

NOTES AND COMMENTS

EVOLUTION OF PRIVACY JURISPRUDENCE – A CRITIQUE

Abstract

Right to Privacy though is not a common law right but has been recognized as an equitable doctrine and as most cherished right in a democracy. Privacy enjoys support of a robust international legal framework in the form of UDHR and ICCPR. Right to privacy finds its genesis in the profound political distrust in the State. This debate of the privacy had reignited with need for data privacy laws and civil right of privacy of every individual, irrespective of their sexual preference. The author in this paper has traced the origins of privacy, as a legal doctrine followed by the evolution of privacy jurisprudence in American Courts. In the next segment the vital role of judiciary, in expansion and interpretation of privacy doctrine in Indian context is elaborated upon.

I INTRODUCTION

Privacy is intrinsic to life and liberty and an inherent part of the fundamental rights enshrined in the Constitution. It exists equally in all individuals, irrespective of class, strata, gender or orientation. It plays a significant role in the development of one's personality, integrity and dignity. However, privacy is not an absolute right, but an invasion must be based on legality, need and proportionality for safeguarding this cherished right. It is to be noted that privacy rights have to be promoted and protected not only in the physical world but also in the virtual world like cyber space. The rapidly advancing internet technologies are not compatible with copyright protection¹. Privacy if not properly protected faces the danger of being abused by other entities of the cyber space. This has generated a hot debate about the protection of privacy, copyright etc., in cyber space. The debate about privacy and the internet is crucial because of the new risks created by the wide reach and the very characteristics of the internet itself².

Certain practices such as bugging, telephone tapping, interception, surveillance pose threats to the confidentiality of communications³. Right to anonymity sometimes

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- 1 Sushan Tilak Kaul, "Copyright Protection: Some Hassles and Hurdles", 46 *JILI* (2004)
 - 2 Yves Poullet with the cooperation of J. More Dinant, "The Internet and Private Life in Europe: Risks and Aspirations", In Andrew T. Kenyon and Megan Richardson (ed.), *New Dimensions in Privacy Law* 60-90 (2006)
 - 3 See *Bartnicki v. Vopper*, 532 US 514(2001); see also *Watergate Scandal [United States v. Nixon*, 418 US 683 (1974)]wherein the then President of America Nixon had to resign for the

conflicts with the freedom of media when there is a public disclosure of private facts⁴. Unauthorized exposure of personal celebrity information and publication amounts to invasion of celebrity privacy⁵. Bio-medical technology infringes genetic privacy⁶. Telemarketing strategies are posing a great challenge to consumer privacy. Patenting and bio-prospecting are leading to Bio-piracy⁷. In a public disclosure of rape victims, there is breach of privacy⁸.

Similarly bio-metric technology is so pervading and has got a telling impact on privacy undoubtedly. Investigative technology is more invasive violating the privacy of the accused. The recent advances of Assisted Reproductive Technology (ART) are posing a huge challenge on the privacy aspects of women grossly violating her fundamental freedoms and dignity. Therefore, privacy is subject to so many threats and onslaughts. Dangers to privacy originate from both State and non-State actors. In the research paper, issues and challenges arising out of privacy would be critically analysed. The roots and historical growth, the contribution of the American and Indian judiciary in evolving privacy jurisprudence are highlighted. At the end suggestions are mooted.

II PRIVACY: THE ROOTS AND HISTORICAL GROWTH

Privacy though not a common law right has been recognized as an equitable doctrine⁹ and as most cherished right in a democracy. It is also protected in many civil law jurisdictions. Privacy enjoys a robust legal framework internationally as UDHR and ICCPR protects persons against the arbitrary interference with one's privacy. The American Courts trace the origins of right to privacy in the right to property¹⁰. However, courts gradually disassociated privacy from property¹¹. In 1890s, Louis Brandeis J articulated the concept of privacy as 'individual's right to be let alone' that shaped the development of the law of privacy¹². The political foundations of the right to privacy

presidency. The US Government itself by authorizing bugging, wire tapping and illegal entry in the interest of national security invaded privacy.

4 *Cohen v. Cowless Media Co.*, 501 US 663 (1991)

5 *Prince Albert v. Strange* (1849) 1 H&TW 1: 47 ER 1302

6 *T. Sareeta v. T. Venkata Subbaiah*, AIR 1983 AP356

7 G. Dutfield, *Intellectual Property Rights, Trade and Biodiversity: Seeds and Plant Varieties* [Earthscan Publications Ltd. London 2000]

8 See *Cox Broadcasting Corporation v. Cohn* 420 US 469 (1975)

9 The court in *Kaye v. Robertson* (1991) FSR 62 expressed its inability to protect the privacy of the individual and blamed the failure of common law and statute in protecting it. See also *Douglas v. Hello Ltd.*, (2001) 2 All ER 289; *Campbell v. MGN* (2003) 1 All ER 224 (CA)

10 *Boyd v. US*, 116 US 616

11 See *Warden v. Hayden*, 387 US 294 (1967)

12 Samuel Warren and Louis Brandeis, "The Right to Privacy" 4 *Harvard Law Review*, 193-220 (1890)

are rooted in a profound distrust of the State¹³. There is a rich potential base of utilitarian support for privacy as a species of liberty. According to Mill, privacy is an aspect of liberty grounded on the permanent interests of man as a progressive human being¹⁴.

Continental European philosophers treated privacy as an integral part of human dignity and dignity as an immutable end of human existence¹⁵. Immanuel Kant's philosophy that persons should be treated as ends in themselves and not means to ends of others became the basis of 'dignitary' idea of privacy in Continental Europe. Privacy lays the ground work for dignity by creating conditions of individualization¹⁶. It is the constitutional core of human dignity. It ensures the fulfilment of dignity. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action¹⁷. Privacy has been part of the fabric of English law since at least the case of *Entick v. Carryington*¹⁸.

In most of the sexual offences committed against women, especially in the case of rape, privacy of the victim is robbed in their disrobed condition. Voyeurism seriously wounds and steals the secrets of woman. Incest desists without resist innocent girl child from revealing her untold miseries to parents. There is no protection to young girls and women from stalkers and harassers. Honour killing haunts the young married couple and finds fault with their choice and autonomous decisions. Acid attack leaves a permanent scar on her privacy. Solitary woman is highly vulnerable for unwelcome solicitations and advances. These behaviours of men are seriously making inroads into women privacy¹⁹. The sense of privacy and the search for its protection originates with the attainment of puberty of a girl. It is inherent in every human being and quite natural. Therefore, it is a natural right and the State does not bestow it on citizens.

13 See Sheetal Asrani; Dann, "The Right to Privacy in the Era of Smart Governance: Concerns Raised by the Introduction of Biometric Enabled National ID Cards in India", 47 *JLLJ*(2005)53-94

14 See Jack Stillinger, "Introduction in John Stuart Mill Auto biography" (London, Oxford University Press, 1971) p. vii; for details see Andrew T. Kenyon and Megan Richardson (ed.) *New Dimensions in Privacy Law* (2006)262-3

15 Immanuel Kant, *The Moral Law : Kant's Groundwork of the Metaphysic of Morals*, translated and analyzed by H. J. Paton (London Hutchinson University Library, 1948) Pp 90-1

16 Kahn, "Privacy as a legal Principle of Identity Maintenance", 33 *Seton Hall Law Review* 371 (2003)

17 L. Heureux – Dube J in *Egan v. Canada*, (1995) 29 CRR (2 nd) 79, 106

18 (1765) 19, Lord Chief Justice Camden, in the Court of Common Pleas, decided the case of 'seizure of papers' in favour of John Entick against Carryington, messenger to king.

19 All these offences like voyeurism, acid attack, incest, honour killing etc were added in the criminal law system on the basis of Justice Verma Committee Report submitted in the wake of the brutal Nirbhaya gang rape case

The intrusion of the State into such a decision making process of the individual is scrutinized by the constitutional courts both in this country and in US with great care.

III EVOLUTION OF PRIVACY JURISPRUDENCE: AMERICAN CONSTITUTION

Privacy encompasses bodily privacy; communication privacy, territorial privacy, decisional privacy and data privacy. Right of reproductive autonomy is a part of decisional privacy. The right to use condoms, right of a woman to abort all these falls within the ambit of right to privacy. In *Skinner v. Oklahoma*²⁰, the US Supreme Court has characterized the right to reproduce as one of the basic civil rights of man. The cascade of judicial decisions that contend with the issue of autonomy of women over their bodies began with *Griswold v. Connecticut*²¹ in 1965 in USA. The case was instrumental in establishing the right of women to enforce their reproductive choices. The act of abortion became a legitimate expression of individualism of an autonomous adult in a family setting. Therefore, reproductive autonomy, choice, reproductive health, internal self determination are integral parts of privacy of women.

Griswold is the first significant pronouncement, where the US Supreme Court recognized a right to privacy. Soon after *Griswold* it was established that constitutional protection extended to even intimate choices by married as well as unmarried persons. In *Eisenstadt*²² and *Carey*²³ the US Supreme Court invalidated a statute that banned the distribution of contraceptives to minors. In *Carey* the claim of minors was found protected by the due process clause of the 14th Amendment to the US Constitution. *Griswold* and *Eisenstadt* together can be said to have laid the jurisprudential foundation for *Roe v. Wade* in 1973, which legalized abortion. Similarly in *Roe v. Wade*²⁴ the Court held that right to privacy was broad enough to protect a woman's right to abortion. Subsequently, in *Casey*²⁵, the constitutional protection was extended to intimate and personnel choices.

In another significant case *Romer v. Evans*²⁶, the Supreme Court held that the amendment to Colorado's Constitution which named as a 'solitary class persons' who are

20 (1941)316 US 535.

21 *Griswold v. Connecticut*, (1965)381US479; a State law banning use of contraceptives was invalidated by the Supreme Court as being inconsistent with right to privacy, a penumbral right emanating from V and XIV Amendments of the US Constitution. Goldberg was of the opinion that the right of marital privacy falls within the contours of the privacy; see also on the right to use contraceptives in *Eisenstadt v. Beird* 405 US 438(1972),

22 405 US 438(1972).

23 *Carey v. Population Services International*, 431 US 678 (1977).

24 410 US 113 (1973).

25 *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 US 833(1992).

26 517 US 620(1996).

homosexuals by orientation was violative of the equal protection clause. Against this backdrop, the US Supreme Court decided *Lawrence*²⁷ which is regarded as landmark victory for gay men and lesbians. The Court held that Texas sodomy law violated due process clause of the Constitution. In this case the petitioners *Lawrence* and *Garner* were convicted to deviate sexual intercourse. The case did involve two adults with full and mutual consent from each other engaged in sexual practices common to homosexual lifestyle. The petitioners are entitled to respect for the private lives. The Court observed that the State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the due process clause gives them full right to engage in their conduct without intervention of the Government²⁸.

However, in *Bowers v. Hardwick*²⁹, the Court upheld sodomy law of Georgia ruling that US Constitution did not confer a fundamental right upon homosexuals to engage in sodomy. In *Bowers*, Stevens J dissenting opinion describes the kind of liberty, individual decisions by married persons, concerning intimacies of their physical relations even when not intended to produce offspring are a form of liberty protected by the due process clause of the Fourteenth Amendment. This protection extends to intimate choices by unmarried as well as married persons. *Lawrence* reversed the holding of *Bowers*. The US Supreme Court in its landmark decision in *Obergefell v. Hodges*³⁰ upheld the same-sex couples' fundamental right to marry on grounds of both equal protection and substantive due process. It is because, marriage is a keystone of social order³¹. It is the foundation of the family and of society, without which there would be neither civilization nor progress³². It is a great public institution, giving character to whole civil polity. As a result, the same-sex couples now enjoy the same marriage rights that their heterosexual counterparts have always had³³.

IV RIGHT TO PRIVACY: ROLE OF INDIAN JUDICIARY

Privacy is inviolable private space. The need for privacy and its recognition as a right is a modern phenomenon. It is a product of individualism as distinguished from collectivism. Privacy is a right against public exposure of private matters. Exposure of public acts and public information is restraint on privacy. Therefore, privacy is a restraint

27 *John Geddes Lawrence and Tyron Garner v. Texas* 539 US 833(1992).

28 Ajendra Srivastava, "Gay Sex and the Constitution : *Naz Foundation* and *Lawrence* Compared", 51 *JILJ*(2009)513

29 478 US 186(1986)

30 See Katherine G. Porter on *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

31 *US v. Windsor*, 133 S.Ct.2675 (2013)

32 *Maynard v. Hill*, 125 US 19, 211 (1888)

33 *Loving v. Virginia*, 388 US1, 12 (1967), Virginia Statute banning inter racial marriage violates both equal protection and due process clauses

on the right to know about others. Though Indian law on privacy is derived from common law of tort and Constitutional law, still Indian Courts have relied largely on American case law in developing the privacy jurisprudence. It is submitted right to privacy as a specific right has not evolved anywhere in the world³⁴.

Privacy is an autonomous zone within which a person may live a personal life and make choices without interference. The Indian Constitution does not grant in express terms any right to privacy as such³⁵. However, such a right has been culled by the Supreme Court as a penumbral right from part III of the Constitution. In *Govind v. State of M.P.*³⁶, the Court accepted a limited fundamental right to privacy as an emanation from Arts 19 and 21. In *Rajagopal v. State of Tamil Nadu*³⁷ the Supreme Court has asserted that right to privacy has acquired constitutional status.

In *Kharak Singh v. State of U.P.*, the Supreme Court viewed that domiciliary visits by the police infringed the petitioner's right to sleep or right to privacy and such infringement could not be authorized by the executive rules. A law enacted by the legislature would be requisite for the purpose under Art. 21 of the Constitution. In *Govind*, similar police regulations were upheld when they were formed under the Police Act. Similarly freedom from searches and seizures is an aspect of right to privacy as observed in *Board of Revenue, Madras v. R.S. Jhava*³⁸. It was held that power of search and seizure can be exercised by the executive only when it is conferred by some statute³⁹.

Telephone tapping constitutes a serious invasion of an individual right to privacy. In *Peoples Union for Civil Liberties v. Union of India*⁴⁰ the Court has ruled that telephone conversation is an important facet of a man's private life. The right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern life of man. Tapping of telephone is a serious invasion of privacy. Telephone tapping infract Art. 21 unless it is permitted under the procedure established by law. The

34 For critical analysis see Madhavi Goradia Divan, *Facets of Media Law*, 112-126 (2006)

35 *Kharak Singh v. State of U.P.*, AIR 1963SC1295

36 AIR 1975 SC 1378

37 AIR 1995 SC 264

38 (1968) SC 59

39 See *Boyd v. US*, (1886)116 US 616; Bradley J., in this case refers to Lord Camden's judgment in *Entick v. Carrington*, as one of the landmarks of English liberty and monument of English freedom. *Henry v. US*, (1959) 361US98; *Federal Trade Commission v. American Tobacco Company*, (1924)264 US 298.

40 AIR 1997 SC 568. Telephone tapping is permissible under sec. 5 (2) of the Telegraph Act, 1885. The Court has held that this section is constitutionally valid which lays down the circumstances and the grounds when an order for tapping of telephone may be passed.

procedure has to be just, fair and reasonable. Further, talking on telephone amounts to exercise by the individual of his right to freedom of speech and expression protected by Art. 19 (1) (a). This means, telephone tapping unless it comes within the compass of permissible restrictions under 19 (2) would infract Art. 19(1)(a). It is submitted that, in the course of its judgment, the Supreme Court referred to the Universal Declaration of Human Rights, 1948 (UDHR), International Covenant on Civil and Political Rights, 1966 (ICCPR), and accordingly interpreted Art. 21 in conformity with the international law.

Privacy which is individual as well as social value has become a casualty and scapegoat with the onset of modern scientific and technological advancements. In *Selvi v. State of Karnataka*⁴¹, the Supreme Court observed that narco-analysis, lie-detection and BEAP tests in an involuntary manner violate prescribed boundaries of privacy. A medical examination cannot justify the dilution of constitutional rights such as right to privacy. In *District Registrar and Collector v. Canara Bank*⁴², the Supreme Court said that the disclosure of the contents of the private documents of its customers or copies of such private documents, by the bank would amount to breach of confidentiality and would, therefore, be violative of privacy rights of its customers.

In *State of Maharashtra v. Madhukar Narayan Gardikar*⁴³ the Supreme Court said even prostitute has a right to privacy under Art. 21 and no person can rape her just because she is a woman of easy virtue. In *Neera Mathur v. LIC*⁴⁴ the court recognized that privacy was an important aspect of personal liberty. An LIC questionnaire sought information about the dates of menstrual periods and past pregnancies and the petitioner was terminated for not providing the correct information to the LIC. The questionnaire amounted to invasion of privacy. Allowing the medical examination of a woman for her virginity would certainly violate privacy and personal liberty enshrined under Art. 21 of the Indian Constitution⁴⁵.

In *Mr. 'X' v. Hospital 'Z'*⁴⁶, the Supreme Court has held that right to privacy as fundamental right but it not an absolute right. Hence the disclosure of the information about the patient by the doctor was not violative of privacy in the interest of his fiancée's health right. In *Suchita Srivasthava v. Chandigarh Administration*⁴⁷, it was held

41 (2010) 7 SCC 263

42 AIR 2005 SC 186.

43 (1991) 1 SCC 57.

44 (1992) 1 SCC 286.

45 *Surjit Singh Thind v. Kamaljit Kaur*, AIR 2003 P&H 353; *Zabida Begum v. Mustaque Abamad*, AIR 2006 Kant 10.

46 AIR 1995 SC 495.

47 AIR 2010 SC 235.

that reproductive rights include a women's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise her child. The right to make a decision about reproduction is essentially a personal decision either on the part of the man or woman. Necessarily such a right includes the right not to reproduce⁴⁸. It is submitted that, one can witness the American influence on the Indian judiciary in recognizing privacy as a fundamental right.

The Supreme Court in a recent trend setting case *Justice K.S.Puttaswamy v. Union of India*⁴⁹, popularly called as *Privacy* judgment, read privacy as a penumbral right under Art. 21 of the Indian Constitution. The Court has unequivocally held that the doctrinal premise of *M.P. Sharma*⁵⁰ and *Kharak Singh* stand invalidated. Further it has explicitly overruled the emergency era *ADM Jabalpur*⁵¹ judgment. The unanimous verdict on privacy is a restatement of core constitutional principles. The opinions of three glorious dissenters i.e. Justice Fazal Ali in *A.K. Gopalan*⁵², Justice Subba Rao in *Kharak Singh* and Justice Khanna in *ADM Jabalpur* stood vindicated with the passing of *Puttaswamy* judgment. *Puttaswamy* has brought to life the brooding spirit of these three dissents. Consequently, the courts most regressive judgments were consigned to the dust heap of history⁵³. The judgment may also open the Aadhaar-Permanent Account Number linkage issue. The Court's ruling was therefore, being seen as a set back to the Government in its bid to expand the scope of Aadhaar as a mandatory requirement for a host of Government services⁵⁴.

It is submitted that, privacy judgment attests to the resilience of our dignitarian liberalism. A welcome aspect of the judgment is that it makes it clear sexual orientation is part of privacy and constitutionally protected. As a result *Kaushal*⁵⁵ ruling upholding section 377 IPC is seriously flawed. Same gender sex remains a crime in the country due to a flagrant judicial mistake committed by the Supreme Court in *Kaushal*. The time has come to undo it. The *NALSA*⁵⁶ judgment is a landmark one which upheld right to choose one's sexual orientation. Transgender even though insignificant in

48 *B.K.Partha Sarathi v. State of A.P.*, AIR 2000AP 156

49 Writ Petition (civil) No: 494 of 2012

50 *M.P. Sharma v. Sathish Chandra*, AIR 1954 SC 300

51 *ADM Jabalpur v. S. Shukla*, AIR 1976 SC 1207.

52 *A.K. Gopalan v. State of Madras*, AIR,1953 SC 27.s

53 Suhrith Parthasarathy, "The Constitution Refreshed", *The Hindu*, 26th August 2017 p. 8 Editorial

54 See *The Hindu*, 25-08-2017 at p.14 - The right to privacy case was being heard as a question that arose out of another case on the collection, protection and use of bio-metric data on Aadhaar, the Government's Unique Identity Authority.

55 *Suresh Kumar Kaushal v. Naz Foundation*, (2014) 6 SCC 433.

56 (2014) 5 SCC 438

numbers are entitled to human rights as observed by the Court in *NALSA*. In *NALSA* the Court while articulating a charter of rights for transgenders noted that sec. 377 IPC effectively targeted specific identities. *NALSA* and *Puttaswamy* together laid the foundation to decriminalize consensual gay sex.

Section 377 IPC criminalizing homosexuality is modelled on the English criminal law. The framers of the Code obviously relying upon the then prevailing sexual mores and the common law of buggery, decided to criminalise carnal intercourse against the order of the nature. The Wolfenden Committee strongly argued that consensual homosexual act between consenting adults in private does not harm others. The committee also relied upon Millsian doctrine that legal intervention in private life is only justified in order to prevent harm to others⁵⁷. The Delhi High Court decriminalized section 377 IPC as unconstitutional in *Naaz Foundation*⁵⁸. *Naaz Foundation* drew heavily on the privacy jurisprudence of the US Supreme Court in *Lawrence* in declaring section 377 of IPC as unconstitutional. The *Kaushal* Court recriminalized homosexuality.

NALSA recognized transgender as third gender by treating the issue as human right issue. The Supreme Court in *NALSA* held that transgender persons have the right to identify their gender a male, female or transgender irrespective of medical sex reassignment and right to expression of their chosen gender identity. The Court in Privacy judgment reaffirmed that right to sexual orientation and gender identity as some of our most intimate life decisions that need to be protected.⁵⁹ The Court in *Puttaswamy* has observed that *Koushal*⁶⁰ has not appreciated the fundamental right to privacy in its application to sec. 377, IPC. The *Kaushal* verdict is dead, only its burial remaining. The Court viewed that a ‘miniscule fraction of the country’s population constitutes lesbians, gays, bi-sexuals or transgenders was not a sustainable basis to deny the right to privacy.

The Supreme Court in its privacy judgment affirmed that the ideas of self-determination and the right of the individual to make fundamental choices about how to use one’s body are at the heart of the Constitution. *Common Cause v. Union of India*⁶¹ represents the first important application of these general principles to a concrete situation. Consequently the autonomy to die is recognized in *Common Cause*.⁶² It also endorses

57 See K.I.Vibhute, “Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality”, 51 *JILI* (2009) 3-31

58 *Naaz Foundation v. Government of NCT of Delhi & Others*, 2010 *Cri.L.J.* 94

59 See Jayna Kothari, “A Promise falls short”, *The Hindu*, op. ed. 9, 12/04/18.

60 (2014) 6 *SCC* 433

61 2018 *SCC* Online SC 208.

62 See also, *Aruna Ramachandra Shanbaug v. Union of India* (2011) 4 *SCC* 254, where the SC rejected euthanasia as a fundamental right under Art. 21 of the Constitution of India.

freedom of the competent individuals to make choices about the medical care and also the principle of technological self-determination⁶³. It is submitted that one can witness the influence of the *Puttaswamy* on the Supreme Court in restoring *Hadiya* marriage. The Court opined that *Hadiya*⁶⁴ is having internal freedom of choice, marriage and autonomy⁶⁵. The Supreme Court has clarified that right to convert is a fundamental right of choice. The Court observed that “freedom of faith is essential to his/her autonomy; choosing a faith is substratum of individuality”. The Supreme Court came down heavily on the crimes committed in the name of honour⁶⁶ by upholding the choice of consenting adults to love and marry as part of their fundamental rights. The apex Court said “honour killing guillotines individual liberty and freedom of choice and one’s own perception of choice”.⁶⁷ It is submitted that the Court has once again applied the Privacy judgment in the instant case. The Court maintained that the State and even the parents could not interfere with the freedom and encroach into their marriages.

V CONCLUSION AND SUGGESTIONS

From the above, it is concluded that, fundamental right to privacy is a multifaceted and multidimensional concept. It includes preservation of personal intimacies, sanctity of family life, marriage, procreation, the home and sexual orientation. It connotes a right to be let alone. It safeguards individual autonomy and recognizes one’s ability to control vital aspects of life. It protects heterogeneity and recognizes plurality and diversity of our culture. It is one of the core freedoms. Having increasingly recognized sexual privacy in jurisprudence around the world, the European countries and many States in the US have repealed adultery laws. In India too, the constitutional validity of the offence of adultery is challenged in *Joseph Shine v. Union of India*⁶⁸. Following the global trend and *Puttaswamy* dictum the Supreme Court might decriminalize adultery which is an ancient vintage on the ground of sexual privacy. Similarly, time is ripe to criminalise marital rape which silently invades sexual privacy of wife.

Capacity of State and non-state actors to invade privacy has been drastically enhanced. Unauthorized leaks, hacking and other cyber crimes have rendered data bases vulnerable.

63 See for details, Gautam Bhatia, “Under a Humane Constitution”, *The Hindu*, 10 Editorial 12-03-2018

64 *Shafin Jahan v. Ashokan K.M* 2018 SCC Online SC 201.

65 See *The Hindu*, 09-03-2018

66 *Shakthi Vahini v. Union of India* 2018 SCC Online SC 275.

67 See *The Hindu*, P. 1, 28-03-2018.

68 See Thulasi K. Raj, “This too is a Right”, *The Hindu*, 05-01-2018, *Editorial*. The matter is referred to the Constitutional Bench. See also “Should Adultery be a Crime”, *The Hindu*, 22-12-2017, OPED

It is in this background that Draft Privacy Bill – a technology neutral was submitted by A.P.Shah J., to the Planning Commission of India in 2012. No steps were taken on the recommendations of the Justice Shah Committee. Justice A.P.Shah Committee recommended a set of principles for a legal framework protecting privacy, drawn from OECD guidelines. As per growing requirement different countries have introduced different legal framework like Data Protection Act, 1998 in U.K., Electronic Communications Privacy Act, 1986 in USA etc from time to time.

Nowadays, computer systems contain large amounts of data which is sensitive. India does not have a separate law for data protection, though sec- 43 A of the Information Technology Act provides a measure of legal protection of personal information. Therefore, it is submitted that IT Act is facing the problem of protection of data and a separate legislation is much needed for data protection⁶⁹. Justice B.N. Sri Krishna Committee made public the white paper to elicit views from the public on the shape and substance of a comprehensive data protection law. The law requires a careful drafting and strictly defined concepts as the law would apply to both Government and private entities but with different obligations.

The Supreme Court in *Puttaswamy* urged the Government to put in place a robust mechanism for data protection. The Court observed that the creation of a regime requires careful and sensitive balance between individual interest and legitimate concerns of the State⁷⁰. It is legitimate to collect personal data in the public interest, but this information should be protected and used only for the purposes it was collected. Above all, the law must provide for a suitably empowered statutory authority to enforce its promised protection to citizen's data and loss of individual autonomy.

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69 Shiv Shankar Singh, "Privacy and Data Protection in India: A Critical Assessment, 53 *JILL* (2011) 663-77.

70 See *The Hindu*, 25-08-2017 at 14.

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