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SCOPE OF RIGHT TO PRIVACY IN INDIA

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6.1 An Overview

Privacy is the ability of an individual or group to seclude information about them and thereby reveal them selectively. The boundaries and content of what is considered private differs between culture and individuals, but shares basic common themes. Privacy is sometimes related to anonymity, the wish to remain unnoticed in the public realm. When something is private to a person, it usually means there is something within them that is considered inherently special or personally sensitive.

In the age of today, right to privacy is the most carefully guarded right, where vast amounts of personal information is provided, used traded and even stolen. And thus law of privacy recognizes the individuals right to be let alone and to have personal space inviolate. The need for privacy and its recognition as a right is a modern phenomenon. It is the product of an increasingly individualistic society in which the focus has shifted from society to the individual.

Privacy related issues have recently cropped up in a variety of cases, ranging from telephone tapping to the right of confidentiality of an HIV infected person, and privacy of the woman dignity to the right to abortion.

Abortion is the area which has not interpreted in the realm of the right to privacy in India properly. Restitution of conjugal rights, a concept abolished in most civilized countries, has not recognized the right to privacy in India.

In the present chapter of the thesis researcher is trying to find out the real scope of right to privacy in India in respect of telephone tapping, HIV/AIDS patient, women's of easy virtue, in respect of right to abortion and lastly in respect of restitution of conjugal rights, what is the law in India in respect of these rights? How Justified are the courts in upholding the law related to privacy rights in India?

6.2 Right to Privacy and Telephone Tapping

The need of society change with the increased use of and progress in technology with the invention of the telephone and computer, communication has reached a new height in clearly. Given enough resources and money, time
along with the increase in the speed of communicating, the efficiency and ease of obtaining information also have increased. The tendency towards an information-based society raises new issues that need to be resolved. One of those issues, privacy rights, demands our attention and resolution.¹

Right to hold a telephone conversation in the privacy of one's name or office without interference can certainly be claimed as right to privacy.² Wiretapping, a method of secretly listening to telephone conversations through perfected mechanical apparatus has been subject to attack in recent years as a violation of the right to privacy.³ In states where the possession of wiretapping equipment is not limited, its possible use for blackmail and business espionage purposes is obvious.⁴ Even where only police officers may possess this equipment, the necessities of law enforcement may not counterbalance the danger to privacy. Wiretapping is not the work of a day; it is usually carried on for weeks, some times months, on the telephones of various people, many of whom are innocent of any offence. In New York the greatest number of convictions from wiretapped evidence are misdemeanors; it is sometimes felt, therefore, that the value of law enforcement in this type of offences is not commensurate with the danger to privacy. Thus wiretapping is said to be a "dirty business"⁵ and a disclosure in court of what is whispered in the closet.⁶ Important than the violation of privacy as it carries messages over outlets peculiarly susceptible to wiretapping, the risk of interception is assumed.⁷ Since the police only tap the wires of suspects, the danger to the privacy of innocent persons is more imagined than real. Moreover, eavesdropping, the use of disguises by an officer posing as a member of a criminal gang, and the concealment of a microphone in a room, all clear violations of the right of privacy, are permitted. There is no substantial distinction between wiretapping and these other invasions of privacy.

**Telephone Tapping in USA**

In the United States, strong protection to privacy is given by a section of a federal law, originally enacted in 1825, which makes it a crime to take
mail before delivery to the addresses with design to obstruct correspondence, or
to pry into open, secret, embezzle or destroy. Protection is afforded against
snooping whether motivated by malice or idle curiosity, even though the mail
is not opened. It is also an offence under the United States Code for any post
master or other postal employee unlawfully detained, delay, or open mail.
Surveillance by opening mail is strictly forbidden because of the constitutional
guarantee to the people of the security of their papers against unreasonable
searches. This fourth Amendment protection has been determined by the
Supreme Court to extend to mail. The Protection of privacy under Article 8 of
the European convention must be developed to meet new technological
developments which were not envisaged at the time of its drafting.

In 1928, the U.S. Supreme Court was faced with its first telephone
tapping case known as Olmstead's v. United States in this case the interception
of Olmstead's telephone line was accomplished without any entry upon his
premises and was therefore, found not to be prescribed by the fourth
Amendment. The fourth Amendment provides that "the right of the people to
secure in their persons, houses, papers and effects against unreasonable
searches and seizure shall not be violated, and no warrant shall be issue, but
upon probable cause, supported by oath or affirmation and particularly
describing the place to be searched and the person or things to be seized."

There had been in this case, no trespass on a constitutionally protected
and no physical object had been seized. The federal prohibition agents had
secured evidence against a gang of runners by tapping there telephones and
recording the conversations and convictions were secured on the basis of this
evidence. By majority the court held that there had been no actual search and
seizure in this case. The agents had never entered the quarters of the suspects,
but had done the tapping in the basements of apartment building. The evidence
was secured by the use of the hearing and that only.

In 1934, the Communication Act was passed by which it was provided
that no person not being authorized by the sender shall intercept any
communication and publish the contents of such intercepted communication to any person.”

The Supreme Court in *Nardane v. United States*, rejected evidence exposing a smuggling ring because it was secured by wiretapping, an unauthorized interception. Although the legislative history of this section indicates that its primary purpose was to amend Section 27 of the Radio Act, extending the Jurisdiction of the Federal Communications commission to wire messages, the Court was willing to recognize a possible subsidiary intention to discourage wiretapping which was inconsistent with ethical standards and destructive of personal liberty. However the communication Act, 1934 did not prevent telephone tapping in the USA. Attorney General Jackson had expressed the view that it was not a criminal violation to intercept conversations by telephone tapping in so far as the results were not used in court. The U.S. department of justice accepted and relied on this view. As a consequence, the federal agencies carried on telephone tapping on a massive scale, with the consent of the Attorney General and especially in the cases of national security.

*Goldman v. United States,* was the first case of electronic eavesdropping or bugging in which no use was made of telephone lines. Here the government agents had used a detectaphone sensitive enough to pick up conversations in an adjoining office, the words being heard through the wall with no physical intrusion into the adjacent office. Relying on decision in *Olmstead*, the court by majority held in this case also that since the words are not protected against seizure and since there had been no search involving physical trespass, the fourth Amendment was not violated. Thus again the claim for the protection of personal privacy suffered a severe blow at the hands of judiciary.

*In Berger v. New York,* the Supreme Court Judges by a majority of five to four held that laws of this kind were not constitutional for the simple reason that telephone tapping, each instance of which could continue for two months,
was condemned as the equivalent of a series of intrusions pursuant to a single showing of probable cause and with no notice those overheard.

In _Katz v. United States_, the government agents had eavesdropped on a gambler by bugging a public telephone booth that he habitually used to place bets. He was constitutionally entitled to make a private telephone call which would not be broadcast to government agents by bug on top of the phone booth. The fact that he was in a glass enclosed booth where he could be readily seen was irrelevant. The fact that there was no physical penetration of the agents into the phone booth was also irrelevant. Departing from the narrow view of the _Olmstead_ case that properly interests of technical notion of trespass control the right of the government to search and seize, in this case the court held that "Government’s activities in electronically listening to the recording of the petitioners words violated the privacy upon, which he justifiably relied while using the telephone booth and thus constitute a search and seizure with in the meaning of fourth amendment.

The Supreme Court in _Katz v. United States_ over ruled Olmsted’s decision and outlined a procedure by which wiretapping could be constitutionally employed, namely (i) Prior Judicial authorization justified by investigation (ii) Showing a probable cause (iii) For a strictly limited law enforcement purpose.

After the decision in _Katz v. United States_, the American congress, through the Crime Control Act, 1968 provided for a system of Judicially approved wiretapping for certain classes of crime on the request of the Attorney General on the application for consent to wiretap or bug had to be detained and particularized and conditions for use of the order were carefully circumscribed.

"Today in addition to some law enforcement agents, numerous private persons are utilizing these techniques. They are employed to acquire evidence in domestic relations cases to carry on individual espionage, to assist in preparing for civil litigation and for personal investigations, among others. In a democratic society, privacy of communication is essential and citizens are to
think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhabing effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process of testing new concepts and ideas is hindered and desirable change is slowed. External restraints of which electronic surveillance is but one possibly are thus repugnant to citizen of such a society."

Thus it is clear from the discussion made that US Supreme Court has recognized privacy as a constitutional right. In varying context, the American Judges have found the roots of this right in the first amendment, the fourth amendments in the penumbras of the bill of right and in the ninth amendment or in the concept of liberty guaranteed by the first section of the fourteenth amendment. Privacy interests of the individual are also protected under the law of torts in the U.S.A. Evolution of right to privacy in U.S.A. has taken place from case to case development and it appears that the doctrine of "Due Process of law" has largely helped the American Supreme Court to identify, recognize and protect different kinds of privacy interest.¹⁷

Telephone tapping in India

Interception of telephonic communication or wire tapping also pose a serious danger to the right to privacy in India. Individual, politicians, officials and other talk a lot in private over telephone. It is gross invasion of privacy of every thing talked on telephone by them is tapped and publish in public forums,¹⁸ except for the reasons of public safety or security of the nation or for the detention and prevention of serious crime. A state can not have any lawful excuse to invade human privacy without any reasonable cause and justification neither the state nor any private individual can legally claim to have the right to intercept telephonic communication of any person. In a democratic country, telephone tapping without any lawful excuse at the behest of the government, central or state, is more deplorable than telephone tapping by a private individual. A man feels of his privacy i.e. loss of his personal liberty when he
comes to know that his telephonic talk is being tapped by somebody. Every individual should have free private zone. When the most confidential conversations are open to eager, prying ears, when that time comes privacy and with it liberty is gone. If a man's privacy can be invaded at will, who can say that he is free? If his every word taken down and evaluated or if he is afraid of every word he says, who can say he enjoys freedom of speech? If every association of man is known and recorded, if his conversation with his associate is purloined, who can say that he enjoys the freedom of association?19

The Indian Supreme Court has in several cases, accepted the evidence taken with the help of mechanical devices, more particularly tape recorder. In *Yusuf Ali, Ismail Nagree v. State of Maharashtra*, the court was faced with the question whether tapping of the appellant's conversation without his knowledge offended his right under Article 21. In this case the police inspector tapped the conversation between Nagree and Sheikh, a municipal clerk whom Nagree wanted to bribe. Nagree had no knowledge of this. Nagree challenged the admissibility of such evidence. The court evolved two directions for guidance in admitting such evidence. First, the court will find out whether it is genuine and free from tampering or mutilations, secondly the court may also secure scrupulous conduct and behaviour on behalf of the police. The reasons are that the police officer is more likely to behave properly if improperly obtained evidence is to be viewed with care and caution by the Judge. In every case the position of the accused, the nature of investigation and the gravity of the offence must be judged in the light of material facts and the surrounding circumstances.

The court further rejected the appellant's argument that it violated procedure established by law and the appellant was incriminated. Conversation was voluntary and without any compulsion.

The court also rejected the appellant's argument that his right to privacy was violated. It was said that Article 21 contemplates procedure established by law with regard to deprivation of life and personal liberty the telephonic conversation of an innocent citizen would be protected by courts against
wrongful or highhanded interference by tapping the conversation. The protection is not for a guilty citizen against the efforts of police to vindicate the law and prevent corruption in police servants. It must not be understood that the courts would tolerate safeguards for the protection of the citizen to be imperiled by permitting the police to proceed by unlawful or irregular methods. In the present case, no unlawful or irregular method was adopted in obtaining the tape recording of conversation.

In *Rama Reddy v. V. V. Giri*, the court held that the tape recorded conversation is admissible provided first, the conversation is relevant to the matter in issue; secondly there is identification of voice; thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorded.

In *Megraj Patodia v. R. K. Birla*, the Supreme Court clearly stated that a document which was procured by improper or even illegal means could not bar its admissibility provided its relevance and genuineness were proved. Mr. Justice Ray reiterated this opinion in *R. M. Malkani v. State of Maharashtra*, Wiretapping is regulated under the Telegraph Act of 1885. Section 5(2) of the Indian Telegraph Act, 1885, permits interception of any communication sent by telegraph by the central or state government on the occurrence of any public emergency or in the interest of the public safety.

Section 26(1) of the Indian post office Act, 1898 similarly permits the Central government and state government or its specially authorized officers to intercept any postal article on the occurrence of any public emergency or in the interest of public safety or tranquility.

Section 26(2) provides that if any doubt arises as to the existence of public emergency or as to any act done under the subsection (1) of section 26 was in the interest of the public safety or tranquility a certificate of the central government or as the case may be of the state government, shall be conclusive proof on the point. These provision of law, drafted about a hundred years back and applied during the British Raj are obviously repugnant to and inconsistent
with the philosophy underlying the preamble, the fundamental right and other provisions of the Constitution of India.

The Law Commission has observed in its forty second report 1971 "As the law on the subject is still rudimentary even in advanced countries, would not advice comprehensive legislation to deal with all aspects of invasion of privacy. It is better to make a beginning with those invasions which may amount to what is known as eavesdropping and unauthorized later on in the light of the experience gained and legislation introduced." 25

The constitutional validity of section 5(2) of the Indian Telegraph Act can be examined in the light of Article 19(1) (a) and 21 of the constitution. Telephone tapping constitutes a serious invasion of an individual right to privacy. The constitutional validity of Section 5(2) of the telegraph Act was challenged before the Supreme Court in a public interest litigation that had been filed in the leading case of:

In People Unions for Civil Liberties v. Union of India, 26 The Supreme Court has held that telephone tapping is a serious invasion of an individual’s right to privacy which is a part of the right to “life and personal liberty” enshrined under Article 21 of the constitution and right to Freedom of speech & Expression is guaranteed also under Article 19(1)(a) of the constitution and when a person is talking on telephone, he is exercising his fundamental right. The court laid down that officials could pass an order of interception only after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India (ii) the security of the state (iii) friendly relation with Foreign states (iv) public order (v) for preventing incitement to the commission of an offence. It is only when any of the five situations mentioned above to the satisfaction of the competent authority require that the said authority may pass the order for interception of messages by recording reasons in writing for doing so. 27

The Court laid down exhaustive guidelines to regulate the discretion vested in the state under Section 5 of the Indian Telegraph Act, for the purpose of telephone tapping and interception of the other messages so as to safeguard
public interest against arbitrary and unlawful exercise of power by the government. The Court has laid down the following procedural safeguard for the exercise of power under section 5(2) of the Indian Telegraph Act.

- An order for telephone tapping can be issued only by the home secretary of the central Government and the state Governments. In an urgent case, the power may be delegated to an officer of the Home Department of the central and state Governments not below the rank of joint secretary.
- The copy of the order shall be sent to the Review Committee within one week of the passing of the order.
- The order shall, unless renewed, cease to have effect at the end of two months from the date of issue. The authority making the order may review before the period if it is considered that it is necessary to continue the order in terms of section 5(2) of the Act.
- The authority issuing the order shall maintain the records of intercepted communications, the extent the material to be disclosed, number of persons, their identity to whom the material is disclosed.
- The use of the intercepted material shall be limited to the minimum that is necessary in terms of section 5(2) of the Act.
- The Review Committee shall, on its own, within two months, investigate whether there is or has been a relevant order under section 5(2) of the Act.
- If on investigation the Review Committee concludes that there has been a contravention of the provisions of section 5(2) of the Act, it shall set aside the order. It can also direct the destruction of copies of the material intercepted.
- If on investigation the Review Committee comes to the conclusion that there has been no contravention of the relevant provision of the Act, it shall record the finding to that effect.

The judgment of the Supreme Court delivered by a Division Bench comprising Mr. Justice Kuldeep Singh and Mr. Justice S. Sagir Ahmad will go a long way in protecting the right of privacy of Indian citizens and others.
enshrined under Article 21 of the Constitutions. The court noted that with the growth of highly sophisticated communication technology the right to hold telephone conversation in the privacy of one’s home or office without interference in increasingly susceptible to abuse. In view of this, the court ruling laying down detailed guidelines for the exercise of power under the relevant Act is timely and of historic importance. Soon after the decision of the Supreme Court, the Central government added Rule 419A to the Indian Telegraph Rules 1951 (here in after referred to as the “Telegraph Rules” which was published in the Gazette of the India stated 19th February, 1999. The rules provide for procedural safeguard on the same pattern as was directed by the Supreme Court in the above mentioned PUCL Case. In short, the rule provides that directions of interception of any message shall not be issued except by an order made by secretary to the Government of India and by the secretary to the State Government and that directions shall be issued only when it is not possible to acquire the information by any other reasonable means. The rules further provided that the directions for interception shall remain enforce, unless revoked earlier, for a period not exceeding 90 days from the date of issue and may be reviewed but shall not remain enforce beyond a total period of 180 days. A high powered Review committee was also required to be formed by the Central Government as also the State Government which, with in a period of 60 days from the issue of the direction, was required to Suomoto make necessary inquiries and investigations and record its findings whether the direction issued were in accordance with the provisions of section 5(2) of the telegraph Act, and if it came to the conclusion that they were not in accordance with the said provisions, then it could set aside the directions and order for destruction of the copy of the intercepted messages.

In Dharam Dutt v. Union of India, the Supreme Court made observations regarding the test of legislative enactment, which must satisfy the Article 19 of the Constitution when a challenge is made to the constitutional validity of the Act.
"The Court confronted with a challenge to the constitutional validity of any legislative enactment by reference to Article 19 of the constitution, shall first ask what is the sweep of the fundamental right guaranteed by the relevant sub clause out of sub clause (a) to (g) of the clause (1). If the right canvassed falls within the sweep and expanse of any of the sub-clause of clause (1), then the next question to be asked would be, whether the impugned law impose a reasonable restriction falling with in the scope of clause (2) to (6) respectively. However, if the right sought to be canvassed does not fall within the sweep of the fundamental rights but is a mere concomitant or adjunct or expansion or incidence of the right, then the validity thereof is not to be tested by reference to clause (2) to (6). The test which it would be required to satisfy for its constitutional validity is one of the reasonableness, as propounded in case of State of Madras v. V.G Row\(^34\) or if it comes into conflict with any other provision of the constitution.

In Smt. Rayala M. Bhuvaneshwari v. Nagaphanender Rayala, \(^35\) the Court held that the act of tapping by the husband of the conversation of his wife with others was illegal and it infringes the right of privacy of the wife. Therefore, the tapes, even if true, can not be admissible in evidence and there is no question of forcing the wife to undergo a voice test and then ask the expert to compare the portions denied by her with her admitted voice.

"Telephone Conversation is a part of modern man’s life. It is considered so important that more and more people are carrying mobile telephone instruments in their pocket. Telephone conversation is an important facet of man’s private life. Telephone tapping would, thus, interact Article 21 of the constitution of India unless it is permitted under the procedures established by law.”

6.3 Right to Privacy and HIV/ AIDS Patients

HIV/AIDS is the most dangerous pandemic the world faces today. There is no certainty about it origin; however it is believed that its virus first surfaced in Africa. Later some how it moved to the United States, where it was first detected decades later. The total number of HIV positive people in the world

There are several dimensions of the disease including moral and legal. One of the legal dimensions of this disease is about the right to privacy of the patient suffering from HIV/AIDS. There are several instances of cruel and inhuman treatment meted out by society to the HIV/AIDS patients on grounds of morality etc. The law however, has no such provisions permitting discriminatory, inhuman, degrading or cruel behavior against them. Though suffering from this dangerous disease, the patient has certain rights provided for by different instruments at the national and international level.  

There has always been an attempt to clear some ambiguity pertaining to these rights through judicial pronouncements.

Some of the fundamental provisions entailing the right to privacy are as under:

The Universal Declaration of Human Rights^37 (UDHR) under Article 12 Stated: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The international Covenant on Civil and political Rights^38 (ICCPR) under Article 17 Stated: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

Similarly, the Constitution of India provides for the right to life under Article 21,^39 which means the right to a decent and dignified life including the right to privacy. As is the case, rights are always subject to certain conditions. The exercise of various rights with in the purview of the right to life under Article 21 of the Constitution is also subject to certain conditions like public health, safety, public order, public interest etc.
A difficult situation arises when a patient asserts his/her right to privacy or confidentiality and it comes in conflicts with the question of public health order, safety etc. in the event of such a conflict to Roman law principle, ‘Salus populi est suprema’ (Regard for the public welfare is the highest law) should apply.\(^{40}\)

In the United States, many laws passed and enforced to protect infected persons and also to protect other people from infected persons. Federal legislation such as the Privacy Act of 1974, under section 552(b) (1), (3), (6), which requires federal agencies to utilize information practices with regard to the collection, use or dissemination of systematized records, and the Freedom of Information Act of 1966 (FOIA), under Section 552, which exempts from governmental disclosure several categories of records, which include health information.\(^{41}\)

In *Doe v. Borough of Barrington*, \(^{42}\) the court held that a police officer violated constitutional right of privacy by disclosing that a person was infected with HIV. The brief facts of the case are as follows:

Jane Doe her, husband and friends, were traveling in the plaintiff’s truck when police officer of Borough of Barrington stopped the truck and questioned the occupants, police officer arrested them and then released Jane Doe and her friends from custody but denied Jane Doe’s husband on charges of unlawful possession of hypodermic needle. When he was initially arrested, Jane Doe’s husband (the plaintiff) told the police officer that he had tested HIV positive and therefore officers should be careful in searching him. Later on the same day Jane Doe and her friend drove her friend’s car to the Doe residence. The car engine was left running, and the car apparently slipped into gear, rolling down the drive way in a neighbour’s fence. Two police officers from Runnemed, the area where later incident happen (Runnemed). Steven van Camp and of the defendant Russell smith, responded to the radio call about the incident while they were at the scene Detective preen of the Barrington police arrived and, in a private conversation with Van Camp, revealed that Jane Doe’s husband had been arrested earlier in the day and had told Barrington police
officers that he had AIDS. Van Camp then told defendant Smith. After Jane Doe and her friend left the immediate vicinity, defendant Smith told the defendant neighbour that Jane Doe's husband had AIDS and that, to protect her, she should wash with disinfectant. Defendant became upset upon hearing this information neighbour's wife, one of the defendants (defendant neighbour), was employed in the school where children of plaintiffs were studying. Knowing that the Jane Doe children attending the Downing school in Runnemede, the same school that her own daughter attending, defendant neighbour contacted other parents with children in the school. She also contacted the media. The next day, eleven parents removed nineteen children from the Downing school due to a panic over the Doe children's attending the school.

The media was present, and the story was covered in the local newspapers and on television. At least one of the reports mentioned the name of the Doe family, plaintiff allege that as a result of the disclosure, they have suffered harassment, discrimination, and humiliation. They allege they have been shunned by the community.

Plaintiff brought this civil rights action against the police officer Smith and the municipalities of Barrington and Runnemede for violations of their federal constitutional rights. The federal constitutional right is their right to privacy under the Fourteenth Amendment. The suit contained pendent state claims against defendant neighbour for invasion of privacy and intentional infliction of emotional distress. The court upholding privacy right finds that the constitution protects plaintiffs from government disclosure of their husbands. Infection with the AIDS virus. The court cited United States Supreme Court decision in Whalen v. Roe, stating the court has recognized that the Fourteenth Amendment protects two types of privacy interest. One is the individual interest in avoiding disclosure of personal matter, and another is the interest in independence in making certain kinds of important decisions. The court said that disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. The court said that disclosure
of a family member’s medical condition, especially exposure to or infection with the AIDS virus is a disclosure of a personal matter.

The court founds that defendant police officer Smith and district administration of Runnemede violated plaintiff constitutional right to privacy and administration’s failure to train their official about AIDS and that defendants are liable under 42 U.S.C. 1983 (Civil action for deprivation of rights).

In *Chizmar v. Mackie*, the Supreme Court of Alaska refused to hold a physician liable for breach of confidentiality after informing a patient’s spouse of her condition without her authorization.

In this case Savitri Chizmar, a native of Trinidad and Tobago, has lived in the United States since 1980, she was married to Mathew Chizmar. There were two children out of this marriage, aged five and seven at the time of the events in question. In February 1989 Savitri was admitted to providence hospital, suffering from pneumonia and gastritis. Dr. Scott Mackie was the admitting physician. Upon her admission, Mathew signed the hospital’s standards admission consent form on his wife’s behalf, because she was “too sick” for the paper work. This form states that the patient consents to procedures that may be performed during hospitalization, including laboratory procedures.

While at province, Dr. Mackie observed that a battery of laboratory test be run on Savitri blood. As part of this testing, Savitri was tested for HIV/AIDS, using the HIV ELISA screen. Dr. Mackie did not discuss with Savitri the specific tests that were being run and did not inform Savitri that he was testing her for AIDS.

Savitri’s initial HIV ELISA screen was found to be “repeatedly reactive”. The report stated that confirmatory tests were being performed and that “no interpretation of the patients HIV antibody status is possible until the confirmatory test has been completed.” Dr. Mackie believed that this result meant that Savitri had tested positive for the HIV virus. Dr Mackie felt that it
was necessary to advise Savitri of the result quickly. Initially, however, he did not inform Savitri of his conclusion.

Instead, he decided to ask her husband to help break the news to her several days after Mathew and Dr. Mackie informed Savitri of the test result, Dr. Janis, on HIV specialist, examined and interviewed Savitri, Dr Janis concluded that the test result was most likely a “False position” and testified that he was confident that he had so informed Savitri. Dr. Mackie testified that, prior to Savitri’s discharge; be informed her that the test was probably a ‘False positive” and that she would need to be retested to make sure.

Savitri left the hospital on the day she was informed of the test result. From that point forward, she and her husband experienced a severes escalation of what had been periodic domestic problems and violence. They fought regularly and, on at least one occasion, Mathew tested negative for HIV.48

Three weeks after her discharge, Savitri and her husband reviewed her medical records. Included with in these records was the discharge summary, which expressly stated “False Positive HIV test.” The records also included a notation from Dr. Janis concluding that it was likely that the HIV test was a false positive test. Subsequently in April, a retest established that Savitri did not have AIDS.

Mathew left the marital home in May 1989 and two months after Savitri received the final test result establishing that she did not have AIDS, he filed for divorce in June. The Divorce became final in March 1990, after the divorce Mathew moved to California, Savitri, Individuaily and on behalf of her children, filed suit against Dr. Mackie. In her personal action, she alleged that Dr Mackie did not have Savitri’s informed consent to conduct the initial HIV/ AIDS test. She also alleged that Dr. Mackie breached his duty of confidentiality owed to Savitri by informing her husband of the test results. The complaint asserted that, as a result of Dr. Mackie’s negligence and breach of duty, she suffered damages, including severe emotional distress. Savitri later amended her complaint to encompass Dr. Mackie’s allegedly negligent misdiagnosis of AIDS.49
In this answer, Dr. Mackie Admitted that the initial HIV test was performed without specific consent and that he informed Mathew of the test results. In September 1991, the superior court, Justice Hunt, entered partial summary judgment in favour of Savitri on the issue of Dr. Mackie’s breach of the duty of confidentiality. However, the court concluded that questions of fact remained as to whether Dr. Mackie’s breach was justified.

The case went to the Supreme Court of Alaska. On the issue of right to privacy the court held that the constitutional right to privacy is a right against government action, not against the actions of private parties. Thus, to the extent her argument is based on the Alaska constitution, her claim must fail. The court also reasoned that Savitri also fails to present a persuasive argument under common law invasion of privacy principles.50

The deadly disease HIV/AIDS has drawn attention of the whole of the world community. A world Health organization doctor estimates that some one in the world is infected with HIV every10-15 seconds. India has the second highest number of HIV/AIDS cases in the world after South Africa.51

A latest estimate released on July 2, 2004 by the National AIDS control organization reveals that over five million people have HIV/AIDS in India.52 The dact is that the disdase is spreading from small group of high risk people, such as commercial sex workers to the general populátion all over the country, such as 4heir married clients, and from them to their spouses and to the children born to them. It is an Irony that in India, no law has been passed as yet to combat the threat of AIDS which makes provisions for the right of AIDS affected persons53 in this respect, a bill was introduced in the Rajya Sabha on August 18, 1989. The bill aimed to prevent the spread of HIV infection by compulsorily testing, isolating and segregating persons and groups who are 'high risk'. The bill was the first step towards the prevention of spread of HIV/AIDS, which unfortunately could not come into force. As there is no law in existence, for the time being the state of affair is being managed by the provisions of penal laws.54 Recently, the state Cabinet of Goa has decided on
17th March, 2006 that person who intends to get married will have to undergo the HIV/AIDS test. Infact Goa is the first State in the Country to do so.\textsuperscript{55}

The Indian Supreme Court has given a landmark Judgment, resolving certain complex legal issue with regard to HIV/AIDS in the case of Mr. X v. Hospital Z\textsuperscript{56} In the instant case, Mr. 'X' the appellant, after obtaining the Degree of MBBS in 1987 from Jawaharlal Institute of Post Graduate Medical Education and Research Chandigarh completed his internship and junior residence at the same college. In June, 1990 he joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade-I. Thereafter, the appellant joined the MD Pharmacology Course though he continued in the Nagaland State Service on the condition that he would resume his duties after completing the MD Course. In September, 1991 the appellant joined the further course of Diploma in Ophthalmology which he completed in April, 1993. In August, 1993 he resumed his duties in the Nagaland State Health service as Assistant Surgeon Grade.\textsuperscript{57}

One who was ailing from a disease which was provisionally diagnosed as Aortic Aneurism was advised to go to the 'Z' Hospital at Madras and the appellant was directed by the Government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the above disease, he was posted for surgery on May 31, 1995 which, however, was cancelled due to shortage of blood. On June 1, 1995 the appellant and the driver were asked to donate blood for the latter. Their blood samples were taken and the result showed that the appellant's blood group was HIV (+). On the next date, namely, on June 2, 1995, patient was operated for Aortic Aneurism and remained in the Hospital till 10th June 1995 when he was discharged. In August 1995 the appellant proposed marriage to one Ms. 'Y' which was accepted and the marriage were proposed to be held on December 12, 1995. But the marriage was called off on the ground of blood test conducted at the respondents Hospital in which the appellant was found to be HIV (+). The appellant went against to the respondents Hospital at Madras where several tests were conducted and he was found to be HIV (+). Since the marriage had
been settled but was subsequently called off, several people including the members of the appellant's family and persons belonging to his community became aware of the appellant's HIV (+) status. This resulted in severe criticism of the appellant and he was ostracized by the community. The appellant left Kohima (Nagaland) around November 26, 1995 and started working and residing at Madras.

The appellant then approached the National Consumer Disputes Redressal Commission for damages against the respondents, on the ground that the information which was required to be kept secret under Medical ethics was disclosed illegally and, therefore, the respondents were liable to pay damages. The Commission dismissed the Petition as also the application for interim relief summarily by order dated 3rd July 1998 on the ground that the appellant may seek his remedy in the civil court.58

Learned counsel for the appellant vehemently contended that the principle of "duty of care", as applicable to persons in medical profession, includes the duty to maintain confidentiality and since this duty was violated by the respondents, they are liable in damages to the appellant.

The Court delivering its opinion said that it is the basic principle of Jurisprudence that every Right has a co-relative Duty and every Duty has a co-relative Right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a Right but there may not be co-relative duty. The instant case, as we shall presently see, falls within the exceptions. The Court further stated that Circumstances in which the public interest would override the duty of confidentiality could, for example, be the investigation and prosecution of serious crime or where there is an immediate or future (but not a past and remote) health risk to others. Learned Counsel for the appellant then contended that the appellant's right of privacy has been infringed by the respondents by disclosing that the appellant was HIV (+) and, therefore, they are liable in damages.

The Court having regard to the fact that the appellant was found to be HIV (+), its disclosure would not be violative of either the rule of
confidentiality\textsuperscript{59} of the appellant's Right of Privacy as Ms. Y with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if marriage had taken place and consummated. The court further said that in case of a clash in the patients right to privacy and his proposed wife's right to lead a healthy wife, the right which would advance the public morality or public interest, would alone be enforced through the process of court for the reason that moral consideration can not be kept at bay. People living with HIV-positive status and those suffering from AIDS deserve full sympathy. It is the power and duty of state to identify HIV-infected persons for the purpose of stopping further transmission of the virus.

In \textit{M. Vijaya v. Chairman and Managing Director, S.C.C Ltd.},\textsuperscript{60} the Full Bench of the Andhra Pradesh High Court rightly observed, "there is an apparent conflict between Right to Privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the state to identify HIV-infected persons for the purpose of stopping further transmission of the virus. In the interest of the general public, it is necessary for the state to identify HIV-positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the constitution, the state was under an obligation to take all steps for the improvement of the public health. A law designated to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India."

In Vijaya case the petitioner alleged that she was infected with the dreadful disease of AIDS on account of negligence on the part of medical and paramedical staff of the hospital of the respondent company while conducting relevant precautionary blood tests before transmission of blood into her body when she was operated upon at the hospital. The court rightly held that the petitioner is entitled to some reasonable amount of compensation to meet the costs incurred by her towards medical expenses. Accordingly, the court directed the respondent company to pay rupees one lakh to petitioner leaving open to the parties to seek appropriate civil court for damages. The court also
issued various directions to the government and the company and suggested measures for the control of this dreaded disease.

Later In *Mr.X v. Hospital Z,* the Court held that the observations made by them, in their earlier decision as to “what rights and obligations arises in such context as to right to privacy or confidentiality or whether such persons are entitled to be married or not in the event, if such persons marry they would commit an offence under law or whether such right is suspended during the period of illness”, were unnecessary, when there was no consideration of the matter after notice to all the parties concerned. Since, the court had rested their decision on the facts of the case, those observations were held to be uncalled for. The court, therefore, partly over ruled the decision in Mr ‘x’ v. Hospital ‘Z’ and confined it to that” It was open to the hospital or the doctor concerned to reveal such information to persons related to the girl whom he intended to marry and she had a right to know about the HIV positive status of the appellant.

Though every young man, or for that matter, a women, has right to marry, but such right, the court, held could not be claimed to be absolute and so long as the person, found to be suffering from veneral disease, was not cured, the right could not be enforced and would be treated to be a suspended right. The court referred to Section 269 and 270 of the Indian Penal Code, 1860, and said that a person suffering from the dreadful disease “AIDS” knowingly marrying a women and thereby transmitting infection to that woman, would be guilty of offences under these sections of Indian Penal Code.

6.4 Right to Privacy and Women dignity and Bodily Integrity

The unique position of the Indian women in our society and the cultural heritage of India has been admitted and acknowledged by all. It is not disputed that the dignity of women has to be preserved and protected. Women personhood including motherhood, wifehood and childhood under the law has been acknowledged to be imperative.
In the Indian polity all efforts have been made for liberation of women and guarantee to them of their dignity and personality. Article 21 guarantees protection of life and personal liberty. Right to life as enshrined in Article 21 includes right to live with human dignity. It is a basic right of a female to be treated with decency and proper dignity acts such as rape, sexual harassment or molestation or many such which encourage or promote these activities are violative of Article 21.

In America the concept of right to privacy of home and right to personal privacy can be deduced from I, III, IV, V and IX Amendments of the Constitution of America.

The right to privacy was highlighted in America through an article published in 1890 in Harvard law review. Illustrative instance of right of privacy can be appreciated in Robertson v. Rochester Folding Box Co.

In this case a photograph of a lady was displayed for advertising a particular brand of flour without her consent. The particular brand of flour was advertised as the best flour. The matter was taken up to the court and it was held to be indefensible in morals in absence of consent and such intrusion should be prevented by law.

In Piwish v. New England Life insurance Company, any intrusion of right to privacy was held to be an actionable claim in torts throughout the country.

Later in reference to Olmsted v. United States, it was held that any unjustifiable intrusion in the right to privacy (right to be let alone) by Government irrespective of means would amount to violation of constitution.

In Mewin v. Ried, a prostitute was prosecuted for the charge of murder and later she was acquitted for the charge. She abandoned the life of shame. Several years later a film was made on the life of the lady depicting her previous life of shame. The right of privacy implies the right not merely to prevent the incurrent portrayal in private life but the right to prevent it being depicted at all the court held that the depiction of her previous life of shame as the violation of right to privacy.
Right to Privacy and Woman of Easy Virtue

In India the right to privacy is not a specifically guaranteed fundamental right under the constitution. However Apex court of India in a series of cases has held that it is implicit under Article 21 of the Constitution, guaranteeing the right to life and personal liberty. So far as right to privacy of women is concerned, the Judiciary had dealt with this aspect in a number of cases. Whether a woman of easy virtue has any right to privacy? The Hon’ble Supreme Court while disposing off the controversy held in State of Maharashtra v. Madhukar Narain,\(^7\) that the ‘right to privacy’ is available even to a woman of easy virtue and no one can invade her privacy. A police inspector visited the house of one Banubai in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force. She raised a hue and cry. When he was prosecuted he told the court that she was a lady of easy virtue and therefore her evidence was not to be relied. The court rejected the argument of the applicant and held him liable for violating her right to privacy under Article 21 of the Constitution.

In Neera Mathur v. LIC,\(^7\) the Court held that the modesty and self respect may perhaps preclude the disclosure of such personal information like whether her menstrual period is regular or painless, the number of conceptions took place; how many have gone full term etc. Any query with respect to above nature would adversely affect the modesty and self respect and would attract the right to privacy of a woman.

In State of Punjab v. Gurmit Singh,\(^6\) the Supreme Court has consistently maintained that the offence of rape is violative of the right to privacy of the victim, the court observed that: “It is sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims privacy and personal integrity, but inevitably causes serious psychological as well as physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of the victim; a rapist degrades the very soul of the helpless female”.\(^6\)
In *State of Maharashtra v. R.J. Gandhi*, the Court held that a female, who was the victim of a sexual assaults kidnap, abduction or like offence, should not further be subjected to the indignity of her name and the incident being published in press/media.

In *Gaurav Jain v. Union of India*, the court observed, “The prostitute has always been an object and was never seen as complete human being with dignity of person; as if she had no needs of her own, individually or collectively. Their problems are compounded by coercion laid around them and tortuous treatment meted out to them. When they make attempts either to resist the prostitution or to relieve themselves from the trap, they succumb to the violent treatment and resultantly many a one settle for prostitution.”

In *Chandra Rajakumari and Another v. Commissioner of police, Hyderabad & Others*, Andhra Pradesh High Court held that, It is also relevant and expedient to hold without any reservation that any act which tend to offend the dignity of a woman to deal with her indecently in the circumstances amounting to indecent representation in any form, they are bound to offend Article 21 of the Constitution of India as right to live includes right to live with dignity and decency and right to live happily. Any violation of the women society in the country in body or mind leading to justifiable unhappy existence is bound to attract Article 21 of the Constitution.

In *State of Punjab v. Baldev Singh*, The procedure for personal search of a female came up for consideration before the Hon’ble Supreme Court. The Hon’ble Supreme Court observed that a female should be searched by another female with strict regard to decency. It is further observed that failure to do so would be violative of basic right of female to be treated with decency and proper dignity.

In *Surjit Singh Thind v. Kanwaljit Kaur*, the Punjab and Haryana High Court has held that allowing medical examination of women for her virginity amounts to violation of her right to privacy and personal liberty enshrined under Article 21 of the Constitution. In this case the wife has filed a petition for a decree of nullity of marriage on the ground that the marriage has never been
consummated because the husband was impotent. The husband had taken the defense that the marriage was consummated and he was not impotent. In order to prove that the wife was not virgin the husband filed an application for her medical examination. The court said that the allowing of medical examination of women’s virginity violates her right to privacy under Article 21 of the constitution. Such an order would amount to raving enquiry against a female who is vulnerable even otherwise. The virginity test can not constitute the sole basis, to prove the consummation of marriage.

6.5 Right to Privacy and Abortion

The Preamble of the Indian Constitution states in most unequivocal terms that the liberty and dignity of the individual are central aims of the Nation. Indian male traditions attach an extremely high value to decisional autonomy for males, and that more recent feminist traditions insist on asserting the same value in the case of women. Women’s rights around the world are an important indicator of understanding global well being. Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom. The most important right of a human is the right to life. It is the Supreme human right from which no derogation is permitted. It is inalienable. The Article 6(1) of the International Covenant on Civil and Political Rights prohibit the arbitrary derivation of life. But there are some controversial issues related to this supreme right. One such right is the question of right to abortion. Among other rights of women, it is believed that every mother has a right to abortion, it is a universal right. But the rights of the mother are to be balanced with the rights of the unborn. Earlier the right to abortion was not permitted and it was strongly opposed by the society.

The termination of pregnancy was termed to be a murder of the foetus. But due to the change in time and technology now-a-days this right has been legally sanctioned by most of the Nations after the famous decision of Roe V. Wade by the US Supreme Court. In the present chapter the area of the discussion is whether a mother has a right to privacy with regard to abortion.
What is the stand of Indian legislation as well as Indian Judiciary on this aspect as well as upon the woman's Dignity and Bodily integrity?

An Abortion is the removal or expulsion of an embryo or foetus from the uterus, resulting in, or cause by, its death. Abortion has become a very controversial issue in the modern world of today, since the recent movements towards liberalization of abortion in the western countries. It is a woman's individual rights, right to her life, to her liberty, and to the pursuit of her happiness, that sanctions her right to have an abortion. It involves competing interest of pregnant women, father, foetus, state and society at large. The abortion has become a controversial and debatable issue among legislatures in planners, women groups, religious denominations, and media as well as in courts.  

The dilemma touches the most sensitive aspects of human life. It stirs strong emotions and brings fundamental changes to the day to day life of society.

Article 1 of the American Declaration of Rights and Duties of Man and the Inter American Commission of Human Rights says that abortion is legalized until the end of first trimester right to life is protected from the moment of its conception by Article 6 (1) of the ICCPR, Article 2 of the European convention of Human Rights and Article 4 of the African Charter of Human and People’s Right. But they are silent on the issue of when does life begin. But the interpretations have forced us to believe that the child is not to be protected from the time of its inception. The right to life of the foetus has to be balanced with the rights of the mother.

In 1973 Roe v. Wade, became one of the most politically significant Supreme Court decisions in history, reshaping national politics, dividing the nations into “pro-choice” and “pro-life” camps, and inspiring grass roots activism. This is a landmark decision of United States Supreme Court establishing that most laws against abortion violate a constitutional right to privacy, thus overturning all state laws outlawing or restricting abortion that were inconsistent with the decision. Jane Roe, the plaintiff wanted to
terminate her pregnancy because she contended that it was a result of rape. Relying on the current state of medical knowledge, the decision established a system of trimester that attempted to balance the states’ legitimate interests with the individual’s constitutional rights. The court ruled that the state can not restrict a woman’s right to an abortion during the first trimester, the state can regulate the abortion procedure during second trimester in ways that are reasonably related to maternal health,” and in the third trimester, demarcating the viability of the foetus, a state can choose to restrict or even to prescribe abortion as it sees fit. Although the constitution of the U.S.A. does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does may be found in the first Amendment (Stanley v. Georgia)\(^9\) in the fourth and fifth amendments (terry v. obio\(^9\)), (Katz v. United States\(^1\)) in the penumbras of the bill of rights (Griswold v. Connecticut\(^2\)) in the ninth Amendment, and in the concept of liberty Guaranteed by the first section of the fourteenth Amendment (Mayer v. Nebraska\(^3\)) these decisions make it clear that only personal rights that can be deemed “fundamental” or implicit in the concept of ordered liberty (Palko v. Connecticut\(^4\)) are included in this guarantee of personal privacy.

The right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interest in regulation. The pregnant woman can not be isolated in her privacy. She carries an embryo and later a foetus. The situation therefore is inherently different from marital intimacy, or bedroom possession or obscene materials, or marriage or procreation or education. It is reasonable and appropriate for a state to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sold and any right of privacy, she possess must be measured accordingly.\(^5\)

In India it was in the sixties when the need of liberalization of abortion was felt and a national debate took place. The Shantilal Shah Committee which
was formed on this occasion, deliberated for more than two years before submitting its report to the government in 1966. Following this, the Medical Termination of Pregnancy (MTP) Act was enacted by the Indian Parliament in 1971 and came into force from 01 April 1972. The MTP was again revised in 1975. India was one of the few countries in the world to legalize abortion by passing the MTP Act in 1972. The position of abortion in India is quite confusing. Though Abortions are legalized in India, and the right is not absolute. There have been a few decisions by the court relating to the MTP Act. However before moving on to that, it is important to throw light on a few provisions of law. Sections 312-318 of the Indian Penal Code, 1860 the Medical Termination of pregnancy Act, 1971 and the preconception and Prenatal Diagnostic Technique Act, 1944 are all related to the debate of Planned Parenthood and abortion. All these are restrictions imposed on the society regarding abortions. Sections 312-314 of the IPC make Causing miscarriage or abortion illegal but for cases of good faith. The medical termination of pregnancy Act, 1972 is in a way an enabling clause to these sections of the Indian Penal Code.

This law guarantees the right of women in India to terminate an unintended pregnancy by a registered medical practitioner in a hospital established or maintained by the Government or a place being approved for the purpose of this Act by the Government. Not all pregnancies could be terminated.

Section 3 of the said Act, says that pregnancy can be terminated:

- As a health measure when there is danger to the life or risk to physical or mental health of the women;
- On Humanitarian grounds—such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc, and
- Eugenic grounds—where there is a substantial risk that the child, if born would suffer from deformities and diseases.
- Where the pregnancy has occurred as a result of the failure of a contraceptive device or method (in this case, the anguish) caused by
such unwanted pregnancy may be presumed to constitute a grave threat to the medical health of the pregnant women.

In fact, the liberalization of abortion law in India was mainly directed towards population control as Menon has argued the concepts of mental health of environment of pregnant women which have been adopted by the medical termination of pregnancy Act as criteria for justifying abortion are extremely vague and certain to be abused. Besides they often raise problems of medical ethics and physician wide discretionary power interpreting such illusive concepts.

A woman’s right in this respect is doubtful because her right is dependant on certain conditions: Proof of risk to her life or grave injury to her physical or mental health, substantial risk of physical or mental abnormalities to the child if born and a situation where abortion could only save her life, all to be arrived at by the medical practitioners. Can a women request a medical practitioner to perform an abortion on the ground that she does not want a child at that time? Where the liberty of the women is fully dependant on certain other factors, such are quest can not be said to be just and reasonable. The Medical termination of pregnancy Act also does not classify the pregnancy period so that the woman’s interests and the state interests could be given predominance in one’s own spheres.

Despite 38 years of liberal legislation, the majority of women in India still lack access to safe abortion care. Amendments in 2002 and 2003 to the 1971 medical termination of Pregnancy Act, including devolution of regulation of abortion services to the district level, punitive measures to deter provision of unsafe abortions, rationalization of physical requirements for facilities to provide early abortion, and approved of medical abortion, have all aimed to expand safe services. Proposed amendment in the medical termination of pregnancy Act to prevent sex-selective abortions would have been unethical and violated confidentiality, and were not taken forward. Continuing problems include poor regulation of public and private sector services, a physician only policy that excludes mid level providers and low registration of rural compared
to urban clinics; all restrict access poor awareness of the law, unnecessary spousal consent requirements, contraceptive targets linked to abortion, and informal and high fees also serve as barriers. Training more providers, simplifying registration procedures, delinking clinic and providers, approval, and linking policy with up to date technology, research and good clinical practice are some immediate measures needed to improve women’s access to safe abortion care.105

It is submitted that a decision as to abortion may be entirely left with woman provided she is sane and has attained majority. Only in cases where an abortion may affect her life, this freedom may be curtailed all other restrictions on the right to abortion are unwelcome. Truely, a woman’s decision as to abortion may depend upon her physical and mental health or the potential threat to the health of the child. Apart from these reasons, there are also various important factors. She or the family may not be financially sound to welcome an addition. It may be a time when she wants to change her profession, which requires free time and hard work. Her relationship with the husband may virtually be on the verge of collapse and she may prefer not to have a child from him, for it may possibly affect a future marriage. All these factors are quite relevant and the Indian statute on abortion does not pay any respect to them. The law thus is unreasonable and could well be found to be violative of the principles of equality provided under Article 14 of the constitution.106 Is it desirable to pay compensation to women for all her physical and mental inconvenience and liabilities, which arises in that context? It may be noted that the medical termination of pregnancy Act does not protect the unborn child. Any indirect protection it gains under the Act is only a by product resulting from the protection of the woman. The rights provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process. It is the protection to the mother that protects the unborn.

In Nand Kishore Sharma v. Union of India,107 the Court had decide the validity of the Medical termination of pregnancy Act. It was argued that the Act
particularly Section 3(2) (a) and (b) and Explanation I and II to Section 3 of the Act as being unethical and violative of Article 21 of the constitution of India.

The court in the case had to determine when the foetus comes to life and hence if his right to life is violated by the said provisions.

The court in this case refused to comment on the attribution of the status of a "person" to the foetus, however it declared that the Act is valid.\(^{108}\)

In *V. Krishnan v. G. Rajan*,\(^ {109}\) the court held that for an abortion, through the guardian’s consent is required, the minors consent is also important and should be taken, case laws show that the women’s consent is of the utmost importance, and no one can take this right away from her.

Hence the situation in India can be summed up as the right to abortion not being absolute as it is subject to the Section 312-314 of the IPC, introduction of Medical Abortion in India is a land mark movement in the road to improvement of women’s health. Medical abortion gives women access to pregnancy termination which is not intrusive and has little or no side effect.\(^ {110}\)

In *D. Rajeshwari v. State of Tamil Nadu*,\(^ {111}\) an unmarried girl of 18 years who is praying for issue of a direction to terminate the pregnancy of the child in her womb, on the ground that bearing the unwanted pregnancy of the child of three months made her to become mentally ill and the continuance of pregnancy has caused great anguish in her mind, which would result in a grave injury to her mental health, sine the pregnancy was caused by rape. The court granted the permission to terminate the pregnancy.

In *Dr. Nisha Malviya and Another v. State of M.P.*,\(^ {112}\) the accused had committed rape on minor girl aged about 12 years and made her pregnant. The allegations are that two other co-accused took this girl, and they terminated her pregnancy. So the charge on them is firstly causing miscarriage without consent of girl. The court held that all the three accused guilty of termination of pregnancy which was not consented by the mother or the girl.

In *Murari Mohan Koley v. The State and Another*,\(^ {113}\) a woman wanted to have abortion on the ground that she has a 6 months old daughter. She approached the petitioner for an abortion. And the petitioner agreed to it for a
consideration. But somehow the condition of the woman worsened in the hospital and she was shifted to another hospital. But it resulted in her death. The abortion was not done.

The petitioner who was a registered medical practitioner had to establish that his action was done in good faith (includes omission as well) so that he can get exemption from any criminal liability under section 3 of the MTP Act, 1971.

In Suchitra Srivastava and Anothers v. Chandigarh Administration," the Court observed that Indian law allows for abortion only if the specified conditions are fulfilled. When the MTP Act was first enacted in 1971 it was largely modeled on the Abortion Act of 1967 which has been passed in the United Kingdom. The legislative intent was to provide a ‘qualified right to abortion’ and the termination of pregnancy has never been recognized as a normal recourse for expecting mothers. There is no doubt that a woman’s right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a women’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as women’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Further more, women are also free to choose birth control methods such as undergoing sterilization procedure. Taken to their logical conclusion reproductive rights include a women’s entitlement to carry pregnancy to its full term, to give birth and to subsequently raise children.”

6.5 Right to Privacy and Restitution of Conjugal Rights

For the first time the personal liberty under Article 21 of the Constitution has been invoked in the husband wife private domain in Saroj Rani v. Sudarshan Kumar," an attention of the Supreme Court was drawn to,
T. Sareetha, in which P.A. Chaudhary J. of the Andhra Pradesh High Court described the remedy of restitution of conjugal rights contained in Section 9 of the Hindu Marriage Act as savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution.

In T. Sareetha, a civil revision petition was filed by Sarretha a well known actress of the south Indian screen against order of the sub judge cuddapah passed pursuant to the petition filed by one venkata subbaiah.

The petitioner attacks Section 9 of the Hindu Marriage Act under Article 21 of our Constitution tracing out the historical development of remedy of conjugal rights, Justice Chaudhary said that the British Indian Courts wrongly equated the ecclesiastical rule of this matrimonial remedy with equity, good conscience and justice, thoughtlessly imported that rule into our country and blindly enforce it among the Hindus and Muslims.


Conjugal rights connotes two ideas:
(a) the right which husband and wife have to each others society,
(b) Marital intercourse,

Thus Chaudhary J. Observed: That the purpose of a decree for restitution of conjugal rights in the past as it is in the present remains the same which is to coerce through judicial process the unwilling party to have to have sex against the person consent and free will with the decree holder. There can be no doubt that a decree of restitution of conjugal rights thus enforced, offends the inviolability of the body and the mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of such a person.

Section 9 of the Hindu marriages Act is liable to be struck down as violative of the guarantee of life, personal liberty, human dignity and decency guaranteed in Article 21 Justice Chaudhary has strenuously traced out the Judicial work done in regard to the development of the privacy dignity aspect
of the personal liberty guaranteed in Article 21 of the constitution. The learned
Judge has referred, quoted and relied on field’s view in Munn V. Illinois\(^{119}\)
Justice Brandeis’s in Olmstead\(^{120}\) the majority and minority views in Kharak
Singh,\(^{121}\) and Justice Mathew’s in Govind\(^{122}\) held that the remedy of Restitution
of conjugal rights violates the right to privacy enshrined in Article 21 and the
individual dignity mentioned in the Preamble of our Constitution. The learned
judge had said that nothing can conceivably be more degrading to human
dignity and monstrous to human spirit than to subject a person by the long arm
of the law to a positive sex act.\(^{123}\) As the restitution of conjugal rights has been
described by Lord Herschel in 1897 as a “barbarous remedy”\(^{124}\) Chaudhary J.
Said “in the presence of making such a fateful choice as to when, where and
how if at all she should beget, bear, deliver and rear a child, the wife consistent
with her human dignity, should never be excluded conception and delivery of a
child involves two most intimate use of her body”\(^{125}\). Concluding the reasons
for declaring section 9 of the Hindu Marriage Act as violative of Article 21 of
the constitution. Chaudhary J. said:

“A decree for restitutions of conjugal rights constitutes grossest form of
violation of an individual’s right to privacy. It denies the women her free
choice whether, when and how her body is to become the vehicle for the
procreation of another human being. A decree for restitution of conjugal rights
deprives a woman of control over her choice as to when and by whom the
various parts of her body should be allowed to be sensed. The woman loses her
control over her most intimate decisions clearly. Therefore the right to privacy
guaranteed by Article 21 is flagrantly violated by a decree of restitution of
conjugal rights.”\(^{126}\) Just contrary to what has been held in T. Sareetha by P.A.
Chaudhary J. of the Andhra Pradesh High Court, Justice A.B. Rohatagi of the
Delhi High Court has in Harvinder Kaur\(^{127}\) held that section 9 of the Hindu
Marriage Act does not violate Article 21 of the Indian Constitution. In
Harvinder Kaur Justice Rohatagi has variably refuted Justice Chaudhary’s
arguments in support of his view that the remedy of restitution of conjugal
rights violates Article 21 the learned Judge said:

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“Chaudhary J.’s over emphasis on sex is the fundamental fallacy in his reasoning. He seems to suggest that restitution decree has only one purpose, that is, to compel the unwilling wife to have sex with her husband”........

The remedy of restitution aims at cohabitation and consortium and not merely at sexual intercourse. To say that restitution decree “subjects a person by his long arm of the law to a positive sex act” is to take the grossest view of the marriage institution. The restitution decree does not enforce sexual intercourse” .......It is a fallacy to think that the restitution of conjugal rights constitutes” the starkest form of governmental invasion” of “marital privacy” as Chaudhary J. seems to think”.128

While upholding the constitutional validity of section 9 of the Hindu Marriage Act Justice Rohatagi advocated that the cold principles of Constitutional law should not be allowed to pollute domestic community of husband and wife based on mutual love and affection and observed: “Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in china shop. It will prove to be ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Articles 14 have any place. In a sensitive sphere which is of once most intimate and delicate the introduction of the Cold Principles of constitutional law will have the effect of weakening the marriages bond......The introduction of constitutional law into the ordinary domestic relationship which should be obviously as far as possible protected from possibilities of that kind. The “Domestic Community “does not rest on contracts sealed with seals and sealing wax nor on constitutional law. It rests on best kind of moral consent which united and produces” two-in-one ship”.

In Saroj Rani a two Judge Bench consisting of S. Murtaza Fazal Ali and Sabyaschi Mukherjee, JJ has allowed129 the counsel for the petitioner to canvases an argument which was not canvassed in the court below.

Justice Sabyaschi Mukherjee having considered the views of the Single judge of the Andhra High Court Expressed in Sareetha and that of learned single judge of Delhi High Court passed in Harvinder Kaur, Speaking for the
court has without slight hesitation, preferred and learned heavily on the constitutional validity of Section 9 of the Hindu Marriage Act, the views of the learned Single Judge of the Delhi High Court. Justice Sabyasachi Mukherjee has expressed his inability to accept Chaudhary J. views that Section 9 of the Act is violative of Article 21 of the Constitution.¹³⁰

On the other hand, the Delhi High Court has upheld the constitutional validity of Section 9 of the Hindu Marriage Act. The court has said that restitution aims at cohabitation and consortium and not merely at sexual intercourse. Agreeing with the Delhi High Court, in Saroj Rani v. Sudarshan Kumar,¹³¹ the Supreme Court has held the Provision to be valid vis-à-vis Article 14 and 21. The court has emphasized that one must see the decree of restitution of conjugal rights in its proper perspective in India. Conjugal rights i.e. the right of the husband or wife to the society of other is not merely a creature of the statute; it is inherent in the very institution of marriage itself.

6.7 Recapitulation

The right to privacy is recognition of the individual’s right to be let alone and to have his personal space inviolate. The need for privacy and its recognition as a right is a modern phenomenon. In early times, the law afforded protection only against physical interference with a person or his property. As civilization progressed, the personal, intellectual and spiritual facets of the human personality gained recognition and the scope of the right to privacy expanded to give protection to these needs.

The concept of privacy is used to describe not only rights purely in the private domain between individuals but also constitutional rights against the state. The former deals with the extent to which a private citizen is entitled to personal information about another individual. The later is about the extent to which government authorities can intrude into the life of the private citizen to keep a watch over his movements through devices such as telephone-tapping.

This aspect also concerns the extent to which government authorities can exercise control over personal choices: for instance by determining
whether a pregnant women has the right to abortion, or whether on HIV infected person has the right to marry or have children. Whether women of easy virtue is entitled to privacy and whether a remedy of restitution of conjugal rights violates the right to privacy.

Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile phones in their pocket. Telephone conversation is an important facet of man's private life. Telephone tapping would thus intract Article 21 of the Constitution unless it is permitted under the procedure established by law. Section 5(2) of the Indian Telegraph Act, 1885 empowers the Central government or the State government or any specially authorized officer to intercept message if satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, the security of the state, friendly relation with foreign states, public order or for preventing incitement to the commission of an offence. It can be done in the event of the occurrence of public emergency or in the interest of public safety for reasons to be recorded in writing. A Division Bench of the Supreme Court in Peoples' Union for Civil Liberties v. Union of India laid down certain procedural safeguards to be observed before resorting to telephone tapping under section 5(2) of the Indian telegraph Act.

In Mr. X.v. Hospital Z, The Supreme Court held that:

Right to privacy is not absolute and may be lawfully restricted for the prevention of crime, disorder or for protection of health or morals or protection of rights and freedom of others. As such, when a patient was found to have HIV positive, its disclosure by a doctor would not be violative of either on the ground of confidentiality or the patients right to privacy as the lady with whom the patient is likely to be married is saved in time by such disclosure, or else, she would have been infected with the dreadful disease had her marriage taken place and consummated. Therefore, the right which would advance the public morality or public interest would alone be enforced through the process of law for the reason that moral consideration can not be kept at bay. In State of Maharashtra v. Madhulkar Narain, the Supreme Court held that any woman of
easy virtue is entitled to privacy and no one is entitled to invade her privacy as and when one likes. She is entitled to protection if there is any attempt to violate such right against her wish.

However in state of Maharashtra v. R.J Gandhi the Court held that a female, who was the victim of a sexual assaults kidnap, abduction or like offence, should not further be subjected to the indignity of her name and the incident being published in press/media.

Right to personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interest in regulation. The pregnant woman can not be isolated in her privacy. The situation there are is inherently different from marital intimacy, bedroom possession or obscene materials or marriage or procreation or education. It is reasonable and appropriate for a state to decide that at some point in time another interest that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sold and any right of privacy she possesses must be measured accordingly.

In Suchitra Srivastava’s case court held that, there is no doubt that a woman’s right to make reproductive choices is also a dimension of personal liberty as understood under Article 21 of the constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a women’s right to privacy, dignity and bodily integrity should be respected.

This means that there should be no restriction whatsoever on the exercise of reproductive choices such as women’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. There are many aspects of privacy, including the right to privacy in the light of restitution of conjugal rights which requires special attention. The question of relation between the right to privacy and restitution of conjugal rights arose for the first time in T. Sareetha v.T.V. Subbaiah. The decision in
Saritha’s case is forthright and aggressively bold. It was the first decision by an Indian High Court to invalidate a law as violating the decisional privacy of a woman. The court in this case categorically held that a women’s right to privacy which is implicit in Article 21 includes the right to marital privacy.
Notes & References:


3. Jones v. Herald Post Co., 230 N.Y. 227, 18 S.w. (2d) 972 where the court said, “The Right to Privacy is the right to live one’s life in seclusion”, without being Subjected to unwarranted and undesired publicity, in short, “It is the right to be let alone.”

4. Supra Note -2 at p. 196.

5. Olmstead v. United States, 277 U.S. 438, 470 (1928), Holmes J., is dissenting no distraction can be taken between the Government as prosecutor and the Government as Judge. If the existing code does not permit district attorney to have a hand in such dirty business it does not permit the Judge to allow such iniquities to succeed”.

6. Ibid at 473, Brandies J. is dissenting: “Subtler and more far reaching means of invading privacy have become available to the Government-Discovery and invention have made it possible for the Government, by means for more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

7. Olmstead v. United States, 277 U.S. 438, 465 (1928. “by the invention of the telephone fifty years ago and its application for the purpose of extending circumstances, one can talk with another at a far distant place the intervening wires are not part of his house or office any mere than are the high ways along which they are stretched.

8. (1) Every one has the right to respect for his private and family, his home and his correspondence............. (2) There shall be no interference by a public authority with the exercise of right except such as is in accordance with the law and it is necessary in democratic society in the interests of national security, public safety of the economic well
being of the country, for the prevention of health or morals or for the protection of the right and freedom of others.


10. Justice Holmes, expressing his dissent in this case observed that wiretapping was a crime in the state of Washington where these acts occurred and that the United States should have no part in such a "dirty business" and Justice Brandies, also dissenting, felt that the conception of 'searches' should not be confined to only actual physical entry.

11. 302 U.S. 379 (1937) Petitioner were charged with smuggling of alcohol, possession and concealment of the smuggled alcohol, and conspiracy to smuggle and conceal it.

12. 44 stat. 1172 (1927).

13. 302 U.S. 379, 383 (1937) "Congress may have thought it less important that some offenders should go unwhipped of justice than officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty.


17. Ibid.


22. AIR 1971 SC 1295.


24. Section 5(2) the Indian Telegraph Act 1885.


28. Supra Note 25 Section 5(2) of the Indian Telegraph Act 1885.

29. Supra Note.26.

30. Ibid.


32. Indian Telegraph Rules 1951.

33. AIR 2004 SC 1295.

34. AIR 1952 S.C. 196.

35. AIR 2008 AP 98.


39. Article 21 of the constitution of India.

40. Supra Note 36.


43. Ibid.

44. Ibid.


47. Ibid.

48. Ibid.

49. Ibid.

50. Ibid.

51. Hema v. Menon, “Right to Privacy is include in the right to life but it is not an absolute right”.

52. Asha Krishna Kumar, “For a war on a many fronts” Frontline, January 2, 2004 p. 92.

54. This Bill was known as the Acquired immune Deficiency syndrome (AIDS) prevention Bill. Section 269, 270 of the Indian Penal Code and Section 13 (1)(v) of the Hindu Marriage Act 1955, Section 269 of the Indian Penal Code.


56. AIR 1999 SC 495.

57. Ibid.

58. Ibid.

59. It refers to the Hippocratic Oath which a doctor takes under the code of Medical ethics. See the Indian Medical Council (Amendment) Act, 1964.

60. AIR 2001 AP 502 (FB).

61. AIR 2003 SC 664.

62. AIR 1999 SC 495.


68. 17 N4 (538) 1902.

69. (1905) 50 SE 68.

70. 112 CAL APP 285 (1931).

71. AIR 1991 SC 207.

72. AIR 1991 SC 207.

73. AIR 1996 SC 1393.

74. AIR 1997 SC 3986
75. (1997) 8 SCC 114 at 119.
77. AIR 1999 SC 2378.
78. AIR 2003 P&H 353.
80. Article 6(1) International covenant on civil and political rights.
82. Manisha Garg, right to Abortion student of NLIU at legal service India.
   Com.
83. Article 1 of the American declaration of rights and duties of man.
84. Inter American commission of Human Rights.
85. Art. 6(1) of the ICCPR.
86. Art. 2 of the European convention of Human Rights.
88. Supra Note 17.
92. 381 U.S. 479.
93. 262 U.S. 390, 399 (1923).
95. Ritika Jhurani, Abortion ; Pro-life v. Pro-choice important article on Abortion at p.3.
96. Medical Termination of Pregnancy Act came into force from 01 April 1972.
98. Sec 312, 318 of the Indian Penal Code 1872.
99. Pre natal Diagnostic Technique Act, 1944.
100. Supra Note 33.


104. Supra Note 95.


106. Article 14 declares that state shall not deny to any person equality before the law or the equal protection of the law.


108. The court said that, “The object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, it would appear the Act is rather in consonance with Ar 21 of the constitution of India than in Conflict with it”.


111. 1996 CRILJ, 3795.

112. 2000 CRILJ, 671.

113. (2004) 3 CALLT 609, HC

114. AIR 2010 SC 236.

115. AIR 1984 SC 1562.


117. Supra Note 2 at p. 367.

118. Supra Note 2 at p.365 id 365.


123. Supra Note 2 at p. 366.
125. Ibid p. 366.
126. Supra Note 2 at P. 357.
128. Supra Note 116.
129. Supra Note 115.
130. Ibid.