The Right to Privacy Regime in India: A Controlled and Authoritative Approach

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ABSTRACT

Unlike in some other countries, the right to privacy is not considered a fundamental right in India. The constitution of India does not recognize it in any form—not even home privacy which is recognized as the right to be secure against unreasonable search and seizure. In case [2011]8SCR725, the Supreme Court of India first recognized the "right to privacy as an integral part of right to life". Since then, India has made four attempts to secure a right to privacy through legislation. Recently the revised Personal Data Protection Bill (2019) was introduced and is still under review. This article explores the perspective of India on the right to privacy from a historical and contemporary perspective, in two aspects: judicial and governmental. In doing so, more than 39 judicial judgments on the right to privacy and four major draft enactments are analyzed. The study affirms that Indian legislatures hold a political, controlled and authoritarian approach towards the right to privacy resulting in a conflict of interest with the people.

Keywords: Right to privacy, Home privacy, E-privacy, Information privacy, Communication privacy, Protected zones, India.

INTRODUCTION

It is often thought the first right to privacy was found in the fourth amendment of the United States (U.S.) constitution:

> *[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized* (Constitution Annotated, 2023).

In this way the right to privacy was introduced as the right "to be secure against unreasonable searches and seizures". This provision resembles the nineteenth century concept of a right to privacy—the right to home privacy which is encapsulated by the maxim "every man's home is his castle". Many countries have adopted the right to privacy in their constitutions with views similar to the ffourth amendment of the U.S. Constitution. For instance, Belgium's constitution of 1831 states in article 16: "one's home is inviolable; no house search may take place except in the cases provided for by the law and in the form prescribed by the law" (Constitution of Belgium, 1831). The 1857 Constitution of Mexico states in article 16:

> *[N]o one shall be molested in his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal grounds upon which the measure is taken. In cases in flagrante delicto any person may apprehend the offender and his accomplices, placing them without delay at the disposal of the nearest authorities* (Federal Constitution, 1857).

The idea of a right to privacy was strengthened when it achieved international recognition as a human right under article 12 of the Universal Declaration of Human Rights (UDHR) (UN General Assembly, 1948). Article eight of the European Convention on Human Rights states: "Everyone has the right to respect for his private and family life, his home and his correspondence" (Council of Europe, 1950). This was mirrored in the 1966 International Covenant on Civil and Political Rights (UN General Assembly, 1966). Despite playing a significant role in drafting the UDHR, India chose not to guarantee a right to privacy as a fundamental right under its Constitution (Morsink, 1999, pp. 4-35; Puntambekar, 2018, pp.27-29; Kabir, 1985, pp 18-19). Unlike other countries' constitutions, the constitution of India does not recognize a right to privacy as including a right to be secure against unreasonable search and seizure.

In 1954, the right to be secure against unreasonable search and seizure was claimed by petitioners in the case *M.P. Sharma and Ors. vs. Satish Chandra and Ors.* But the Supreme Court of India (SCI) held:

> *[W]hen the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy ... we have no justification to import it, into a totally different fundamental right, by some process of strained construction* (AIR1954SC300).

In 1962, in the case *Kharak Singh vs. The State of U.P. and Ors.* the right to privacy and its constitutional aspects was again discussed. The SCI held:

> *The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III* (AIR1963SC1295).

Though the court did not recognize the right to privacy, this was the first case where a link between a right to privacy and a right to life under article 21 of the

constitution of India was considered. Hence, "domiciliary visits" under Regulation 236 of the 1861 Uttar Pradesh Police Regulations (Kabir & Uttar Pradesh, 1971) was struck down as unconstitutional because it infringed article 21 of the constitution. In 1975, the right to privacy was declared part of the fundamental right to life in the case *Govind vs. State of Madhya Pradesh and Ors.* In this case the SCI held:

> *The right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest … even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute* (AIR1975SC1378).

So in *Govind vs. State of Madhya Pradesh and Ors.* (AIR1975SC1378) the SCI first recognized the right to privacy as a fundamental right and made per incuriam on its previous judgments. However, the SCI has not recognized the right to privacy as an absolute right which means the state still has the power to "reasonably" restrict the right. Later in 2011, in the case *Ram Jethmalani and Ors. vs. Union of India and Ors.* ([2011]8SCR725), the SCI again recognized the nexus between right to privacy and right to life and stated, "(the) right to privacy is an integral part of (the) right to life".

Although India has not made the right to privacy a fundamental right explicitly secured by the constitution, it has chosen to guarantee the right under different terms. India's first enactment that guaranteed a right to privacy was the 1986 Juvenile Justice Act which was later repealed and reintroduced as the 2015 Juvenile Justice (Care and Protection of Children) Act. The act clearly states, "[E]very child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process" (Juvenile Justice [Care and Protection of Children] Act, 2015: Article 3 XI). This means India first guaranteed the right to privacy only to juvenile offenders during the judicial process. However, India has made numerous attempts to guarantee the right to privacy through enactments such as the right to privacy bills (2011; 2013). India is still trying to guarantee the right to privacy through such enactments. Recently, a 2019 draft Personal Data Protection Bill (Data Protection Bill, 2019) was introduced, which is still under review.

In this paper, the development of the right to privacy in India is discussed through case-by-case analysis and comparison between draft bills. This paper aims to provide an Indian perspective on the right to privacy. In this empirical qualitative research project both primary and secondary data were used, however, case judgments were relied on for the most part. For the purpose of the study, cases from the years 1954 to 2020 were considered and 100 cases were found where the right to privacy was discussed by the Indian judiciary in different areas, such as home privacy, body privacy, and communication and information privacy. Of these, 39 cases discussed the right to privacy thoroughly, and were selected for use in this article.

The paper is divided into three sections: introduction, discussion and conclusion. The discussion begins with the right to privacy as a fundamental right in India and how it emerged. It then explains how perspectives on the right to privacy changed from home and body privacy to communication and information privacy.

In this way the article analyzes the prominence and development of the right to privacy in India under two time periods: the twentieth (through case analysis) and twenty-first (through draft bill comparison) centuries. In the twentieth century most cases where the right to privacy was discussed involved home privacy, but by the end of that century the right to privacy had broadened. The paper concludes by discussing the dilemma of Indian legislatures struggling to develop a right to privacy as the country still does not consider it an absolute right and often restricts it.

AN EVOLVING APPROACH TOWARDS THE RIGHT TO PRIVACY: CASE-BY-CASE ANALYSIS

RIGHT TO PRIVACY AS FUNDAMENTAL RIGHT FROM 1954-2000

The issue of privacy was first discussed in India in *M.P. Sharma and Ors. vs. Satish Chandra and Ors.* (AIR1954SC300). In this case the right to privacy was first claimed in terms of home privacy under the umbrella of the article 19(1)(f) of the Constitution (Omitted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 2), titled as the right to property that guaranteed:

> *The right of all citizens to acquire, hold and dispose of property subject to the operation of any existing or future law in so far as it imposes reasonable restrictions, on the exercise of any of the rights conferred thereby, in the interests of general public.*

So it was the first time the right to privacy was claimed as the right "to be secure against unreasonable searches and seizures". However, dismissing the application, the court held that:

> *When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction*.

Despite analyzing the U.S. fourth constitutional amendment ensuring home as a protected zone, the Indian judiciary decided not to follow it, going on to explore whether 'home privacy' was a fundamental right under the Indian constitution, and not incorporating it as a fundamental right. Besides, the interpretation of article 19(1)(f) of the constitution of India can give a different view, guaranteeing:

> *The right of all citizens to acquire, hold and dispose of property subject to the operation of any existing or future law in so far as it imposes reasonable restrictions, on the exercise of any of the rights conferred thereby, in the interests of general public.*

Breaking down article 19(1)(f), it first states an Indian citizen holds the right to acquire, hold and dispose of any property, which includes movable and non-movable property. (As the word property used here is not defined as movable or non-movable property, it can be interpreted that the word property here includes

property in both forms.) Secondly, as the right is not an absolute right, the state always holds a tendency to restrict it. So, any existing or future law, or any rights, can be prioritized over the right only on the grounds of public interest. Thirdly, article 19(1)(f) states, for any existing or future law, or for any right to override the "right to hold and dispose of any property", it must be established that there is "the interest of the general public". Furthermore, there is a continuous tendency of India to restrict the right which might cause violations of privacy.

The constitution of India has not acknowledged the right to privacy or home privacy as a fundamental right. However, it has given its citizens the fundamental "right to hold and dispose of any property" which is not in the general public's interest. This is mean if the authority has the right to search on reasonable grounds, then at the same time, if authorities want to seize any property that is recovered from a searched person, they need to establish that the property in question forms or is part of a general public interest.

In the case *Kharak Singh vs. The State of U.P. and Ors.* (AIR1963SC1295) the right to privacy as a fundamental right was claimed. The petitioner claimed that regulation 236 of the Uttar Pradesh Police Regulations violated the rights guaranteed to citizens under Articles 19(1)(d) and 21 of the constitution. This case examined the question:

> *Whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitutes a violation of the freedom guaranteed by Article 19(1)(d), or a deprivation of the personal liberty guaranteed by Art. 21.*

The court considered the U.S. Supreme Court's decision in *Wolf vs. Colorado* ((1949) 338 U.S. 25) There the U.S. Supreme Court held:

> *The security of one's privacy against arbitrary instruction by the police … is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples … We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment.*

Further considering the U.S constitution's fourth amendment the SCI (AIR1963SC1295) stated:

> *Our constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilization.*

Moreover, considering the English Common Law maxim "every man's house is his castle" that was applied in Semayne's case ((1604) 5 Coke 91 : 1 Sm. L.C. 104) by the Court of King's Bench where it was held that "the house of everyone is to him as his castle and fortress as well as for his defense against injury and violence as for his repose", the SCI stated (AIR1963SC1295):

> *19. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.*
> *20. In our view clause (b) of Regulation 236 is plainly violative of Art. 21 and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional.*

The SCI further stated:

> *21. … the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*

Making the right to privacy essential to personal liberty, the SCI stated: "It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty." It further defined the right of personal liberty in Art. 21, stating:

> *A right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution.*

The SCI has struck down Regulation 236 of the U.P. Police Regulations as unconstitutional and in violation of article 21. However, it has held back from declaring the right to privacy as a fundamental right or an integral part of article 21 of the constitution. It has made a nexus between the right to personal liberty under article 21 and the right to privacy.

After this development, the first case the SCI experienced regarding the question of privacy was in the case, *Pooran Mal vs. the Director of Inspection (Investigation), New Delhi and Ors*, and in answering the argument of the appellant that the search and seizure and admission of evidence from the house in question was against the spirit of the Constitution, which inviolable liberties, the SCI held (AIR1974SC348) that:

> *24. … the privacy of a citizen's home was specifically safeguarded under the Constitution, although reasonable searches and seizures were not taboo. Repelling the submission, this Court observed at page 1096. "A power of search and seizure is in any system of jurisprudence in overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution*

makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3)would be defeated by the statutory provisions for searches.

Although in this case the legal representative of the appellant argued that the search and seizure violated inviolable liberties under the Constitution, article 21 was not invoked in this case. This case circulated within the ambit of articles 14, 19, 20(3), 31, 32, and 226.

The first case after the nexus between "personal liberty and privacy" under article 21 of the Indian Constitution was declared by the SCI in the case *Kharak Singh v. The State of U.P. and Ors.* (AIR1963SC1295) was in 1975 in the case *Govind vs. State of Madhya Pradesh and Ors.* (AIR1975SC1378). In this case the SCI first dealt with whether the right to privacy itself is a fundamental right flowing from the other fundamental rights guaranteed to a citizen under article 19(1)(d) and article 21 of the constitution. The Court held that:

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

31.... Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.

According to the SCI the right to privacy "can be taken away by procedure established by law - alleged regulations have force of law - object of regulations to keep surveillance on habitual criminals and to ensure public safety" (AIR1975SC1378). However, the court did not agree with the argument that regulation 856 violated the fundamental right of the petitioner under article 21 as article 21 guarantees that no person shall be deprived of his life or personal liberty except by the procedure established by law. The court in terms of Article 19(1)(d) held that:

31. Even if we hold that article 19(1)(d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within article 19(5); or, even if it be assumed that article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid.

In this case, although the Court declared the right to privacy as a fundamental right, not an absolute right, the Court itself declared clearly the regime under which

the right to privacy falls. After this case, any claims under the right to privacy can be brought under article 19(1)(d) of the Indian Constitution, but reasonableness of the restriction needs to be established. This case perused the nexus between liberty and privacy similar to the U.S Supreme Court's view that was followed by the SCI in *Kharak Singh vs. The State of U.P. and Ors.* (AIR1963SC1295).

Another significant development from *Govind vs. State of Madhya Pradesh and Ors.* (AIR1975SC1378) was defining theories of a right to privacy. Defining the right to privacy in terms of home privacy, the SCI stated:

> *27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might he engaging in such activities and that such 'harm' is not constitutionally protective by the state. The second is that individuals need a place of sanctuary where they can be free from societal control.*

After this development in the right to privacy, the SCI again dealt with the claims of a right to privacy in the case *V.S. Kuttan Pillai vs. Ramakrishnan and Ors*, where the Court adopted the view taken by the Court in the case *Pooran Mal vs. The Director of Inspection (Investigation), New Delhi and Ors.* (AIR1974SC348); in both cases claims were made under article 20(3) of the Indian Constitution. But the development made by *Kharak Singh vs. The State of U.P. and Ors.* (AIR1963SC1295) and *Govind vs. State of Madhya Pradesh and Ors.* (AIR1975SC1378) opened doors for the right to privacy claims from different aspects, such as marital privacy, communication privacy, and so on.

For instance, the Andhra Pradesh High Court in the case of *T. Sareetha vs. Venkata Snbbaiah* (AIR1983AP356), citing section nine of the Hindu Marriage Act, 1955 as constitutionally void, found "the right to privacy and human dignity (are) guaranteed by article 21 of the Constitution". Although the SCI did not make any comment on the right to privacy guaranteed by article 21 of the Constitution, it stated that section 9 of the Hindu Marriage Act, 1955 does not violate article 21 of the constitution if the said act is understood in its proper perspective (AIR1984SC1562). So here, the SCI has implicitly accepted that the right to privacy is guaranteed by article 21 of the constitution—as the view taken by the learned judge of the Andhra Pradesh High Court towards section 9 of the Hindu Marriage Act, 1955 was not in proper perspective. In this case the right to privacy was not claimed in terms of home privacy.

The case of *Unni Krishnan, J.P. and Ors. vs. State of Andhra Pradesh and Ors.* (AIR1993SC2178) in the SCI has given new direction and amplitude to the right to privacy by stating "several unremunerated rights fall within article 21 since personal liberty is of widest amplitude". Then the court went on to mention the rights that article 21 of the constitution covers and mentions the right to privacy. This judgment gained support in *P. Rathinam and Ors. vs. Union of India and Ors.* (AIR1994SC1844).

Such directions and support has helped the right to privacy gain constitutional status (AIR1995SC264). Hence, the claims of right to privacy have achieved new momentum and claims from different aspects have started to emerge, like the case of *R. Rajagopal and Ors. vs. State of Tamil Nadu and Ors.* In this case the question concerned the freedom of press vis-a-vis the right to privacy. The SCI held:

28. The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters … whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

Similarly in the case of *People's Union of Civil Liberties vs. Union of India and Ors.* (AIR1997SC568) the question before the SCI regarded telephone-tapping and the right to privacy. Addressing "communication privacy" the SCI held:

18. We have, therefore, no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law."

19. The right to privacy by itself has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, in fact Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

The Court further stated that "the right to privacy of an individual has to be safeguarded" and asked "the Central Government to lay down just, fair and reasonable procedures under section 7(2)(b) of the act" (AIR1997SC568). The SCI also stated "it is necessary to lay down procedural safeguards for the exercise of power under section 5(2) of the Act so that the right to privacy of a person is protected". Safeguarding people's right to privacy, the SCI went on to provide directives.

Another new aspect of the right to privacy claim can be seen in the case *X' vs. Hospital 'Z'* (AIR1999SC495). In this case, the question put before the SCI was whether "the appellant's right of privacy has been infringed upon by the respondents disclosing that the appellant was HIV positive". Addressing the question of information privacy the SCI held that:

Doctors are morally and ethically bound to maintain confidentiality. In such a situation, 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 right, however, is not

absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

So by the end of the twentieth century, the right to privacy had successfully gained constitutional status as a fundamental right that can be claimed under article 21 of the Indian constitution. After this, the right was claimed from different perspectives other than only home privacy. In the case of *State of Karnataka vs. Krishnappa* (AIR2000SC1470) the SCI made a remarkable contribution to the right to privacy:

Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honor and offends her self-esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience.

Since the right to privacy has been widely accepted as implied in the Indian constitution (AIR2005SC186) by the end of the twentieth century, it was hoped that in the next century the right to privacy would go further.

THE RIGHT TO PRIVACY AS A FUNDAMENTAL RIGHT FROM 2001-2020

The right to privacy in India began conflicting with the right to information at the beginning of the new millennium. The beginning of the conflict can be tracked to the case *X' vs. Hospital 'Z'* (AIR1999SC495), however, the right to information was not claimed in that case. Hence the conflicting relation between right to information and right to privacy remained unanswered. However, in *People's Union for Civil Liberties and Ors. vs. Union of India and Ors.* (AIR1997SC568), address this conflicting relationship between the two rights, the SCI held that:

By calling upon the contesting candidate to disclose the assets and liabilities of his/her spouse, the fundamental right to information of a voter/citizen is thereby promoted. When there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right as it serves larger public interest. The right to know about the candidate who intends to become a public figure and a representative of the people would not be effective and real if only truncated information of the assets and liabilities is given … More importantly, it should be noted that the Parliament itself accepted in principle that not only the assets of the elected candidates but also his or her spouse and dependent children should be disclosed to the constitutional authority and the right of privacy should not come in the way of such disclosure.

Furthermore, the SCI held (AIR2003SC2363; 2008(12)SCALE167) that:

17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law."

> *18. The right to privacy -- by itself -- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.*

In cases like *Sharda vs. Dharmpa* ((2003)4SCC493) and *Banarsi Dass vs. Teeku Dutta and Anr.* ((2005)4 SCC 449) the right to privacy being not an absolute right has given importance to the right to information: in *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Ors.* (AIR2010SC2851) the SCI held:

> *When there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration.*

The Indian judiciary came to consider the right to privacy as more individual-orientated, but with the emergence of the Right to Information Act 2005, conflicts between the right to information and right to privacy gained momentum. Hence, understandings about the right to privacy started changing. In *Selvi and Ors. vs. State of Karnataka* (AIR2010SC1974) the SCI held that "we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes". Although the Indian judiciary conceptualized the right to privacy in physical and mental senses, *Amar Singh vs. Union of India and Ors.* (2011(5)SCALE606) recognized obligations to protect the right to privacy by stating, "(the) court shall protect (the) right to privacy of individuals only in accordance with constitutional privileges". The conflict between the right to information and right to privacy was brought before the SCI in terms of the medical information of an individual in the case *Sharda vs. Dharmpa* ((2003)4SCC493), *Banarsi Dass vs. Teeku Dutta and Anr.* ((2005)4 SCC 449), and *Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Ors.* (AIR2010SC2851). More explicit mentions were in the case *Ram Jethmalani and Ors. vs. Union of India and Ors.* (2011]339ITR107(SC)) where the SCI held:

> *Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner…...Revelation of bank account details of individuals, without establishment of prima facie grounds to accuse them of wrongdoing, would be a violation of their rights to privacy. ...State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions*

of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility.

A similar view was taken by the SCI in the case *Prithipal Singh and Ors. vs. State of Punjab and Anr* ((2012) 1 SCC 10):

The right to life has rightly been characterized as 'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State. The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that the State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction.

The conflict between right to information and right to privacy was again dealt by the SCI in *Sanjoy Narayan Editor in Chief Hindustan and Ors. vs. Hon. High Court of Allahabad thr. R.G.* (JT2011(10)SC74) and *Namit Sharma vs. Union of India* (JT2012(9)SC166). The SCI case (JT2011(10)SC74) first stated that:

The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to Information Act is the most empowering step in this direction. The role of people in a democracy and that of active debate is essential for the functioning of a vibrant democracy.

And further stated that the right "must be carefully regulated and must reconcile with a person's fundamental right to privacy". The SCI in both cases has tried to make a balance between both rights and make the right to information more meaningful and reasonable (JT2012(9)SC166).

A broader explanation and analysis on the right to information and right to privacy was made by the SCI in the case *Bihar Public Service Commission vs. Saiyed Hussain Abbas Rizwi and Ors.* (116(2013)CLT78). This case analyzed the Right to Information Act 2005 regarding the right to privacy and the SCI held:

The scheme of the Act contemplates for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. It was aimed at providing free access to information with the object of making governance more transparent and accountable. Another right of a citizen protected under the Constitution is the right to privacy. This right is enshrined within the spirit of Article 21 of the Constitution. Thus, the right to information has to be balanced with the right to privacy within the framework of law.

Furthermore, the SCI stated that:

The right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt within the act and secondly the constitutional limitations emerging from article 21 of the Constitution. Thus, wherever in response to an application for disclosure of information, the public authority takes shelter under the provisions relating to exemption, non-applicability or

infringement of article 21 of the constitution, the State Information Commission has to apply its mind and form an opinion objectively if the exemption claimed for was sustainable on facts of the case.

Then, illustrating the public interest in terms of the right to privacy and right to information, trying to create a balance between both the rights, the SCI held:

The public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India.

In *Asha Ranjan and Ors. vs.State of Bihar and Ors.* (AIR2017SC1079) the SCI held:

To weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day to put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognize and accept the right of one which has to be protected.

A similar view is taken by the SCI in *Thalappalam Ser. Coop. Bank Ltd. and Ors. vs. State of Kerala and Ors.* ((2013)16SCC82). The Court in this case made two points. First:

Information which has been sought relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual .. even if he has got that information, is not bound to furnish the same to an applicant, unless he is satisfied that the larger public interest justifies the disclosure of such information, that too for reasons to be recorded in writing.

Second: "*Right to information and right to privacy – Are not absolute rights – Both rights, one of which falls under article 19(1)(a) and other under article 21 – Can obviously be regulated, restricted and curtailed in larger public interest*". This indicates the nature of the right to privacy and the right to information are similar and one can overrule another in the view of larger public interest. In *Central Public Information Officer, Supreme Court of India vs. Subhash Chandra Agarwal* (2019(16)SCALE40) the question of the larger public interest and right to privacy was dealt with by the SCI, where the court held, "*If one's right to know is absolute, then the same may invade another's right to privacy and breach confidentiality, and, therefore, the former right has to be harmonized with the need for personal privacy, confidentiality of information and effective governance.*" (2019(16)SCALE40). Further illustrating different sections of the Right to Information Act 2005, the Court held that:

The RTI Act captures this interplay of the competing rights under Clause (j) to Section 8(1) and Section 11. While Clause (j) to Section 8(1) refers to personal

information as distinct from information relating to public activity or interest and seeks to exempt disclosure of such information, as well as such information which, if disclosed, would cause unwarranted invasion of privacy of an individual, unless public interest warrants its disclosure, Section 11 exempts the disclosure of 'information or record...which relates to or has been supplied by a third party and has been treated as confidential by that third party'. By differently wording and inditing the challenge that privacy and confidentiality throw to information rights, the RTI Act also recognizes the interconnectedness, yet distinctiveness between the breach of confidentiality and invasion of privacy.

Here it is important to mention ABC vs. The State (NCT of Delhi). In the said case the SCI held that "the Appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child". Although it was important information, the SCI said, "Any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world". In this case the privacy of the women was given importance. However, if the child wanted to know the father's name through the right to information then which right should prevail is still an open question.

Quite a similar conflict was dealt with by the SCI in *K.S. Puttaswamy and Ors. vs. Union of India and Ors.* The case concerns information about an individual obtained by the Unique Identification Authority of India while issuing an Aadhaar card and the privacy of that individual. The SCI bench ruled:

It is better that the ratio decidendi of M.P. Sharma (supra) and Kharak Singh (supra) is scrutinized and the jurisprudential correctness of the subsequent decisions of this court where the right to privacy is either asserted or referred be examined and authoritatively decided by a bench of appropriate strength.

However, the bench has made the issuing of Aadhar cards only with consent. It has also ordered some directives so that the information obtained for the Aadhar card is not used for any other purpose. Similar questions were again brought before the SCI in *Binoy Viswam vs. Union of India and Ors.* and *K.S. Puttaswamy and Ors. vs. Union of India and Ors.* Even in this case the SCI refrained from resolving the dispute between information obtained for the Aadhar card and privacy of the individual.

However, in *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* the right to privacy was discussed in depth by the SCI. The court dealt with the question of whether the Aadhar card scheme violated the right to privacy, whether there was any fundamental right of privacy under the Indian constitution, and also scrutinized the view taken by the bench in *M.P. Sharma and Ors. vs. Satish Chandra* and Kharak Singh vs. The State of U.P. and Ors. regarding the right to privacy. Stating that "privacy ensures the fulfillment of dignity and was a core value which the protection of life and liberty was intended to achieve", the SCI held that:

188. ..... privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function (AIR2017SC4161).

In this case the SCI (AIR2017SC4161) went on to discuss "the normative and descriptive functions" of the right to privacy and held that:

> *At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.*

In defining the normative and descriptive functions of the right to privacy the SCI has given a brief description about the scope of the right to privacy.

> *Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture.*

This definition of the right to privacy defines the scope of the right by asserting it is entangled with living a human life. The SCI went on to state, "it was important to underscore that privacy was not lost or surrendered merely because the individual was in a public place … privacy attaches to the person since it was an essential facet of the dignity of the human being". However, the SCI repeated the view taken in *Govind vs. State of Madhya Pradesh and Ors.* that "privacy is not an absolute right". Although the Court did not acknowledge the right to privacy as an absolute right, it went on to prescribe a test to answer whether the right to privacy can be overridden or not:

> *A law which encroaches upon privacy would have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which was fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.*

Further justifying its position the SCI stated:

> *Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III. Judicial recognition of the existence of a constitutional right of privacy was not an*

exercise in the nature of amending the Constitution nor was the Court embarking on a constitutional function of that nature which was entrusted to Parliament. […]Present Court has not embarked upon an exhaustive enumeration or a catalog of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the Rule of law. The meaning of the Constitution could not be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features.

Further, illustrating the right to privacy as fundamental right recognized by the Indian Constitution the SCI held that:

281. (viii) There is no doubt that privacy is integral to the several fundamental rights recognized by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right of privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which was alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 was liable to be tested. Under Article 21, the standard test at present was the rationality review expressed in Maneka Gandhi's case. This requires that any procedure by which the state interferes with an Article 21 right to be "fair, just and reasonable, not fanciful, oppressive or arbitrary …

411. (xiii) The "right to privacy" emanating from the two expressions of the preamble namely, "liberty of thought, expression, belief, faith and worship" and "Fraternity assuring the dignity of the individual" and also emanating from Article 19(1)(a) which gives to every citizen "a freedom of speech and expression" and further emanating from Article 19(1)(d) which gives to every citizen "a right to move freely throughout the territory of India" and lastly, emanating from the expression 'personal liberty" under Article 21. Indeed, the right to privacy is inbuilt in these expressions and flows from each of them and in juxtaposition …

412. (xiv) "Right to privacy" is a part of fundamental right of a citizen guaranteed under Part III of the Constitution. However, it is not an absolute right but is subject to certain reasonable restrictions, which the State is entitled to impose on the basis of social, moral and compelling public interest in accordance with law.

Lastly, stating "the right of privacy is a fundamental right" the Court held that:

496. (xv)... It is a right which protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

Additionally, after rendering the right to privacy and its constitutional status as fundamental rights the SCI shed light on the extent of privacy and held that:

> *233. (vi) It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter was conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations were to be identified on case to case basis depending upon the nature of the privacy interest claimed. There were different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right of privacy, it was necessary to outline the manner in which such a right to privacy could be limited.*

Stating that "the just, fair and reasonable standard of review under Article 21 needs no elaboration" the Court held that:

> *236.(vii) ... it was critical that this standard be adopted with some clarity as to when and in what types of privacy claims it was to be used. Only in privacy claims which deserve the strictest scrutiny was the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 would apply. When the compelling State interest standard was to be employed must depend upon the context of concrete cases …*
>
> *396. (x) This right is subject to reasonable Regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various Articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy was over fundamental personal choices that an individual was to make, State action could be restrained under Article 21 read with Article 14 if it was arbitrary and unreasonable; and under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by present Court for such legislation or subordinate legislation to pass muster under the said Article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.*

In *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* the SCI went on to address information privacy, emphasizing:

> *190. (v) … Informational privacy was a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. Present Court commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime,*

encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These were matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee, for that purpose, the matter should be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

Additionally scrutinizing the view taken by the bench in *M.P. Sharma and Ors. vs. Satish Chandra* (AIR1954SC300) and *Kharak Singh vs. The State of U.P. and Ors.* (AIR1963SC1295) regarding the right to privacy, the SCI held that:

186. (ii) The judgment in M.P.Sharma holds essentially that in the absence of a provision similar to the Fourth Amendment to the United States Constitution, the right to privacy could not be read into the provisions of Article 20 (3) of the Indian Constitution. The judgment did not specifically adjudicate on whether a right to privacy would arise from any of the other provisions of the rights guaranteed by Part III including Article 21 and Article 19. The observation that privacy is not a right guaranteed by the Indian Constitution is not reflective of the correct position. M.P. Sharma was overruled to the extent to which it indicates to the contrary … (AIR2017SC4161)

187. (iii) Kharak Singh has correctly held that the content of the expression 'life' under Article 21 means not merely the right to a person's "animal existence" and that the expression 'personal liberty' is a guarantee against invasion into the sanctity of a person's home or an intrusion into personal security. Kharak Singh also correctly laid down that the dignity of the individual must lend content to the meaning of 'personal liberty'. The first part of the decision in Kharak Singh which invalidated domiciliary visits at night on the ground that they violated ordered liberty was an implicit recognition of the right to privacy. The second part of the decision, however, which holds that the right to privacy was not a guaranteed right under our Constitution, was not reflective of the correct position. Similarly, Kharak Singh's reliance upon the decision of the majority in Gopalan was not reflective of the correct position in view of the decisions in Cooper and in Maneka. Kharak Singh to the extent that it holds that the right to privacy was not protected under the Indian Constitution was overruled …

283. (ix) The ineluctable conclusion must be that an inalienable constitutional right to privacy inheres in Part III of the Constitution. M.P. Sharma and the majority opinion in Kharak Singh must stand overruled to the extent that they indicate to the contrary. The right to privacy is inextricably bound up with all exercises of human liberty - both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is distributed across the various articles in Part III and, mutatis mutandis, takes the form of whichever of their enjoyment its violation curtails …

377. (xi) The inalienable fundamental right to privacy resides in Article 21 and other fundamental freedoms contained in Part III of the Constitution of India. M.P. Sharma and the majority in Kharak Singh, to the extent that they indicate to the contrary, stand overruled. The later judgments of present Court recognizing privacy as a fundamental right do not need to be revisited. These cases were, therefore, sent back for adjudication on merits to the original Bench of three Judges of present Court …

> *504. (xviii)The decision in M.P. Sharma which holds that the right to privacy is not protected by the Constitution stands overruled, the decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands overruled, the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution and decisions subsequent to Kharak Singh which have enunciated the position above lay down the correct position in law.*

The illustration of the right to privacy and the extent of the right to privacy given by the SCI in *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* was adopted in many cases including *Navtej Singh Johar and Ors. vs. Union of India and Ors. (*AIR2018SC4321), *Joseph Shine vs. Union of India* (AIR2018SC4898), *Kamal Nath vs. Election Commission of India and Ors.* (AIR2019SC336), *Indian Hotel and Restaurant Association and Ors. vs. The State of Maharashtra and Ors.* (AIR2019SC589), *Ritesh Sinha vs. State of Uttar Pradesh and Ors.* (AIR2019SC3592), *P. Gopalkrishnan vs. State of Kerala and Ors.* (AIR2020SC1), *Anuradha Bhasin and Ors. vs. Union of India and Ors.* (MANU/SC/0022/2020), *Chief Information Commissioner vs. High Court of Gujarat and Ors.* (MANU/SC/0275/2020), *Christian Medical College, Vellore Association vs. Union of India and Ors.* (MANU/SC/0424/2020) and *Kantaru Rajeevaru* vs. Indian Young Lawyers Association and Ors.* (MANU/SC/0443/2020). While dealing with the question of bodily integrity and privacy in *Navtej Singh Johar and Ors. vs. Union of India and Ors.* (AIR2018SC4321) the SCI held:

> *524. Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable. The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination. The right to privacy has now been recognized to be an intrinsic part of the right to life and personal liberty Under Article 21. Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15, and 21. The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual. The right to privacy is not simply the "right to be let alone", and has traveled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.* (AIR2017SC4161)

With the change in perspective towards the right to privacy the SCI is showing how, with the advancement of technology, the scope of privacy is also changing. In *Facebook Inc. vs. Union of India and Ors.* (2019(13)SCALE13) the SCI first dealt with the question of 'e-privacy'. As India is still struggling to ensure privacy and the judiciary is struggling to explore the extent of privacy in general, the question of 'e-privacy' remained unsettled. However, the Court in *Facebook Inc. vs. Union of India and Ors.* held that:

9. … We must also highlight that de-encryption, if available easily, could defeat the fundamental right of privacy and de-encryption of messages may be done under special circumstances but it must be ensured that the privacy of an individual is not invaded. ...

12. ... There may be instances where even an individual may have the right to ask for such information to protect his reputation and dignity. We are not sure whether any guidelines in this regard have been framed till date. This aspect may also be addressed.

REFLECTIONS ON THE RESTRICTED APPROACH TO THE RIGHT TO PRIVACY

In this section two pairs of major draft enactments are compared within themselves: the Right to Privacy Bill (2011) is compared to the Right to Privacy Bill (2013), and the Data Protection Bill (2018) is compared to the Data Protection Bill (2019).

THE 2011 AND 2013 RIGHT TO PRIVACY BILLS

The Right to Privacy Bill (2011) was the first enactment to acknowledge a right to privacy and secure it: under section 3 the draft bill stated: "all citizens shall have the right to privacy which shall not be infringed except in accordance with the law and subject to the provisions of this Act". Under articles 4, 5 and 6 the draft bill discussed when privacy can be infringed, and what constitutes and does not constitute an infringement of privacy. The draft bill gave six grounds for infringing the right to privacy: (1) Sovereignty, integrity and security of India, including the strategic, scientific or economic interest of the state; (2) Preventing incitement of any offence; (3) Prevention of public disorder or the detection of crime; (4) Protection of the rights and freedoms of others; (5) In the interest of friendly relations with a foreign state; (6) Any other purpose specifically mentioned in the Act.

Further acknowledging the importance of monitoring data and privacy, article 33 obliges the government to establish a Data Protection Authority of India. Under this draft article, personal data, the security, collection and retention of personal data and many such aspects were addressed. However, the draft bill mainly focused on the protection of personal data. The 2011 Bill was quite an advance which had a narrow, overprotective and rigid view of protecting personal data. It is addressed as an advanced enactment because the Right to Privacy Bill (2011) addresses the issue of cross-border data flows under article 22. However, the authority is obliged to ensure that data is not transferred. The draft bill also provides some exceptions allowing the transfer of data across borders, however, the grounds do not protect the privacy of data, rather it makes it more vulnerable and open.

Later, with numerous additions to the same bill, the Right to Privacy Bill (2013) was proposed. It added nothing new, rather, it made some minor changes making data protection more complicated. The Right to Privacy Bill (2013) removed a "right to privacy". The right, which was explicitly secured under section 3 of the Right to Privacy Bill (2011), was subject to reasonable restriction. Both drafts

expressed government concerns regarding the personal data of the citizen, at the same time, the conflict between the concern over the personal data of the citizen and the right to privacy of the citizen is visible. It is not imprecise to argue that the reason why these draft bills were not enacted was more because of a conflict of interest between the government and citizens.

THE 2018 AND 2019 DATA PROTECTION BILLS

After the previous bills in 2011 and 2013, privacy over personal data was considered once more in the Data Protection Bill (2018). The draft bill was influenced by the European Union's 2018 General Data Protection Regulation (GDPR). Although the Data Protection Bill 2018 was influenced by the GDPR, the former was quite advanced as it acknowledged the continuous evolution of technology. The GDPR does not take into account advancement in technology. However, despite addressing the advancement of technology there are many loopholes in the 2018 Data Protection Bill. The draft bill proposes actions that are not practical and are vague in terms of action. For instance, as per the 2018 GDPR, personal data may only be collected for specified legitimate purposes whereas under the Data Protection Bill (2018), data may be processed (which includes collecting, recording, organizing, structuring, storing, altering, etc.) for specified legitimate purposes. The GDPR (2018) uses the 'compatibility' test, I.e., whether further processing of the data is compatible with the original purpose for which the data was collected for.

On the other hand, the Data Protection Bill (2018) permits incidental processing of personal data, a process which is wider in standard than the compatibility test. So similar to the draft 2011 and 2013 Right to Privacy bills the Data Protection Bill 2018 again proposes more complicated actions and a higher level of data protection. Despite this, one of the promising aspects of the Personal Data Protection Bill (2018) is that the Bill acknowledges the right to forgetting, correction and erasure. The draft bill also addressed the issue of cross-border data flows with the same approach seen in the 2011 and 2013 Right to Privacy bills. This means the Data Protection Bill (2018) focuses on traditional privacy and 'e-privacy' over personal data. Later, the 2018 Bill was revised and a 2019 version was introduced.

From the above analysis a conflict of interest is visible which demonstrates India's rigid, political and controlled perspective towards the right to privacy and data protection. India is highly concerned about data, 'e-privacy' and cross-border data flows, which makes it hold to such a narrow view. From the analysis of these four major draft bills, the unwillingness of Indian legislatures to give citizens the right to privacy is obvious. Indian legislatures always want executive control over the personal data making the right to privacy political in nature. Hence, they want the standard of data protection within the territory to be so high that it makes enforcement difficult, along with the cross-border data flows, which are important for the digital economy. On the other hand, a data protection system requires a monitoring system, capacity building, use of advanced technology and other aspects that are often overlooked. It can be asserted that India wants to hold an authoritative approach towards a right to privacy resulting in conflicts of interest, hence, it is still struggling to ensure the right to privacy for its people.

CONCLUSION

The constitution of India has not recognized a right to privacy in any form—not even home privacy, which is well recognized as the right to be secured against unreasonable search and seizure. Nor is any enactment in force to ensure people's right to privacy. Although the government has made numerous attempts to ensure a right to privacy through enactments previously discussed, but they remained draft bills, mostly because of India's rigid political and controlled perspective towards the right to privacy and data protection.

On the other hand, the Indian judiciary has played an important role in ensuring the right to privacy as a fundamental right, broadening the scope of the right and making it not an absolute right. In the case *M.P. Sharma and Ors. Vs. Satish Chandra and Ors.* (AIR1954SC300) the right to home privacy was implicitly claimed by a petitioner challenging the illegality of a search warrant. The SCI stated:

> *When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy ... we have no justification to import it, into a totally different fundamental right, by some process of strained construction.*

A similar approach regarding the right to privacy can be seen in *Kharak Singh vs. The State of U.P. and Ors.* (AIR1963SC1295) where the SCI clearly stated:

> *The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*

Despite such clarity that the right of privacy is not a guaranteed right under the constitution of India, claims under the right gained momentum. The scope of the right to privacy broadened gradually from home privacy to bodily privacy, and later, from information privacy to communication privacy. The twenty-first century can be called the golden period of the right to privacy, starting with the case *Ram Jethmalani and Ors. vs. Union of India and Ors.* ([2011]8SCR725) where the SCI first recognized the "right to privacy as an integral part of right to life". However, the case did not go further than that. The view towards a right to privacy changed with the case *Justice K.S. Puttaswamy and Ors. vs. Union of India and Ors.* (AIR2017SC4161). Now, with the advancement of technology, the Indian judiciary is preparing to deal with 'e-privacy', a change that happened with the case *Facebook Inc. vs. Union of India and Ors.* (2019(13)SCALE13). Indian legislatures are still struggling to enact a right to privacy and data protection legislation, but hopes are circulating around the latest draft Data Protection Bill. Because of the 'not an absolute right' approach towards the right to privacy the country is still struggling to successfully enact legislation that will harmonize the evolving nature of a right of privacy with the country's interest in restricting that right.

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