indian Drugs and Pharmaceuticals Ltd v. Workmen, (2007) 1 SCC 408.
\textsuperscript{61} AIR 1997 SC 568.
\textsuperscript{62} Id.
\textsuperscript{63} AIR 1982 SC 149.
\textsuperscript{64} AIR 1986 Raj 515.
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’, 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 (2000 TO PRESENT): INCREASING RECOGNITION, SAFEGUARDING THE RIGHT, REASONABLE RESTRICTIONS, VARYING POSITIONS AND CONSTITUTIONAL DEBATE**

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. 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.

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70 Sharda v. Dharmapal, AIR 2003 SC 3450.
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.71 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.72

In the Bhabani Prasad Jena v. Orissa State for Commission of Women73, 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 India74, 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.75 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 authorised by a statutory provision, the right may be infringed.76

Most recently, the Bombay High Court in Shaikh Zahid Mukhtar v. The State of Maharashtra77 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 Bihar78 held that Indian

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71 Ashit Kapur v. Union of India, AIR 2004 Del 203.
72 Teeku Dutta v. State, AIR 2004 Del 205.
73 AIR 2010 SC 2851.
74 (2011) 8 SCC 1.
75 Avishek Goenka v. Union of India, AIR 2012 SC 2226.
77 2017 (2) ABR 140.
78 2016 (4) PLJR 369.
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\textsuperscript{79} 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\textsuperscript{80} and Kharak Singh\textsuperscript{81}, 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.

CONCLUSION

Although the bench in M.P. Sharma and Kharak Singh had held Art. 21 to not include right to privacy and the matter is being referred to a larger constitutional bench, that does not render all the subsequent decisions by the Supreme Court recognising its existence legally untenable. This position was noted in Harbhajan Singh v. State of Punjab\textsuperscript{82} and Ashok Sadarangani v. UOI\textsuperscript{83}, where the Supreme Court observed that “the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference…. Until such time as the decisions cited at the Bar are not modified or altered in any way, they [continue to hold the field]\textsuperscript{84}.”

However, though right to privacy has been recognized by many judgements to be implicit under Part III of the Constitution, there is a need to explicitly adopt Right to Privacy as a fundamental right by the Parliament.

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\textsuperscript{79} (2014) 6 SCC 433.
\textsuperscript{80} AIR 1954 AIR 300.
\textsuperscript{81} Kharak Singh \textit{v.} State of Uttar Pradesh, AIR 1963 SC 1295.
\textsuperscript{82} (2009) 13 SCC 608.
\textsuperscript{83} AIR 2012 SC 1563.
\textsuperscript{84} Id., at 19.
INTEGRAL PART TEST: RELATION BETWEEN RIGHT TO PRIVACY AND RIGHT TO PERSONAL LIBERTY

This section of the paper analyses the implied existence of right to privacy under Part III of the Indian Constitution. The Supreme Court in *Surabh Chandni v UOI*[^85^], noted that the Constitution is organic and ongoing in nature. In *Ashok Tanwar v State of HP*[^86^], 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*[^87^] 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 nature and character as that fundamental right”[^88^]

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”[^89^]. This approach was adopted by the Supreme Court in *Unni Krishnan v State of Andhra Pradesh*[^90^] when they read the term ‘life’ to include ‘education’ as one of its essential element promoting good and dignified life. This went on to take the form of the 86th constitutional amendment[^91^] which inserted Article 21-A[^92^] in the Constitution and made “right to education” a fundamental right under Part III. Also, the Supreme Court has been quite liberal

[^85^]: AIR 2004 SC 361.
[^86^]: AIR 2005 SC 614.
[^87^]: AIR 1978 SC 597.
[^88^]: *Id.*, at 80.
[^89^]: *Id.*, at 54.
[^90^]: AIR 1993 SC 217.
[^92^]: INDIA CONST., art. 21-A.
while reading implied rights into Article 21, some of which are: right to livelihood\textsuperscript{93}; right to shelter\textsuperscript{94}; right of an accused against custodial violence\textsuperscript{95}; right to health\textsuperscript{96}; right to legal aid and speedy trial\textsuperscript{97}; right to education\textsuperscript{98} and right to compensation\textsuperscript{99}.

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\textsuperscript{100}.

Now, let’s understand the relation between “right personal liberty” and “right to privacy”. 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.\textsuperscript{101} 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\textsuperscript{102}, 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\textsuperscript{103}, where the Court held that the right to privacy is subject to reasonable restrictions, like public benefit or compelling state interest. The US Supreme Court in

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  \item \textsuperscript{94} Shantistar Builder v. N.K. Totane, AIR 1990 SC 630.
  \item \textsuperscript{96} Vincent Panikulangara v. India, AIR 1987 SC 990; Parmanand Kataria v. Union of India, AIR 1989 SC 2039; Paschim Banga Khet Mazdoor Samiti v. State of West Bengal, AIR 1996 SC 2426.
  \item \textsuperscript{98} AIR 1993 SC 217.
  \item \textsuperscript{101} Hallborg, R.B, Principles of Liberty and the Right to Privacy in LAW AND PHILOSOPHY 183 (Springer Publications 2015).
  \item \textsuperscript{102} Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.
  \item \textsuperscript{103} Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148; AIR 1975 SC 1378.
\end{itemize}
Planned Parenthood v. Casey, 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 liberty protected by the Fourteenth Amendment and thus, should be protected.

The same can be concluded from right to privacy allowing an individual the right to be let alone, to be free from unwarranted interference from the state, to have control over personal information and physical information, and to be free from unlawful physical invasion and disturbances. 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 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 (xii) of the Juvenile Justice (Care and Protection of Children) Act, 2015, 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

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105 Basu, supra note 12.
106 Edwin Shorts and Claire de Than, Civil Liberties: Legal Principles of Individual Freedom 362-63 (Sweet and Maxwell 1998); Basu, supra note 12.
108 Basu, supra note 12.
110 “Art. 21-B. - (1) Every person has a right to respect 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.”
amendment to that effect and finally give the citizens of India the unequivocal and paramount right to protect their privacy from any external interference.