CHAPTER 9

ROLE OF JUDICIARY IN MAKING FUNDAMENTAL RIGHT TO PRIVACY

9.1 Introduction

For every peaceful society, sense of justice among the people is a pre-condition. A society without a sense of justice cannot be peaceful and cannot be called society at all, rather it would be considered as jungle. To express the human approach in a positive way it must be said that justice is absolutely necessary for ensuring peace and security in the society, in the country as a whole.1

In India, the judges were reluctant to admit that their function involved law-making. Such reluctance stemmed from their new acquaintance with the constitution. Although before the constitution also, the Indian courts exercised judicial review and in fact struck down acts of legislature or executive as being ultravires but such occasions used to be rare and the scope for judicial review was restricted until the Government of India Act, 1935 was enacted. The pre-constituent laws did not contain any declaration of fundamental rights and therefore the only ground on which a legislative or executive act could be struck down was lack of power. Under the Constitution of India, the power of judicial review increased not only horizontally but also vertically in dimension. The court was entrusted with the function of the custodian and guarantor of the fundamental rights.2

In the pre-Maneka era the court assumed the role of rich man’s court, radiated capitalism, enlarged property-rights and protected status quo. The activism that came from the rich man’s court was not given up by the court when in the post-Maneka era it assumed the role of poor man’s court and gave us a new variety of activism servicing the interests of the poor. The court has, thus, given normative force to two totally opposed activisms, one functional and the other dysfunctional to radical social change.3

Beginning in the early 1980s, the Supreme Court of India waived traditional doctrines of standing and pleadings to permit concerned citizens, public interest advocates and non-government organizations to petition it on behalf of individuals or communities suffering

violations of constitutionally protected rights. As a consequence, the Court entertained applications for constitutional protection on behalf of a wide range of traditionally powerless persons, including bonded labourers, rickshaw drivers, pavement dwellers, inmates of mental infirmaries and workhouses and victims of environmental damage. In conducting these cases, the Court created its own fact-finding commissions to investigate alleged violations, and dramatically expanded its remedial powers to include detailed supervision of government institutions and the ordering of programs to mitigate the effects of systematic injustice. Through the development of its ‘Public Interest Litigation’ (PIL) jurisdiction, the Supreme Court of India came to act as a ‘combination of constitutional ombudsman and inquisitorial examining magistrate, vested with responsibility to do justice to the poor litigant before it by aggressively searching out the facts and the law, and by taking responsibility for fully implement its decisions. PIL provides a model for courts struggling to balance the transformative aspect of law against the law’s natural tendency to favour those rich enough to invoke it.’

By doing so, it is submitted that, the courts recognized even those fundamental rights which were not explicitly mentioned in the Constitution of India. Therefore, it would not be incorrect to say that the judiciary played a significant role in recognizing the fundamental right to privacy in India. The Indian judiciary gave new dimensions to the meaning of ‘life’, ‘personal liberty’, and ‘procedure established by law’ for protecting individuals’ privacy rights. The courts brought various women’s, prisoners’, and decisional privacy rights within the ambit of ‘life’ and ‘personal liberty’.

Article 21 of the Constitution of India provides:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Article 21 of the Indian Constitution, if read literally, is a colourless provision and would be satisfied, the moment it is established by the State that there is a law which provides a procedure which has been followed by the impugned action. But the expression ‘procedure established by law’ in Article 21 has been judicially construed as meaning a procedure which

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is reasonable, fair and just. Therefore, under the canopy of Article 21 of the Indian Constitution, so many rights have found shelter, growth and nourishment.\(^5\)

In order to understand the role of judiciary in the making of fundamental ‘right to privacy in India’, the researcher has analysed the important case-laws, in the present chapter, under the following headings:

- Liberal construction of ‘life’, ‘personal liberty’ and ‘procedure established by law’.
- The period of post-\textit{Kharak Singh} vis-à-vis Right to Privacy
- Prisoners’ privacy rights
- Women’ privacy rights
- Medical Confidentiality and Medical Examination
- Decisional privacy in India

\textbf{9.2 Liberal construction of ‘life’, ‘personal liberty’ and ‘procedure established by law’}

\textbf{9.2.1 Right to Life}

The expression ‘human rights’ embraces the rights of man both as individual and as a member of society. Their aim is to promote individual welfare as well as social welfare. Most fundamental of all human rights that man can aspire for is ‘right to life’. Denial of this basic right means denial of all other rights because none of other rights would have any utility and existence without it. This is the reason why it has been recognized in various international, national, and regional documents. Similarly, ‘right to life’ under Article 21 of the Indian Constitution is one of the most precious right amongst all fundamental rights, enshrined in Part III of the Constitution of India.\(^6\)

Justice H.R. Khanna rightly observed that sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a State of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life arbitrarily without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating

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the sanctity of life and liberty, it existed and was in force before the coming into force of the
Constitution.\(^7\)

Despite of it being most precious fundamental right, it is submitted that, the term ‘life’
has not been defined anywhere in the Constitution of India. Therefore, we will have to analyse
various Indian judicial pronouncements for its interpretation. Furthermore, it is pertinent to
mention here that the United States’ judicial decisions also guided Indian courts at many fronts
for defining the term ‘life’ and ‘personal liberty’.

While referring the Fourteenth Amendment\(^8\) of the U.S. Constitution, Mr. Justice Field
explained the meaning of ‘life’ and ‘personal liberty’ in \textit{Munn v. Illinois}.\(^9\) He observed:

\begin{quote}
  By the term ‘life’ as here used something more is meant than mere animal
  existence. The inhibition against its deprivation extends to all those limbs
  and faculties by which life is enjoyed. The provision equally prohibits the
  mutilation of the body by amputation of an arm or leg or the pulling out of
  an eye, or the destruction of any other organ of the body through which the
  soul communicates with the outer world.

  By the term "liberty," as used in the provision, something more is meant
  than mere freedom from physical restraint or the bounds of a prison. It
  means freedom to go where one may choose, and to act in such manner, not
  inconsistent with the equal rights of others, as his judgment may dictate for
  the promotion of his happiness- that is, to pursue such callings and
  avocations as may be most suitable to develop his capacities and give to
  them their highest enjoyment.\(^10\)
\end{quote}

In \textit{Kharak Singh v. State of UP},\(^11\) both the majority and minority quoted Mr. Justice
Field’s observations with approval and acknowledged that the observation rightly explained the
meaning of right to life and personal liberty. Such observations were again approved by the

\(^{8}\) Amendment XIV to the U.S. Constitution, Section 1.
\(^{9}\) It provides:
  “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the
  United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the
  privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or
  property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
\(^{10}\) Id., at 142.
\(^{11}\) AIR 1963 SC 1295.
Hon’ble Supreme Court of India in *Sunil Batra v. Delhi Administration*\(^\text{12}\). The court held that the ‘right to life’ prohibited the mutilation of the body through which the soul communicates with the outer world.

It is submitted that the inspired courts started giving new dimensions to the ‘right to life’ under Article 21 of the Indian Constitution. The Supreme Court of India in *Francis Coralie Mullin v. Union Territory of Delhi*\(^\text{13}\) observed (Bhagwati, J):

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\text{[R]ight to life includes the right to live with human dignity and all that goes along with it, namely, the basic necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.}\(^\text{14}\)
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As the researcher observed, this was the time in India when the real soul of ‘right to life’ took rebirth in the form of ‘right to live with human dignity’. The Hon’ble Supreme Court again in *Samatha v. State of U.P.*\(^\text{15}\) endorsed an individual’s right to live with human dignity, and observed that the life could only be meaningful if an individual attains the social, cultural and intellectual life.

Indeed, right to reputation is also a part of right to live with human dignity. The Supreme Court of India referring to *D.F. Marion v. Minnie Davis*\(^\text{16}\), in *Smt. Kiran Bedi v. Committee of Inquiry*\(^\text{17}\) held that a good reputation was an element of personal security and was protected by the Constitution, equally with the right to the enjoyment of life, liberty and property. The court affirmed that the right to enjoyment of a private reputation was of ancient origin and was necessary to human society. Recently, in *State of Bihar v. Lal Krishna Advani*\(^\text{18}\) the Supreme Court ruled that it is amply clear that one is entitled to have and preserve one’s reputation and one also have a right to protect it.

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\(^{12}\) AIR 1978 SC 1675.  
\(^{13}\) AIR 1981 SC 746.  
\(^{14}\) Id., at 618-619.  
\(^{15}\) AIR 1997 SC 3297.  
\(^{16}\) 55 American LR 171.  
\(^{17}\) AIR 1989 SC 714.  
\(^{18}\) AIR 2003 SC 3357.
9.2.2 Right to Personal Liberty and Reasonable ‘procedure established by law’

According to Blackstone, “Personal liberty consists in the power of locomotion, of changing situation or moving one’s person to whatsoever place one’s own inclination may direct.”\(^19\) It is submitted that Blackstone’s main emphasis on the freedom of movement.

Another view is of Dicey who says, “The right to personal liberty means in substance a person’s right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.”\(^20\) It is submitted that Dicey’s definition is primarily concerned with the negative aspect of personal liberty which prohibits the State from taking any unjustified action against an individual.

Lord Denning has also given broader expression to the ‘liberty’ of a person. He observed:\(^21\)

By personal freedom I mean the freedom of every law abiding citizen to think what he will, to say what he will and to go where he will on his occasions without let or hindrance from any other person.

Another significant case is of *Allgeyer v. Louisiana*,\(^22\) in which the United States Supreme Court observed that the term ‘liberty’ in the Fourteenth Amendment means not only freedom from mere physical restraint but the term ‘liberty’ means:\(^23\)

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[R]ight of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.
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This broader definition of liberty, as it was observed, is not only important for economic matters, but is capable of principled expansion into a range of other issues as well.\(^24\) The expansive


\(^{23}\) *Id.*, at 589.
definition of ‘liberty’ was followed in two important cases i.e. *Meyer v. Nebraska*\(^25\) and *Pierce v. Society of Sisters*.\(^26\) The former case overturned a conviction for teaching the German language to school children.\(^27\) The latter overturned a rule that prohibited the education of children in parochial schools.\(^28\) While explaining the concept of ‘liberty’, Justice McReynolds wrote:

> Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\(^29\)

For defining ‘personal liberty’ in India, we have to again rely on the judicial interpretations. However, it is believed that the Supreme Court of India began as a positivist court and strictly followed the traditions of the British courts.\(^30\) In *A.K. Gopalan v. State of Madras*,\(^31\) the Court refused to accept the liberal interpretation of Constitutional provisions. In that sense, it is believed that the Court gave a narrow construction to words such as ‘personal liberty’ and ‘procedure established by legitimated law’ contained in Article 21 of the Constitution. In matters of personal liberty as well as regulation of the economy, the Court observed judicial restraint and legitimated the actions of the government. These were the days of the welfare state and the Court was supposed to legitimize the expanded sphere of the State and its powers.\(^32\)

However, in *Kharak Singh v. State of UP*,\(^33\) the Supreme Court of India refused to accept the narrowest interpretation of the term ‘personal liberty’. The Court held that the term ‘personal liberty’ under Article 21 of the Indian Constitution included not only mere freedom from

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\(^{26}\) 268 U.S. 510 (1925). Cited in ibid.

\(^{27}\) Supra note 25 at 403.

\(^{28}\) Supra note 26 at 536.

\(^{29}\) Supra note 25 at 399.


\(^{31}\) AIR 1950 SC 27.

\(^{32}\) Id., at 41.

\(^{33}\) Supra note 11.

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physical restraint but all other aspects of liberty not covered by Article 19 of the Indian Constitution. The court wrote:

‘[P]ersonal liberty’ is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those deal with in the several clauses of Art. 19 (1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Art. 21 takes in and comprises the residue.34

In Satwant Singh v. Assistant Passport Officer,35 the Court held that the right to personal liberty included the right to go abroad and declared certain provisions of the Passport Act unconstitutional and void. The Court objected to the Act’s failure to provide a procedure for regulating the grant or denial of passports. The Court said that travel abroad was a fundamental right within “personal liberty” subject to restriction or regulation by law. In response to this case, Parliament enacted the Passport Act of 1967, specifying who can obtain a passport, when a passport can be refused, and the application procedure for a passport.36

A major breakthrough came in Maneka Gandhi v. Union of India.37 In this case, the action of impounding Maneka Gandhi’s passport was challenged on the ground that it violated her personal liberty. The authorities did not provide her a hearing on the impounding of her passport. The Supreme Court not only broadened the meaning of the words ‘personal liberty,’ but also adopted the concept of procedural due process within the words ‘procedure established by law.’ The Court rejected the earlier view that ‘personal liberty’ included all attributes of liberty except those mentioned in Article 19. It was recognized that when a law restricts personal liberty, a court should examine whether the restriction on personal liberty also imposed restrictions on any of the rights given by Article 19. The Court held that personal liberty includes “a variety of rights which go to constitute the personal liberty of man,”38 in addition to those mentioned in Article 19, and that one such right included in “personal liberty” is the right to go abroad.

34 Id., at 1300.
35 AIR 1967 SC 1836.
36 Supra note 30 at 54.
37 AIR 1978 SC 597.
38 Id., at 622.
It is to be noted that while in *Kharak Singh v. State of UP*, the freedoms of Article 19(1) were excluded from the scope of ‘personal liberty’ of Article 21, the Supreme Court in *Maneka Gandhi v. Union of India* made them part of ‘personal liberty’. It follows that a law depriving a person of ‘personal liberty’ has not only to stand the test of Article 21 but it must also stand the test of Article 19.

From above, it is clear that the expression ‘personal liberty’ received its full meaning in *Maneka Gandhi v. Union of India*. It is submitted that the Court gave the widest possible interpretation to the term ‘personal liberty’. After this decision, the courts started interpreting ‘fundamental rights’ in their true spirit. This decision suggests to add new wordings to Article 21, which will run as:

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

The decision of *Maneka Gandhi v. Union of India* also projected the concept of reasonableness into the procedure established by law in Article 21. This concept received a wider scope and amplitude in this decision. It reflects the rising of ‘due process’ in the horizon of Indian law.

In other words, the Court liberally construed the words “procedure established by law” to include within it all those essential aspects of procedure that constitute due process of law. The makers of the Constitution purposely avoided the use of that expression because they were apprehensive of importing the substantive due process concept into the Constitution. However, procedural due process provides the essentials of the rule of law. In *A.K. Gopalan v. State of Madras*, the Court held that the procedure established by law meant the procedure prescribed by enacted law. The Court chose ‘lex’ (enacted law) instead of ‘jus’ (justice) as meaning of ‘law’ in ‘procedure established by law’ under Article 21 of the Indian Constitution. It means that an individual’s personal liberty could be taken away by law and by such procedure as the law provided. A court had no power to question the fairness or justness of the law or the procedure.

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39 *Supra* note 11.
40 *Supra* note 37.
41 *Ibid*.
43 *Supra* note 37.
45 *Supra* note 30 at 58.
46 AIR 1950 SC 27.
However, the Court in *Maneka Gandhi v. Union of India* held that the procedure provided by the law must contain the essentials of fair procedure—the principles of natural justice. The word “established” did not mean “prescribed” but meant “institutionalized.” Such institutionalization takes place after a long tradition and practice. The Court therefore acquired the power to decide whether proper procedure was prescribed by the legislature and followed by the executive.

The Hon’ble Supreme Court of India in *Kartar Singh v. State of Punjab*, again reiterated that the ‘procedure’ contemplated by Article 21 is that procedure which is right, just and fair, and not arbitrary, fanciful or oppressive. In order that the procedure is ‘right, just and fair,’ it should conform to the principles of natural justice, that is, ‘fair play in action’.

Thus, the Summit Court by adopting a new approach to the expression ‘procedure established by law’ has a watershed in the history of development of human rights in our country and this affords protection not only against executive action but also against legislation and any law which deprives the person of his human rights would be invalid unless it prescribed a procedure for such deprivation which is ‘reasonable, fair and just’.

It is submitted, therefore, that the decision of *Maneka Gandhi v. Union of India* inspired the later decisions and made the courts realized to adopt new vistas of personal freedoms like right to privacy, right to education, right to health, right to speedy trial, right to bail, right to appeal, right to humane treatment inside prison, right against torture, right to live with basic human dignity, right to compensation to the victims, etc.

Thus far, the Supreme Court has construed the three expressions in Article 21, “life,” “personal liberty,” and “procedure established by law,” in an expansive manner in order to give individuals substantive due process of law as understood in the United States. Although the drafters of the Constitution purposely avoided including a due process clause, it has been brought into the Constitution through judicial interpretation.

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47 *Supra* note 37.
48 (1994) 3 SCC 569.
49 *Id.* at 671.
51 *Supra* note 37.
52 *Supra* note 30 at 59.
9.3 The Period of post-Kharak Singh vis-a-vis Right to Privacy against Government 
Surveillances

In the case of Kharak Singh v. State of UP,53 it was alleged that the appellant was being 
harassed by the police under Regulation 236(b) of UP Police Regulation, which permitted 
domiciliary visits at night. The Supreme Court held that the part of Regulation 23654 dealing with 
domiciliary visits, was violative of Article 21 of the Indian Constitution and as there was no law 
on which the same could be justified it must be struck down as unconstitutional, and the 
petitioner was entitled to a writ of mandamus directing the respondent not to continue 
domiciliary visits.55

However, in order to save honest and innocent citizens from the unregulated powers of 
the Police, Justice Subba Rao went further to hold the entire Regulation 236 is unconstitutional 
on the ground that it infringes both Articles 19 (1)(d) and 21 i.e. right to move freely and right to 
life or personal liberty respectively, of the Indian Constitution.56 He observed that both of these 
fundamental rights are independent, though there is overlapping. He continued to say:

[T]here is no question of one being carved out of another. The fundamental 
right of life and personal liberty has many attributes and some of them are 
found in Art.19. If a person's fundamental right under Art.21 is infringed, 
the State can rely upon a law to sustain the action; but that cannot be a 
complete answer unless the said law satisfies the test laid down in Art.19(2) 
so far as the attributes covered by Art.19(1) are concerned. In other words, 
the State must satisfy that both the fundamental rights are not infringed by

53 Supra note 11.
54 Regulation 236 of Chapter XX of the U. P. Police Regulations. The said Regulation reads :- "Without prejudice to 
the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which 
they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for 
most practical purposes be defined as consisting of one or more of the following measures :-
(a) Secret picketing of the house or approaches to the houses of suspects;
(b) Domiciliary visits at night;
(c) through periodical inquiries by officers not below the rank of Sub-Inpector into repute, habits, associations, 
income, expenses and occupation;
(d) the reporting by constables and chaukidars of movements and absences from home;
(e) the verification of movements and absences by means of inquiry slips;
(f) the collection and record on a history sheet of all information bearing on conduct."
56 Id., at 351.
showing that there is a law and that it does amount to a reasonable restriction within the meaning of Art. 19(2) of the Constitution.57

In another case, Govind v. State of M.P.,58 in which Mathew, J. further developed the law on right to privacy. This case was also related to domiciliary visits. The Supreme Court laid down that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that acclaimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.59 Similarly, the Hon’ble Supreme Court of India again ruled in Malak Singh v. State of Punjab60, that while exercising surveillance over reputed bad characters, habitual offenders, and potential offenders the police should not encroach upon the privacy of a citizen so as to offend his rights under Article 21 and Article 19 (1) (d).61

Undoubtedly, it was the Indian judiciary which considered phone tapping as a serious invasion of one’s right to privacy. Such argument is based on the principle that the ‘State’ cannot impose unreasonable restrictions on one’s right to life or personal liberty. In People’s Union for Civil Liberties v. Union of India62, the Supreme Court held that wiretapping is a serious invasion of an individual’s privacy. The court observed that telephonic conversation is a part of a man’s private life. And certainly, right to privacy includes telephonic conversation in the privacy of one’s home or office. Thus, telephone tapping under S. 5(2) of Telegraph Act, 188563 would violate an individual’s right to privacy unless it is permitted under the reasonable procedure established by law. For this, the court laid down certain guidelines to regulate the government’s

57 Id., at 356-357.
58 1975 SCR (3) 946.
59 Id., at 953.
60 AIR 1981 SC 760.
61 Id., at 323.
62 AIR 1997 SC 568.
63 The Indian Telegraph Act, 1885, s. 5(2).

It provides as follows:

“On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be, recorded in writing, by order, direct that any message or class of messages to or from any person or, class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order: Provided that press messages intended to be published in India of correspondents accredited Central Government or a State Government shall not be intercepted or detained, unless their transmission has been Prohibited under this sub-section.”
action of wiretapping. It was directed by the Hon’ble Supreme Court that the interception order shall be issued by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. It is also required that copy of such order shall be sent to the Review Committee within one week. The order should contain every detail of the whole mechanism of interception. Name of the person to whom the order is addressed and, the person to whom intercepted information is being disclosed should be mentioned in the respective orders. The validity of the order can also be checked on ground, whether the information could reasonably be acquired by other means or not. Thus, it is necessary that reasons should be recorded before issuance of the orders. Furthermore, the order shall, unless renewed, cease to have effect after two months. The total period for the operation of the order shall not exceed six months. The issuing authority shall also maintain the records of intercepted material like for what purpose message was intercepted, which telecommunication device was intercepted, how the intercepted material was used, to whom it was disclosed, and what is the number of copies, made of intercepted material. The intercepted material should only be used for that purpose for which it was intercepted. More importantly, every copy of the intercepted material should be destroyed if the purpose has been achieved.\textsuperscript{64}

In District Registrar and Collector \textit{v.} Canara Bank,\textsuperscript{65} the court struck down Sec. 73 of the Indian Stamp Act, 1899 as amended by the Andhra Pradesh Act (17 of 1986) as permitting an overbroad invasion of private premises or the homes of persons in possession of documents in a power of search as seizure without guidelines as to who and when and for what reasons can be empowered to search and seize, and impound the documents. The Court held that the right to privacy dealt with persons and not places. The court, however, held that no right to privacy could be available for any matter which is part of public records including court records.\textsuperscript{66}

Recently in \textit{Selvi v. State of Karnataka}\textsuperscript{67}, the Supreme Court held that compulsory administration of any of the techniques, like narcoanalysis, polygraph examination and brain Electrical Activation Profile (BEAP) test, is an unjustified intrusion into the mental privacy of an

\footnotesize{\textsuperscript{64} Supra note 62 at 578-579.  
\textsuperscript{65} AIR 2005 SC 186.  
\textsuperscript{66} Id., at 192.  
\textsuperscript{67} 2010(4) SCALE 690.}
individual. It was also recognized that forcible intrusion into a person’s mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.

Recently, the Court took a serious note against the police brutalities at Ram Lila Maidan, New Delhi. In Baba Ramdev’s rally at about 12:30 a.m. on 5th June 2011, twenty thousand sleeping persons were forcibly woken up by the police and were thrown out of their tents. This was done in the purported exercise of the police powers conferred under Section 144 of Code of Criminal Procedure (Cr PC) on the strength of a prohibitory order dated 4.6.2011 passed by the Assistant Commissioner of Police. While showing deep concern over such a serious issue, the Supreme Court took suo motu action and called upon the Delhi Police Administration to answer such brutal action. Therefore, in Re: Ramlila Maidan Incident Dt. 4/5.06.2011 v. Home Secretary, Union of India and others, decided on 23 February, 2012, the Supreme Court noted that even if such an assembly was illegal, the action of police under Section 144 of Code of Criminal Procedure (Cr PC) without being preceded by an announcement to the sleeping individuals was not reasonable. The court observed that ‘Sleep’ is a basic requirement for the survival of every human life. Furthermore, to disturb someone’s sleep is a violation of his or her human right as it amounts to torture. Therefore, the court declared that right of privacy of sleeping individuals was immodestly and brutally outraged by the State police action.

After the disclosures of United States spying programs over India, it becomes necessary for the Indian government to conduct proper inquiry to protect Indian citizens’ personal information. However, for the time being, the Hon’ble Supreme Court of India has refused to entertain a Public Interest Litigation seeking direction to the government to initiate action against internet companies involved in sharing internet data from India with United States National Security Agency. The apex court said it cannot entertain the petition as Indian agency is not involved in it and allowed the petitioner, former dean of law faculty of Delhi University S N Singh, to move any other forum for seeking remedy against internet companies and the United States agency for snooping data resulting in violation of right to privacy. In his plea, Singh alleged that such large scale spying by the United States authorities is detrimental to national security and urged the apex court to intervene in the matter. He claimed internet companies were

68 Id., at 783.
69 Id., at 778.
70 Suo Moto Writ Petition (Crl.) No. 122 of 2011. Available at http://www.indiankanoon.org/doc/17021567/ accessed on May 31, 2012 at 9:00 a.m. IST.
71 Id., at 248.
sharing information with the foreign authority in breach of contract and violation of right to privacy.  

In a significant development, the Supreme Court on September 23, 2013 ruled that Aadhar cards are not mandatory even as various state governments insist on making it compulsory for a range of formalities, including marriage registration, disbursement of salaries and provident fund among other public services. A bench of Justices BS Chauhan and SA Bobde said, “The Centre and state governments must not insist on Aadhar cards from citizens before providing them essential services.” The apex court said that Aadhar card is not necessary for important services. The order passed in response to a Public Interest Litigation pleading it to examine the ‘voluntary’ nature of the Aadhaar cards. The Public Interest Litigation was filed by Justice KS Puttaswamy, a retired judge of the Karnataka High Court, and sought an immediate stay on the implementation of the scheme. It was contended that the scheme is violative of fundamental Rights under Articles 14 (right to equality) and 21 (right to life and liberty). Although the government has claimed that Aadhaar card is not mandatory, it is made compulsory for purposes like registration of marriages and others. Maharashtra government has recently said no marriage will be registered if parties don’t have Aadhaar cards. The Bench accepted his arguments and agreed to hear his contentions on the interim stay as well on September 23, 2013 while asking the centre and state governments to file their replies.

It is submitted that the Supreme Court’s interference was required at this time when the government had planned to make Aadhar system mandatory. It has been alleged that making of Aadhar cards is also one of the modes of surveillance, which could be misused for political purposes.

9.4 Prisoners’ Privacy Rights

By giving new dimensions to the term ‘personal liberty’, the courts do recognize prisoners’ privacy rights. The cumulative effect of various prisoners’ rights like freedom of speech, right to bail, right to live in hygiene conditions, compensation, protection against custodial torture, inhumane treatment, etc. create prisoners’ right to privacy.

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In its earlier decisions, the Supreme Court had held that prisoners did not lose their right to freedom of speech and expression in jails.\textsuperscript{74} Thereafter, in \textit{Charles Sobraj v. Superintendent Central Jail},\textsuperscript{75} and \textit{Sunil Batra v. Delhi Administration},\textsuperscript{76} the Court held that prisoners were not denuded of their fundamental rights, like their right to equality or their right to life or personal liberty, beyond that taken away by the nature of the imprisonment itself. The Court held that even a prisoner was entitled to be treated according to the prison rules, and even the prison rules could not violate the prisoner’s fundamental rights such as rights to equality, of life, and of personal liberty. For example, a prisoner certainly could not be subjected to inhumane torture during imprisonment. Prisoners are also entitled to other rights such as freedom of religion. Prisoners’ exercise of the fundamental rights are restricted only in so far as they are under detention.\textsuperscript{77}

The Supreme Court touched another aspect of prisoners’ right to privacy in \textit{Prabha Dutta v Union of India}\textsuperscript{78}. In this case, journalists sought permission from the Supreme Court to interview and photograph prisoners. Although the issue of privacy was not directly dealt with, the court implicitly acknowledged the right to privacy by holding that the press had no absolute right to interview or photograph a prisoner but could do so only with his consent.\textsuperscript{79} Again, the Supreme Court in \textit{R. Rajagopal v. State of Tamil Nadu}\textsuperscript{80} held that the petitioners have a right to publish what they allege to be the lifestory/autobiography of Auto Shankar (prisoner) insofar as it appears from the public records, even without his consent or authorization. But if they go beyond that and publish his life story, they may be invading his right to privacy, then they will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restraint the said publication. It was stated that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent—whether truthful or otherwise and whether laudatory or critical. If he does so, he would

\textsuperscript{74} \textit{State of Maharashtra v. Prabhakar}, AIR 1966 SC 424.
\textsuperscript{75} AIR 1978 SC 1514.
\textsuperscript{76} AIR 1978 SC 1675; AIR 1980 SC 1579.
\textsuperscript{77} \textit{Supeco} note 30 at 57.
\textsuperscript{78} (1982) 1 SCC 1.
\textsuperscript{80} (1994) 6 SCC 632.
be violating the right to privacy of the person concerned and would be liable in an action for damages.81

In Neelabati Bahera v. State of Orissa,82 the Supreme Court awarded compensation to the mother of a young man who was beaten to death in police custody. The Supreme Court held that its power to enforce fundamental rights carries a constitutional obligation to forge new tools for doing complete justice.83

In D.K. Basu v. State of West Bengal,84 the Supreme Court observed that Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. Any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. Obviously, such 'procedure established by law' should be just, fair and reasonable. The court held that the expression "life of personal liberty" includes right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries.

However, right to privacy is not an absolute right. It is subject to certain reasonable restrictions. In Peoples’ Union for Civil Liberties (PUCL) v. Union of India,85 Right to privacy of an electoral candidate was held not violated by publications of details of his criminal antecedents and/or his assets and liabilities. The right to be informed of the electorate was held superior to candidate’s desire for secrecy. Similarly, in Mr. K.J. Doraisamy v. The Assistant General Manager, State Bank of India,86 decided on 22-11-2006, the Madras High Court held that right to privacy is not absolute and from the point of view of the Bank, the duty to maintain

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81 Id., at 650-651.
82 1993 SCR (2) 581.
83 Id., at 584.
84 AIR 1997 SC 610.
85 AIR 2003 SC 2363.
secrecy is superceded by a larger public interest as well as by the banks own interest under certain circumstances.

9.5 Medical Confidentiality and Medical Examination

In Mr. X v. Hospital Z, the Supreme Court dealt with the issue of confidentiality between doctor and patient. In this case, the appellant’s marriage was called off because the respondent’s hospital disclosed his HIV(+) status to the girl with whom he was going to be married. The appellant contended that the respondents violated the duty to maintain confidentiality, and therefore they should be made liable to pay damages to the appellant. The Court admitted that ‘right to privacy’ is a basic human right, and may be aroused out of contract, or out of a particular specific relationship which may be commercial, matrimonial, or even political. It was observed that in the Doctor-patient relationship, doctors are morally and ethically bound to maintain confidentiality. Therefore, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of person’s ‘right to be let alone’ with another person’s ‘right to be informed’. The court continued and observed that disclosure of even true private facts has the tendency to disturb a person's tranquility. It may cause serious psychological problems. For this, it becomes necessary to protect the basic component of right to life i.e. right to privacy.

However, the Supreme Court also mentioned that the right to privacy is not an absolute right. It can be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. Considering the facts in detail, the court held that where the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy as Ms. Akali 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.

Furthermore, the court held that Sections 269 of the Indian Penal Code, 1860 impose a duty upon the persons suffering from Acquired Immuno Deficiency Syndrome (AIDS),

88 Id., para 26.
89 Id., para 27.
90 Ibid.
91 Id., at 501.
92 Indian Penal Code, 1860, s. 269. It provides:
communicable venereal disease or impotency, not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence. And such persons’ suspended right to marry cannot be legally compensated by damages either in torts or in common law. For this, the Court reasoned that every personal law had made ‘communicable venereal disease’ a ground for divorce. Moreover, the court relied upon the argument that ‘AIDS’ is the product of indiscipline sexual impulse. And finally, the court cautioned that ‘sex’ with the persons suffering from AIDS should be avoided as otherwise they would infect and communicate the dreadful disease to others.94

However, in its later decision of Mr. X v. Hospital Z,95 the Supreme Court said that there was no need for this Court in Mr. X v. Hospital Z96 to go beyond the facts in issue, particularly when the proper hearing was not given to the relevant parties like Non-Government Organizations representing HIV or AIDS infected persons, etc. As the Court stated, it was unnecessary to go in detail to determine rights and obligations in such circumstances or whether such persons suffering from HIV or AIDS are entitled to be married or not or whether such persons would commit an offence under law if they get married or whether such right to marry is suspended during the period of illness.97 Therefore, the Court in Mr. X v. Hospital Z,98 held such observations, except the observation holding up to the extent that the appellant’s right was not affected in any manner in revealing his HIV positive status to the relatives of his fiancee, were uncalled for. Finally, the Court clarified that there is no bar for the marriage, if the healthy

“Negligent act likely to spread infection of disease dangerous to life -Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.”
93 Indian Penal Code, 1860, s. 270.

It provides:
“Malignant act likely to spread infection of disease dangerous to life -Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”
94 Supra note 87 at para 44.
95 AIR 2003 SC 664.
96 Supra note 87.
97 Supra note 95 at 665.
98 Id. at 664.

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spouse consents to marry in spite of being made aware of the fact that the other spouse is suffering from HIV or AIDS.\textsuperscript{99}

However, in divorce proceedings the courts do have power to compel the parties to undergo medical tests for reaching some satisfied conclusion. In \textit{Sharda v. Dharmpal},\textsuperscript{100} the Supreme Court mentioned that medical examinations of the parties play crucial role where divorce had been sought on the ground of impotency, schizophrenia, etc. The Court held that right to privacy is not an absolute right. Therefore, the Supreme Court concluded that a matrimonial court has power to order a person to undergo medical test. And passing of such an order would not be in violation of right to personal liberty under Article 21 of the Indian Constitution. However, the Supreme Court asked the courts to exercise such power only in a case where the applicant had a strong prima facie case and had produced sufficient material before them.\textsuperscript{101} For this, the Supreme Court also considered its earlier decision of \textit{Goutam Kundu v. State of West Bengal}.\textsuperscript{102}

In \textit{Goutam Kundu v. State of West Bengal},\textsuperscript{103} the purpose of the appellant’s application for child’s paternity test was nothing more than to avoid payment of maintenance. Moreover, the appellant could not establish non-access in order to dispel the presumption arising under Section 112\textsuperscript{104} of the Evidence Act. In such circumstances, the Supreme Court held that the courts cannot order blood test as a matter of course. It was further held that the court must have carefully examined the consequences before ordering the blood group test. The court should avoid passing any such order where it would have the effect of branding a child as a bastard and the mother as an unchaste woman.\textsuperscript{105}

\textsuperscript{99} Id., at 666.
\textsuperscript{100} AIR 2003 SC 3450. Available at http://indiankanoon.org/doc/1309207/ accessed on April 1, 2012 at 9:20 a.m. IST.
\textsuperscript{101} Id., para 86.
\textsuperscript{102} 1993 SCR (3) 917.
\textsuperscript{103} Ibid.
\textsuperscript{104} The Indian Evidence Act, 1872, s. 112.
\textsuperscript{105} It provides as follows:
Section 112: Birth during marriage, conclusive proof of legitimacy:
“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”
\textsuperscript{106} Supra note 102 at 929.
Applying the same test i.e. whether there is any prima facie case or sufficient material produced before the court, the Supreme Court in *Banarasi Dass v. Teeku Dutta*\(^{106}\) refused to give any directions for conducting respondent’s Deoxyribonucleic Acid Test (DNA test) in a proceeding for issuance of succession certificate under the Indian Succession Act, 1925.\(^{107}\)

However, in *Ms. X v. Mr. Z & Anr.*,\(^{108}\) the respondent alleged that his wife i.e. the appellant had adulterous affairs with one Jose Thomas. He also denied being the father of aborted foetus, which was discharged by his wife. In order to prove his contention, he sought directions from the court that the Deoxyribonucleic Acid (DNA) test of aborted foetus should be conducted. The Delhi High Court held that an aborted foetus was not a part of a body of women and therefore, she was not being compelled to be a witness against herself. The court held that aborted foetus was discharged by herself with her own consent, and therefore, subjected to Deoxyribonucleic Acid (DNA) test. While considering the whole facts of the case, the court held that it would not be a violation of right to privacy.\(^{109}\)

Recently, the Hon’ble Supreme Court of India in *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women*\(^{110}\) evaluated certain important judgments i.e. *Sharda v. Dharampal*\(^ {111}\), *Goutam Kundu v. State of West Bengal*\(^ {112}\) and *Banarasi Dass v. Teeku Dutta*\(^ {113}\). It was observed that there is no conflict in these decisions. Therefore, the Hon’ble Supreme Court in *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women*\(^{114}\) held that since scientific tests may bastardise an innocent child, the courts must not direct such tests as a matter of course or in a routine manner. It was held that the court has to consider diverse aspects including presumption under section 112 of the Evidence Act; pros and cons of such order and the test of ‘eminent need’; whether it is not possible for the court to reach the truth without use of such test.\(^ {115}\)

\(^{106}\) (2005) 4 SCC 449.
\(^{107}\) Ibid.
\(^{109}\) AIR 2010 SC 2851.
\(^{110}\) Supra note 100.
\(^{111}\) Supra note 102.
\(^{112}\) Supra note 106.
\(^{113}\) Supra note 110.
\(^{114}\) Id. at 2857.
Again, where the appellant fails to make any *prima facie* case, the court refuses to give any directions for paternity test. In *Master ‘X’ v. ‘Y’*, plaintiff claimed that the defendant was his father. He sought directions be issued against the defendant for conducting paternity test. But the court found no *prima facie* as the plaintiff could not produce relevant material in his evidences. Therefore, the court refused to pass any direction to the defendant to undergo a Deoxyribonucleic Acid Test (DNA test).\(^{117}\)

### 9.6 Women’s Right to Privacy

The right to personal liberty also includes various women’s rights such as the right not to be asked information about menstrual cycles or pregnancies on job applications in the public sector,\(^{118}\) the right to the presumption of chastity, and the right not to subject a child to a paternity test unless a prima facie case against the mother during the period of conception is established.\(^{119}\) The Hon’ble Supreme Court of India in *Bodhisatwa Goutam v. Subhra Chakraborty*,\(^{120}\) observed that rape destroys the entire psychology of a victim and pushes her into deep emotional crises. It is not only an offence under criminal law, but a violation of a woman’s basic human right to life and personal liberty.

In *State of Maharashtra v. Madhukar N. Mardikar*,\(^{121}\) the Supreme Court held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.

‘Gender Equality’ requires that women should be provided with a non-discriminatory and safe atmosphere at work places. It fosters the relationship between women and society. It is only under such protective ambience that a woman would be able to attain personal autonomy and respect for her modesty. In *Vishaka v. State of Rajasthan*,\(^{122}\) an incident of alleged brutal gang rape of social worker in a village of Rajasthan, was considered as violation of the fundamental rights of ‘Gender Equality’ and the ‘Right of Life and Liberty’. Hence, it is clear violation of the

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\(^{116}\) AIR 2003 Del. 195.
\(^{117}\) Id., at 198.
\(^{119}\) Supra note 102.
\(^{120}\) AIR 1996 SC 922.
\(^{121}\) AIR 1991 SC 207.
\(^{122}\) AIR 1997 SC 3011.
rights under Articles 14, 15 and 21 of Constitution. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The court observed that equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace. The court further emphasized on the wider definition of sexual harassment, which includes such unwelcome sexually determined behavior as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Therefore, the court held that effective complaints procedures and remedies, including compensation, should be provided.\(^{123}\)

In *State of Karnataka v. Krishnappa*\(^ {124}\) the court strengthened the protection of the right to privacy over the person by requiring stern punishment of rapists. The offence was held to be seriously violating the right to privacy.

In another case of *Alarmelu Mangai v. The Secretary to the Government of Tamil Nadu*,\(^ {125}\) decided on 27-4-2010, the Madras High Court awarded compensation to the petitioner for infringement of her Right to Privacy and the ordeal of public humiliation meted out to her by the action of the respondents. The court said that though the public humiliation and mental agony gone by the petitioner can never be compensated in terms of money, yet the respondents cannot be allowed to go scot-free for their constitutional infringement of the right of the petitioner and for having made public humiliation of the petitioner who is not a stranger to the quarters, but the wife of serving Constable who was defending the Country in its North Eastern border.\(^ {126}\)

In the case of *Neera Mathur v. LIC*,\(^ {127}\) Life Insurance Corporation asked its employee Neera Mathur to disclose the information about her menstrual cycles, conceptions and pregnancies and abortions. Considering the information as embarrassing and humiliating, the Supreme Court of India required the Life Insurance Corporation to delete such questions from

\(^{123}\) *Id.*, at 3015.

\(^{124}\) *AIR 2000 SC 1470.*


\(^{126}\) *Id.*, at para 5.

\(^{127}\) *Supra* note 118.
their questionnaire. The Punjab and Haryana High Court in the case of *Surjit Singh Thind v. Kawaljit Kaur*, held that allowing a medical examination of a woman for her virginity amounts to violation of her right to privacy and personal liberty enshrined under Article 21 of the Constitution. In this case, the wife filed a petition for divorce before lower court on the ground that the marriage has never been consummated. Whereas, the husband contended that he is not impotent and the marriage was consummated. In order to prove his contention, he filed the petition before the Hon’ble High Court and prayed that her wife’s virginity test should be conducted. But the High Court rejected the contention on the ground that such a medical examination even if it does not prove her virginity would not necessarily lead to the conclusion that the marriage with the husband-petitioner has been consummated.

9.7 Decisional Privacy and Personal Autonomy

9.7.1 Is There Any Fundamental Right to Marry?

In a very old case, *Maynard v. Hill*, the court considered the institution of marriage as most important part of our life. The court emphasized on the fact that the marriage is the foundation of the family and of society, and in its absence, there would be neither civilization nor progress.

While defining the term ‘liberty’, mentioned under the Fourteenth Amendment to the United States Constitution, the court in *Meyer v. Nebraska*, said:

> [W]ithout doubt, denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges

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128 AIR 2003 P&H 353.
129 Id., at para 4.
131 Id., at 211.
132 “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Fourteenth Amendment to the United States Constitution, available at http://www.law.cornell.edu/constitution/amendmentsxiv accessed on March 10, 2013.
133 Supra note 25.
long recognized at common law as essential to the orderly pursuit of
happiness by free men.\textsuperscript{134}

Therefore, the \textit{due process clause} protects an individual’s right to marry, establish a home, and bring up children. Again, in order to protect these basic civil rights of an individual, the United States Supreme Court in the case of \textit{Skinner v. Oklahoma}, \textsuperscript{135} struck down Oklahoma’s Compulsory Sterilization Law on the ground of the violation of equal protection clause. The Supreme Court said:

\textquote{Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.}\textsuperscript{136}

Furthermore, the United States Supreme Court protected the sacred precincts of marital bedroom in the case of \textit{Griswold v. Connecticut}\textsuperscript{137}, and invalidated the Connecticut law barring the use of any drug or instrument for contraceptive purposes. The Court emphasized:

\textquote{We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.}\textsuperscript{138}

Justice Douglas, for the majority said:

\textquote{Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.}\textsuperscript{139}

Increasingly, the United States Supreme Court found no reasonable basis for permitting a ban on distribution of contraceptives to unmarried persons. Therefore, in \textit{Eisenstandt v. Baird}\textsuperscript{140},

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134} \textit{Id.}, at 399.
\item \textsuperscript{136} \textit{Id.}, at 541.
\item \textsuperscript{137} 381 U.S. 479 (1965).
\item \textsuperscript{138} \textit{Id.}, at 486.
\item \textsuperscript{139} \textit{Id.}, at 485-486.
\item \textsuperscript{140} 405 U.S. 438 (1972).
\end{itemize}
\end{footnotesize}
the court observed that if the right to privacy means anything it is the right of individual, married
or single, to be free from unwarranted governmental intrusion into matters so fundamentally
affecting a person as the decision whether to bear or beget a child.\textsuperscript{141}

Once again the United States Supreme Court in \textit{Roe v. Wade}\textsuperscript{142} observed that freedom of
personal choice in matters of marriage and family life is one of the liberties protected by the Due
Process Clause of the Fourteenth Amendment. Finally, the court struck down a Texas statute
which prohibited almost all abortions. The court’s decision was based on the assumption that the
right to abortion was part of a right of personal privacy. The court observed:

\begin{quote}
This right of privacy whether it be founded in the Fourteenth
Amendment’s concept of personal liberty and restrictions upon state
action, as we feel it is or as the district court determined, in the Ninth
Amendment’s reservation of rights, is broad enough to compass a
woman’s decision whether or not to terminate her pregnancy.\textsuperscript{143}
\end{quote}

The private right to marry whom one chooses has been at the heart of due process judicial cases
since the early 1960s. Laws that generally limit one’s choice in marriage or that tend to restrict
the rights of a class of persons to marry will not be upheld unless the state can show a
compelling interest in the restriction or in maintaining the classification.\textsuperscript{144} In the case of \textit{Loving
v. Virginia}\textsuperscript{145}, the facts were that two residents of Virginia, Mildred Jeter, a Negro woman, and
Richard Loving, a white man, got married in the District of Columbia. The trial judge indicted
and finally, convicted Lovings for violating the Virginia Code’s ban on interracial marriages.
The Trial Judge opined:

\begin{quote}
Almighty God created the races white, black, yellow, malay and red, and
he placed them on separate continents. And, but for the interference with
his arrangement, there would be no cause for such marriage. The fact
that he separated the races shows that he did not intend for the races to
mix.\textsuperscript{146}
\end{quote}

\begin{flushright}
\textsuperscript{141} \textit{Id.}, at 453.
\textsuperscript{142} \textit{410 U.S. 113 (1973)}.
\textsuperscript{143} \textit{Id.}, at 115.
\textsuperscript{145} \textit{388 U.S. 1 (1967)}.
\textsuperscript{146} \textit{Id.}, at 3.
\end{flushright}
However, when the matter tabled before the United States Supreme Court, the main legal issue was drafted i.e. Whether the Virginia’s ban on interracial marriages is violative of Equal Protection and Due Process Clauses of the Fourteenth Amendment? Answering it affirmatively, the US Supreme Court held that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. Moreover, such type of statutory provisions deprives the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The court again reclaimed that the freedom to marry is one of the vital personal rights essential to the orderly pursuit of happiness by free men.147

Therefore, after Loving’s case, it became necessary for every court to check the validity of State laws restricting ‘right to marry’, on the parameters of Equal protection and Due Process Clauses.

Again, the judicial scrutiny of another Statute i.e Wisconsin Statute, restricting ‘right to marry’, was done in the case of Zablocki v. Redhail.148 In the case, the Constitutional validity of a Wisconsin Statute, which prohibited the certain class of members from marrying without a court’s permission, was challenged. As per according to the Statute, the Class included any resident having minor issue not in his custody, and also under court’s obligation to support the minor. It was further specified in the Statute that the court’s permission for marriage would be granted only if the applicant had submitted the proof of compliance with above said ‘support obligation’, and had also demonstrated that the children covered by the support order “are not then and are not likely thereafter to become public charges.” And any marriage entered into without fulfilling such requirements would be declared void.149

In Zablocki’s case, the United States Supreme Court held that such pre-requisite requirements for people under child support obligations to remarry, are violative of equal protection clause. The Court reaffirmed that the right to marry is of fundamental importance for all individuals, and said that the importance of the ‘decision to marry’ is equal to the importance of decisions relating to procreation, childbirth, child rearing, and family relationships.150

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147 Id., at 12.
149 Id., at 375.
150 Id., at 386.
However, in order to bring the balance, the court mentioned that every state regulation in this regard will not be subjected to rigorous scrutiny. The court favoured those reasonable regulations which do not significantly interfere with decisions to enter into the marital relationship.\textsuperscript{151} Therefore, the law which has ‘direct and substantial’ interference on the ‘right to marry’ will be rigorously scrutinized.

While following \textit{Zablocki}'s reasoning, the United States Supreme Court in \textit{Turner v. Safley},\textsuperscript{152} struck down the regulation which permitted an inmate to marry only with the prison superintendent's permission, which can be given only when there are "compelling reasons" to do so. And it was only a pregnancy or the birth of an illegitimate child which would be considered as "compelling."\textsuperscript{153} While admitting the limitations of incarceration, the court still emphasized on the important attributes of marriage. Like others, inmate marriages are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. Marriages are also being recognized as having spiritual significance.

While considering ‘Divorce’ as one of the component of ‘right to marry’, the United States Supreme Court in \textit{Boddie v. Connecticut},\textsuperscript{154} held that the Due Process Clause prohibits a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.\textsuperscript{155}

This case can be seen as another check on State’s regulations regarding ‘divorce’. If the State imposes unjustified restrictions, and denies divorce, then, such restrictions are subject to judicial scrutiny, as it violates one’s ‘right to remarry’.

In the similar fashion, after citing earlier judgements, the United States Supreme Court in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{156} again recognized the constitutional protection which has been afforded to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. The United States Supreme Court appreciated its earlier precedents in which the Court protected the private realm of family life from state’s unjustified intrusions. After considering the relevance of such personal decisions, the court observed:

\textsuperscript{151} \textit{ibid.}\textsuperscript{.}
\textsuperscript{152} \text{482 US 78 (1987).}
\textsuperscript{153} \textit{Id.}, at 82.
\textsuperscript{154} \text{401 U.S. 371 (1971).}
\textsuperscript{155} \textit{Id.}, at 374.
\textsuperscript{156} \text{505 U.S. 833 (1992).}
[These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.]

Increasingly, the court in *M.L.B. v. S.L.J.* observed that choices about marriage, family life, and the upbringing of children are among associational rights, sheltered under Fourteenth Amendment of the US Constitution against the State’s unwarranted usurpation, disregard, or disrespect.

In another case, *Lawrence et. al. v. Texas*, petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. The court held the Texas Statute unconstitutional, as it violated the Due Process Clause. The court said that the liberty protected by the Constitution allows homosexual persons the right to make this choice. While mentioning its earlier pronouncements in which the Supreme Court provided the constitutional protection to personal decisions like marriage, procreation, contraception, family relationships, and education, the court in this case said that persons in a homosexual relationship may also seek autonomy in such personal decisions, just as heterosexual persons do.

The fundamental ‘right to marry’ has also been recognized under International Law. The Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly in 1948, seeks to promote human, civil, economic and social rights. Only after such promotion, one can expect freedom, justice and peace in the world.

In order to eliminate discrimination against women in the matters of marriage, the States are bound to take appropriate measures. Women should have same right to enter into marriage, and have complete freedom to choose a spouse of her own choice. Furthermore, both married

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157 Id., at 851.
158 519 U.S. 102 (1996)
159 Id., at 116.
161 Id., at 567.
162 Id., at 574.
couples should be provided with same rights and responsibilities.\textsuperscript{163} Again, it is the responsibility of both State and Society to protect the fundamental institution of society i.e. family. Equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution should be ensured by the States.\textsuperscript{164}

Similarly, Article 8 of European Convention on Human Rights (ECHR) concerns an individual’s right to respect for their private and family life. And Article 12 of the European Convention on Human Rights (ECHR) provides ‘right to marry’. It is being stated that Men and women of marriageable age shall have the right to marry and to found a family, according to national laws governing the exercise of this right.

So far as India is concerned, the fundamental rights are enshrined under Part III of the Indian Constitution. The efforts of Indian judiciary enlightened the people with the true, meaningful, and liberal construction of fundamental rights. Although there are only six fundamental rights are mentioned under Indian Constitution, the judiciary has made the fundamental rights’ list an inclusive one. Whenever an individual’s interest is at stake, the individual invokes Article 21 of the Indian Constitution.\textsuperscript{165} It protects an individual’s right to life and personal liberty from State’s unjustified intrusion. It means that the State will have to adopt a procedure, which should be just, fair, and reasonable,\textsuperscript{166} before intruding into our right to life and personal liberty. The judiciary has defined the term ‘life’ as it includes basic necessities of human life, education, food, health, clean and hygiene environment, privacy, etc. Similarly, in the absence of any strong reasons against ‘right to marry’, the judicious mind definitely includes ‘right to marry’ in the purview of ‘basic necessities of life’, and hence, it is inseparable part of ‘right to life and personal liberty’ under Article 21 of the Indian Constitution.

However, ‘right to marry’ is not an absolute right. In the \textit{Mr. X v. Hospital 'Z'},\textsuperscript{167} the court held that the girl, whom the appellant intended to marry, had a right to know about the HIV(+) positive status of the appellant.

However, recent instances of Honour Killings questions whether there is any fundamental ‘right to marry’ in India? Where the State has failed to adopt a reasonable procedure in order to

\begin{footnotesize}
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\item[\textsuperscript{163}] Universal Declaration of Human Right 1948, Art.16.
\item[\textsuperscript{164}] International Covenant on Civil and Political Rights 1966, Art. 23.
\item[\textsuperscript{165}] Article 21 of the Indian Constitution: “No person shall be deprived of his life and personal liberty except according to procedure established by law”;
\item[\textsuperscript{166}] Supra note 37.
\item[\textsuperscript{167}] AIR 1999 SC 495.
\end{itemize}
\end{footnotesize}
protect consent marriage, it amounts to violation of one’s right to life and personal liberty. This inability on the part of the State gives us the message that tribal instincts are much stronger than the individuals’ privacy rights. These unjustified and unreasonable notions intrude into one’s personal matters. A person is not able to decide his own personal interests together with freedom to marry. The society becomes the sole qualifier and custodian of the marriages. Generally, the individuals accept the social dictas because the society controls their status, dignity, life, family and social relations, etc. In this kind of social totalitarianism, the rights regarding freedom to marry come under question. This scenario questions the basic edifice of marriage from legal as well as sacred perspective. In every sacred text ‘marriage’ has been considered as the meeting of two souls which conjointly make the path of spiritual journey.

Indeed, the Supreme Court in *Lata Singh v. State of Uttar Pradesh*,\(^{168}\) recognized the right to marry as a fundamental component of right to life under Article 21 of the Indian Constitution. The court said that a major person can marry any person of his own choice in the free and democratic society. The court continued to say that if the parents are against the inter-caste marriage the maximum they can do is that they can cut off social relations with the son or daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste marriage. The court criticized such killings, as these are barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment.

Furthermore, the Supreme Court of India in the case of *Arumugam Servai v. State of Tamil Nadu*,\(^{169}\) said that the institutions who encourage honour killings or other atrocities on the boys and girls, belong to different castes or religions and wish to get married, are illegal. In order to stamp out such institutions ruthlessly, the Supreme Court directed the administrative and police officials to take effective steps to prevent such barbarous acts. It was further directed by the court that if any such incident happen and the administration showed its apathy, the State should suspend the District Magistrate/Collector, SSP/SPs of the district and other concerned officials.\(^{170}\)

\(^{168}\) AIR 2006 SC 2522.

\(^{169}\) 2011 STPL(Web) 403 SC 1. Available at www.stpl-india.in accessed on March 12, 2013, at 2:00 p.m. IST.

Increasingly, in *Bhagwan Dass v. State (NCT of Delhi)*, the Supreme Court held that the so-called ‘Honour Killings’ fall within the ambit of ‘rarest of rare cases’, as these are barbaric and feudal practices. Therefore, the court held that the perpetrators of such killings deserve death punishment.

It is submitted that in the cases, where parents snap social relations with their offspring, who marry against their wishes, the ostracized couple feels sense of insecurity and psychologically harassed. It spreads hate crimes and not the harmony in the society.

Apart from the heterosexual ‘right to marry’, the activists of same-sex marriages seems to see the ray of hope in India. The Indian Judiciary is in the mood to recognize the same-sex marriages in India, as a legal introduction where the heterosexual right to marriage is still disputed.

The Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*, declared that Section 377 Indian Penal Code, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. While giving more and more personal autonomy to the individual, the Supreme Court in *S. Khusboo v. Kamiammal*, recognized the Live-in relationships, as one’s decisional privacy. The court held that there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of ‘adultery’ as defined under Section 497 IPC. Furthermore, the court observed that notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy.

In the present case, the Supreme Court referred some important judgments. In *Lata Singh v. State of U.P.*, the court observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of ‘adultery’), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or live with anyone she likes. In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him. The petitioner's brother had filed a criminal complaint accusing her husband of offences under Sections 366 and 368 IPC, thereby leading to the commencement of trial proceedings. The Court quashed the criminal trial.
Furthermore, the Court noted that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court.

At this juncture, decision of the House of Lords, United Kingdom (UK) in *Gillick v. West Norfolk and Wisbech Area Health Authority*,\(^\text{175}\) is also relevant. In this case, mother of a teenage girl had questioned the decision of the National Health Service (NHS) to issue a circular to local area health authorities which contained guidelines for rendering advice about contraceptive methods to girls under the age of 16 years. Objections were raised against this circular on the ground that the health service authorities had no competence to render such advice and that doing so could adversely affect young children while at the same time interfering with parental autonomy in the matter of bringing up children. The majority decision rejected the challenge against the circular by clarifying that the rendering of advice about contraceptive methods and their provision by medical professionals did not amount to a sexual offence. Among the several aspects discussed in this case, it was held that the provision of information about contraceptive facilities to girls under the age of 16 years could not be opposed on the ground that such information could potentially encourage more sexual activity by the teenagers. The Supreme Court in *S. Khusboo v. Kanniammal*,\(^\text{176}\) referred this decision, and said that this decision supports the reasoning that we must fully understand the context and the purpose for which references to sex have been made in any given setting.

Indeed, it is apt to quote Cass R. Sunstein, who said:

> [I] have not argued that the official institution of marriage should be abolished. Like most people, I believe that it should be continued, if only because it provides the basis for a kind of precommitment strategy that is often beneficial to adults and children alike. But an understanding of the arguments against official marriage clarifies a central fact: Marriage is unambiguously a form of government intervention, one whose future form should be a matter not of following dictates of any kind, but of our own free choices.\(^\text{177}\)

\(^{175}\) (1985) 3 All ER 402.


Analyzing the above case laws, it is submitted that Indian Constitution casts the obligation on the State to protect ‘fundamental right to marry’, irrespective of person’s caste, religion, and sex. The obligation involves State’s positive duty as well as negative duty. It is binding on the State to take positive measures to eliminate barbaric practices like ‘honour killings’ or any other atrocities on consensual marriages, so that individuals would enjoy their ‘freedom to marry’ or ‘live-in relationships’. It demands the elimination of disparate conditions in the society. The State is barred to impose unreasonable restrictions on ‘right to marry’. Criminalizing the same-sex marriages is an unreasonable restriction on one’s personal autonomy. In such case, there is a need to understand the goals of our society, which promised us to provide equal respect and justice for all. While intending such goals in their mind, the judiciary seems opting ‘equal protection clause’ to check the intrusions of the State on one’s ‘freedom to marry’.

9.7.2 Personal Decisions Over One’s Own Body

The most significant development in the personal autonomy occurred in the decision of the High Court of Delhi in *Naz Foundation v. Government of NCT of Delhi*. The broadest statement of the Delhi High court’s approach, following its review of Indian case law on protection of privacy, is ‘The right to privacy thus has been held to protect a “private space in which man may become and remain himself”. The ability to do so is exercised in accordance with individual autonomy.’ This writ petition has been preferred by Naz Foundation, a Non Governmental Organisation (NGO) as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described as ‘unnatural offences’, to the extent the said provision criminalises consensual sexual acts between adults in private. The challenge is founded on the plea that Section 377 of the Indian Penal Code, 1860 (IPC), on account of it covering sexual acts between consenting adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19 & 21 of the Constitution of India. Limiting their plea, the petitioners submit that Section 377 of the Indian Penal Code, 1860 (IPC), should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

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178 Supra note 172.
180 Supra note 172.
In this case, the petitioner submitted that private, consensual, sexual relations or sexual preferences come within the domain of an individual’s personal autonomy, and thus get protected under the fundamental right to life and personal liberty given under Article 21. Although it can be restricted as per according to procedure established by law, Section 377 of the Indian Penal Code 1860 unreasonably restricts an individual’s such ‘private space of having sexual preferences. Moreover, Section 377 of the Indian Penal Code, 1860 (IPC), curtails an individual’s ability to make personal statement about one’s sexual preferences, right of association, right to move freely, etc. Therefore, it was prayed that consensual sexual intercourse between two willing adult males (i.e. homosexuals) in privacy should be saved and excepted from the penal provision contained in Section 377 IPC.\(^{181}\)

After hearing whole submission, the Delhi High Court declared that Section 377 of the Indian Penal Code, 1860 (IPC), insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 of the Indian Penal Code, 1860 (IPC), will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The court said that ‘adult’ means everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report. And the court believed that such recommendation will remove a great deal of confusion. Secondly, the court also clarified that this judgment will not result in the re-opening of criminal cases involving Section 377 of the Indian Penal Code, 1860 (IPC), that have already attained finality.\(^{182}\)

Therefore, the approach of the Supreme Court is now towards the protection of individual privacy. By giving more and more personal autonomy to the individual, the Supreme Court is also protecting his decisional privacy. In fact in *S. Khusboo v. Kanniammal*\(^{183}\) also, the court recognized the Live-in relationship which is again a right of decisional privacy. The rigid attitude of the courts against the practices of honour-killings is an another step towards the protection of one’s right to choose his or life partner.\(^{184}\)

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\(^{181}\) *Id.*, para 10.

\(^{182}\) *Id.*, para 132.

\(^{183}\) (2010) 5 SCC 600.

In *Suchita Srivastava and Another v. Chandigarh Administration*, the Supreme Court held that a woman’s right to make reproductive choices comes within the purview of ‘personal liberty’ under Article 21 of the Constitution of India. Considering a woman’s right to privacy, dignity and bodily integrity, the court said that there should be no restriction on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. The court concluded that reproductive rights include a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a ‘compelling state interest’ in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the Medical Termination of Pregnancy Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

Another important question arises as to whether there is a ‘right to die with human dignity in India?’ The debate gets ignited when the Supreme Court in *P. Rathinam v. Union of India*, for the first time, declared Section 309 of the Indian Penal Code 1860 as unconstitutional. It was considered as a cruel and irrational provision, and it punishes a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State’s interference with the personal liberty of the persons concerned is not called for. Therefore, the Court held that Section 309 violates Article 21. The Supreme Court wanted to humanize the criminal law.

However, the larger bench of the Supreme Court in *Smt Gian Kaur v. State of Punjab*, overruled *P. Rathinam’s* case and established that the ‘right to life’ does not include ‘right to die’. Verma, J. (as he then was) speaking for the Constitution Bench of the Supreme Court observed that the right to life’ including the right to live with human dignity would mean the existence of

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185 AIR 2010 SC 235.
186 Id., at 242.
187 AIR 1994 SC 1844.
188 AIR 1996 SC 946.
such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the right to die' an unnatural death curtailing the natural span of life.189

In Aruna Rameshandra Shanbaug v. Union of India,190 decided on 7 March, 2011, the Supreme Court has legalized passive euthanasia and clarified that it would remain in force until the enactment of a relevant law by Parliament in this regard. Considering some foreign judgments, the Supreme Court held that Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support devices of a patient who is in permanent vegetative state and is incompetent to give any consent. The court also laid down a proper procedure in this regard. It was mentioned that when such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed.191 The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench.192 Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament

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189 *Id.*, at 952.
http://indiankanoon.org/doc/235821/ accessed on July 21, 2012, at 11:00 a.m. IST.
191 *Id.*, para 138.
192 *Id.*, para 139.
makes legislation on this subject. The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient. The High Court should give its decision assigning specific reasons in accordance with the principle of 'best interest of the patient'. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature.

An individual’s personal autonomy has also an habitat in Article 19(1)(a) and Article 19(1)(g) of the Indian Constitution i.e. freedom of speech and expression, and freedom of trade, profession, etc. respectively. While allowing dances in Bars, hotels, etc., the Hon’ble Supreme Court in its recent judgment of State of Maharashtra v. Indian Hotel & Restaurants Association recognized the dancing girls’ personal autonomy over their choices and decisions. In this case, the constitutional validity of Sections 33A and 33B of the Bombay Police Act, as amended by the Bombay Police (Amendment) Act, 2005 was challenged.

193 Id., para 140.
194 Id., para 141.
195 Id., para 142.
196 In the Supreme Court of India civil appellate jurisdiction, Civil Appeal No.5504 of 2013, decided on July 16, 2013. Available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=40562 accessed on July 22, 2013, at 11:00 a.m. IST.
197 The Bombay Police (Amendment) Act, 2005, s. 33A.
198 It provides as follows:

“(1) Notwithstanding anything contained in this Act or the rules made by the Commissioner of Police or the District Magistrate under sub-section (1) of Section 33 for the area under their respective charges, on and from the date of commencement of the Bombay Police (Amendment) Act, 2005,-
(a) holding of a performance of dance, of any kind or type, in any eating house, permit room or beer bar is prohibited;
(b) all performance licences, issued under the aforesaid rules by the Commissioner of Police or the District Magistrate or any other officer, as the case may be, being the Licensing Authority, to hold a dance performance, of any kind or type, in an eating house, performance, of any kind or type, in an eating house, permit room or beer bar shall stand cancelled.
(2) Notwithstanding anything contained in Section 131, any person who holds or causes or permits to be held a dance performance of any kind or type, in an eating house, permit room or beer bar in contravention of Sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to rupees two lakhs:
Provided that, in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than rupees fifty thousand.
(3) If it is, noticed by the Licensing Authority that any person, whose performance licence has been cancelled under Sub-section (1), holds or causes to be held or permits to hold a dance performance of any kind or type in his eating house, permit room or beer bar, the Licensing Authority shall, notwithstanding anything contained in the rules framed under section 33, suspend the Certificate of Registration as an eating house and the licence to keep a Place of Public Entertainment (PPEL) issued to a permit room or a beer bar and within a period of 30 days from the date of suspension of the Certificate of Registration and licence, after giving the licensee a reasonable opportunity of being heard, either withdraw the order of suspending the Certificate of Registration and the licence or cancel the Certificate of Registration and the licence.
The Court observed that the prohibition of any form of dancing in the establishments covered under Section 33A led to the unemployment of over 75,000 women workers. Furthermore, the Court mentioned that such prohibitions also compelled many of the unemployed women workers to take up prostitution out of necessity for maintenance of their families. Therefore, the Hon’ble Supreme Court held that the impugned legislation is totally counter productive and violative of Article 19(1)(g) of the Indian Constitution. The Court said:

[T]he restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance. In fact, a large number of imaginative alternative steps could be taken instead of completely prohibiting dancing, if the real concern of the State is the safety of women.

In addition to this, the Hon’ble Chief Justice of India penned down:

[T]he State has to provide alternative means of support and shelter to persons engaged in such trades or professions, some of whom are trafficked from different parts of the country and have nowhere to go or earn a living after coming out of their unfortunate circumstances. A strong and effective support system may provide a solution to the problem.

(4) A person aggrieved by an order of the Licensing Authority cancelling the Certificate of Registration and the licence under Sub-section (3), may, within a period of 30 days from the date of receipt of the order, appeal to the State Government. The decision of the State Government thereon shall be final.
(5) Any person whose performance stands cancelled under Sub-section (1), may apply to the Licensing Authority, who has granted such licence, for refund of the proportionate licence fee. The Licensing Authority, after making due inquiry shall refund the licence fee on pro-rata basis, within a period of 30 days from the date of the receipt of such application.
(6) The offence punishable under this section shall be cognizable and non-bailable.

198 The Bombay Police (Amendment) Act, 2005, s.33B.
199 Supra note 196.
200 Id., para 124 at 124.
201 Id., at 132.
Again, rejecting charges of overreach by the Supreme Court in the context of dance bar case, Hon’ble Chief Justice of India Altamas Kabir said that it was the duty of the judiciary to protect the Constitutional rights of people.202

9.8 Mental Privacy

Psychological surveillance consists of those scientific and technological methods that seek to extract information from an individual which he does not want to reveal or does not know he is revealing or is led to reveal without a mature awareness of its significance for his privacy.203

The Polygraph test, also known as ‘lie detection’ test, was developed as an instrument to aid police in the detection of crime. The theory behind the polygraph is that lying causes distinctive and measurable physiological reactions in a person who knows that he is not telling the truth. The polygraph operator asks questions in a special pattern while testing the subject’s heart and pulse rate, relative blood pressure, breathing, and perspiration rate. Bodily changes are recorded by pens on graph paper, producing “squiggles” resembling those on an electrocardiogram or seismograph. By interpreting these records, a trained polygrapher is supposed to be able to identify untrue responses to critical questions.204

Increasingly, personality test is the use of written or oral examination to discover traits of personality for purposes of judging an individual’s psychological strength, especially to predict his future performance in some role such as employment. In addition to emotions, attitudes, propensities, and level of personal adjustment, personality tests also measure subject’s attitude towards sexual, political, religious, and family matters. The issue of privacy obviously raised by both polygraphing and personality testing is whether employers or government should be allowed to require individuals to have their inner processes probed through machine or test measurements.205

Moreover, there are other relations of voyeurism to the problem of surveillance. It was observed by many researchers that polygraph operators do ask embarrassing personal questions

204 Ibid.
205 Ibid., at 134.
to female subjects. It satisfies their erotic desires. Similarly, during wiretapping the authorized
officials record the intimate conversation and play it to their friends just for entertainment.\footnote{Id., at 56.}

Increasingly, there are many other intrusive techniques have been invented which can see
our mind. Functional magnetic resonance imaging (fMRI) technology produces a four
dimensional map of brain activity, such as perception, memory, emotion, and movement. The
full image of applications of Functional magnetic resonance imaging (fMRI) technology is just
emerging, but proponents have already sought its admission in court as a type of lie detector or
credibility builder. If Functional magnetic resonance imaging (fMRI) scans are incorporated into
the government's investigatory process, constitutional safeguards should be in place to protect
the fundamental right to privacy and an individual's freedom to decide whether to assist the
state.\footnote{Mara Boundy, Note, The Government Can Read Your Mind: Can the Constitution Stop It?, 63 HASTINGS L.J. 1
accessed on July 22, 2013, at 1:00 p.m. IST.} It is proposed that Functional magnetic resonance imaging (fMRI) brain scan results
must be considered privileged evidence protected by an individual's Fifth Amendment right not
to bear witness against himself. Functional magnetic resonance imaging (fMRI) brain scans
disclose the contents of the subject's mind and allow the government to extract self-
incriminating knowledge without having to derive that information independently. The
admissibility of Functional magnetic resonance imaging (fMRI) brain scans, if found reliable,
should turn on whether the scan is compelled by the government. Holding otherwise would
enable the government to invade the inner sanctum of an individual's mind and strip citizens of a
fundamental constitutional protection. The government can read our minds, and the Constitution
should protect us.\footnote{Id., at 1644.}

Furthermore, leading neuroscientists have claimed that employers, the military and
intelligence services may soon be using computerised mind-reading techniques and there is a
need for a public debate about 'mental privacy.'\footnote{Roger Highfield, “Mind reading by MRI scan raises 'mental privacy' issue,” The Telegraph, June 2008, available
ses-mental-privacy-issue.html accessed on July 22, 2013, at 1:00 p.m. IST.} Another possibility raised by studies of how
the brain encodes memories and other information is that these methods could be used by
intelligence agencies: a suspect's brain could be interrogated against their will. And it could be
possible to reveal unconscious prejudices: a person who claims not to be a racist could be
revealed to be one, if their amygdalae, almond shaped structures linked with disgust, go into action when shown a picture of a black person, raising the nightmarish possibility of interrogation for ‘thought crimes’.\textsuperscript{210}

Considering the above said arguments, the researcher viewed that it has become necessary for every modern legal system to adopt such invasive technologies with proper procedural safeguards.

In India, in a case of \textit{Ramchandra Ram Reddy v. State of Maharashtra}\textsuperscript{211} the Bombay High Court upheld these technologies. The court drew a distinction between 'statements' and 'testimonies', and held that what was prohibited under Article 20(3) were only ‘statements’ that were made under compulsion by an accused. In the court's opinion, ‘the tests of Brain Mapping and Lie Detector in which the map of the brain is the result, or polygraph, then either cannot be said to be a statement.’ At the most, the court held, ‘it can be called the information received or taken out from the witness.’\textsuperscript{212}

This position was, however, overturned recently by the Supreme Court in \textit{Selvi v. State of Karnataka}\textsuperscript{213} and invoked the right of privacy to hold these technologies unconstitutional. The Hon’ble Supreme Court of India for the first time recognized an individual’s mental privacy against such mind-reading technologies. The Supreme Court held that involuntary administration of any of the techniques, like narcoanalysis, polygraph examination and Brain Electrical Activation Profile (BEAP) test, is an unjustified intrusion into the mental privacy of an individual.\textsuperscript{214} It was also recognized that forcible intrusion into a person’s mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.\textsuperscript{215} In this case, the scientific validity of the impugned techniques was also questioned and, it was argued that their results are not entirely reliable. For instance, the narcoanalysis technique involves the intravenous administration of sodium pentothal, a drug which lowers inhibitions on part of the subject and induces the person to talk freely. However, empirical studies suggest that the drug-induced revelations need not necessarily be true. Polygraph examination and the Brain Electrical Activation Profile (BEAP) test are methods which serve the respective purposes of lie-
detection and gauging the subject’s familiarity with information related to the crime. These
techniques are essentially confirmatory in nature, wherein inferences are drawn from the
physiological responses of the subject. However, the reliability of these methods has been
repeatedly questioned in empirical studies. In the context of criminal cases, the reliability of
scientific evidence bears a causal link with several dimensions of the right to a fair trial such as
the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to
present a defence. Therefore, the court gave value to the fact that these requirements have long
been recognised as components of ‘personal liberty’ under Article 21 of the Constitution. Hence
it will be instructive to gather some insights about the admissibility of scientific evidence.\footnote{Id, at 692.}

The Court further said that even though these are non-invasive techniques the concern is
not so much with the manner in which they are conducted but the consequences for the
individuals who undergo the same. The use of techniques such as ‘Brain Fingerprinting’ and
‘FMRI-based Lie-Detection’ raise numerous concerns such as those of protecting mental privacy
and the harms that may arise from inferences made about the subject’s truthfulness or familiarity
with the facts of a crime. The Court essentially relied on the individuals’ mental privacy and said
that there are several ways in which the involuntary administration of either of the impugned
tests could be viewed as a restraint on ‘personal liberty’. The most obvious indicator of restraint
is the use of physical force to ensure that an unwilling person is confined to the premises where
the tests are to be conducted. Furthermore, the drug-induced revelations or the substantive
inferences drawn from the measurement of the subject’s physiological responses can be described
as an intrusion into the subject’s mental privacy.\footnote{Id, at 740.}

The court showed its great concern towards the issues where the contents of the test
results could prompt investigators to engage in custodial abuse, surveillance or undue
harassment. The court also directed the police and courts to adopt fair and reasonable procedure
at the time of exercising their powers of arrest, detention, interrogation and search and seizure.
The court also took serious note of the issues where the investigation agencies have leaked the
video-recordings of narcoanalysis interviews to media organisations. This is an especially
worrisome practice since the public distribution of these recordings can expose the subject to

\footnote{Id, at 692.}
\footnote{Id, at 740.}

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undue social stigma and specific risks. It may even encourage acts of vigilantism in addition to a ‘trial by media’.  

The court further said that even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872. The court ordered to adopt the National Human Rights Commission ‘Guidelines for the Administration of Polygraph Test (Lie 249 Detector Test) on an Accused’, 2000 for conducting the ‘Narcoanalysis technique’ and the ‘Brain Electrical Activation Profile’ test.

It is submitted that the Hon’ble Supreme Court of India emphasized on the procedural safeguards of the administration of such psychological tests. By recognizing one’s mental privacy, the court has broadened the horizon of right to privacy. It is pertinent to mention here that such a significant judgment is also a warning to the private individuals or bodies that are in practice of conducting such psychological tests over concerned subjects.

It is submitted that Indian judiciary has started widening the scope of right to privacy in India. The judicial cognizance over such privacy issues help in abolishing the social taboos. Increasingly, it prohibits both State’s action as well as private action from interfering with the individuals’ decisional privacy rights. By construing the true spirit of the Constitution, the courts would not feel hesitant in recognizing individuals’ right of personal autonomy. The emerging issues of right to privacy are knocking the doors of Indian courts because prevailing legislations are insufficient to tackle the issues. Therefore, it is the duty of the Indian judiciary to fill the gap by redressing privacy violations.

\footnote{Id., at 742.}  
\footnote{Id., at 784.}