LIMITS TO PRIVACY

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CASES

1 Introduction

In 1965, the Supreme Court of India heard and decided *State of UP v. Kaushaliya*[1], a case which involved the question of whether women who are engaged in prostitution can be forcibly removed from their residences and places of occupation, or whether they were entitled, along with other citizens of India, to the fundamental right to move freely throughout the territory of India, and to reside and settle in any part of the territory of India [under Article 19(1)(d) and (e) of the Constitution of India]. In other words, did these women possess an absolute right of privacy over their decisions in respect to their occupation and place of residence? In its decision, the Supreme Court denied them this right holding that "the activities of a prostitute in a particular area... are so subversive of public morals and so destructive of public health that *it is necessary in public interest* to deport her from that place." In view of their 'subversiveness', the statutory restrictions imposed by the Suppression of Immoral Traffic Act on prostitutes, were upheld by the court as constitutionally-permissible "reasonable restrictions" on their movements.

The legal alibis that the State employs to justify its infringement of our privacy are numerous, and range from 'public interest' to 'security of the state' to the "maintenance of law and order". In this chapter we attempt to build a catalogue of these various justifications, without attempting to be exhaustive, with the objective of arriving at a rough taxonomy of such frequently invoked terms. In addition we also examine some the more important justifications such as "public interest" and "security of the state" that have been invoked in statutes and upheld by courts to deprive persons of their privacy.

The statutory venues of deprivation of privacy by the state being many – strictly, *any* statute that imposes any restriction on movement, or authorizes the search or examination of any residence or book, or the interception of communication may be read as a violation of a privacy right — tracking each of these down would not only be an impossible exercise, but also contribute little to the analytical exercise we are attempting here. Instead, in this chapter we only list provisions from a few statutes that are the familiar

[1] *The State of Uttar Pradesh V. Kaushaliya and Others* AIR 1964 SC 416

instruments by which the state impinges on our privacy. This is done with the limited object of arriving at a rough inventory of the common technologies which the state employs to impinge on our privacy.

Even if intrusions into our privacy are statutorily authorised, these statutes must withstand constitutional scrutiny. We therefore, begin this chapter with a discussion of the constitutional framework within which these statutes operate, and against which the severity of their incursions must be measured.

2 Constitutional Jurisprudence on Privacy

The 'right to privacy' has been canvassed by litigants before the higher judiciary in India by including it within the fold of two fundamental rights: the right to freedom under Article 19 and the right to life and personal liberty under Article 21.

It would be instructive to provide a brief background to each of these Articles before delving deeper into the privacy jurisprudence expounded by the courts under them.
Part III of the Constitution of India (Articles 12 through 35) is titled 'fundamental rights' and lists out several rights which are regarded as fundamental to all citizens of India (some apply all persons in India whether citizens or not). Article 13 forbids the State from making "any law which takes away or abridges the rights conferred by this Part".

Thus, Article 19(1) (a) stipulates that "all citizens shall have the right to freedom of speech and expression". However this is qualified by Article 19(2) which states that this will not "affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes *reasonable restrictions* on the exercise of the right … in the interests of the **sovereignty and integrity of India**, the **security of the State**, **friendly relations with foreign States**, **public order**, **decency or morality**, or in relation to **contempt of court, defamation or incitement to an offence**".
Thus, the freedom of expression guaranteed by Article 19(1) (a) is not absolute, but a qualified right that is susceptible, under the Constitutional scheme, to being curtailed under specified conditions.

The other important fundamental right from the perspective of privacy jurisprudence is Article 21 which reads "No person shall be deprived of his life or personal liberty except **according to procedure established by law**."

Where Article 19 contains a detailed list of conditions under which freedom of expression may be curtailed, by contrast Article 21 is thinly-worded and only requires a "procedure established by law" as a pre-condition for the deprivation of life and liberty. However, the Supreme Court has held in a celebrated case *Maneka Gandhi vs. Union of India*[2] that any procedure "which deals with the modalities of regulating, restricting or even rejection of a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus, understood, 'procedure' must rule out anything arbitrary, freakish or bizarre."

Four decisions by the Supreme Court have established the right to privacy in India as flowing from Articles 19 and 21.

The first was a seven-judge bench judgment in *Kharak Singh vs The State of U.P*[3]. The question for consideration before this court was whether 'surveillance' under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by 'domiciliary visits at night' was held to be violative of Article 21.The word 'life' and the expression 'personal liberty' in Article 21 were elaborately considered by this court in Kharak Singh`s case. Although the majority found that the Constitution contained no explicit guarantee of a 'right to privacy', it read the right to personal liberty expansively to include a right to dignity. It held that "an unauthorised 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".

[2] (1978) 2 SCR 621
[3] (1964) 1 SCR 332

In a minority judgment in this case, Justice Subba Rao held that "the right to personal liberty takes is not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. 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. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his '"castle" it is his rampart against encroachment on his personal liberty." This case, especially Justice Subba Rao's observations, paved the way for later elaborations on the right to privacy using Article 21.

In 1972, the Supreme Court decided a case – one of the first of its kind – on wiretapping. In *R. M. Malkani vs State of Maharashtra*[4] the petitioner's voice had been recorded in the course of a telephonic conversation where he was attempting blackmail. He asserted in his defence that his right to privacy under Article 21 had been violated. The Supreme Court declined his plea holding that "the telephonic conversation of an innocent citizen will be protected by courts against wrongful or high handed interference by tapping the conversation. *The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.*"

The third case, *Govind vs. State of Madhya Pradesh*[5], by a three-judge bench of the Supreme Court is regarded as being a setback to the right to privacy jurisprudence. Here, the court was evaluating the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulation which provided for police surveillance of habitual offenders including domiciliary visits and picketing. The Supreme Court desisted from striking down these invasive provisions holding that "It cannot be said that surveillance by domiciliary visit, would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead criminal lives that are subjected to surveillance.

[4] AIR 1973 SC 157, 1973 SCR (2) 417
[5] (1975) 2 SCC 148

The court went on to make some observations on the right to privacy under the Constitution:

> "Too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty, the right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from them it could not he absolute. It must be subject to restriction on the basis of compelling public interest. But the law infringing it must satisfy the compelling state interest test. *It could not be that under these freedoms that the Constitution-makers intended to protect or protected mere personal sensitiveness"*

The next case in the series was *R. Rajagopal vs. State of Tamil Nadu*[6] which involved a balancing of the right of privacy of citizens against the right of the press to criticize and comment on acts and conduct of public officials. The case related to the alleged autobiography of Auto Shankar who was convicted and sentenced to death for committing six murders. In the autobiography, he had commented on his contact and relations with various police officials. The right of privacy of citizens was dealt with by the Supreme Court in the following terms: -

(1) 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. 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 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.

[6] (1994) 6 S.C.C. 632

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

Elsewhere in the same decision, the court took a cautionary stance and held that "the right to privacy...will necessarily have to go through a process of case-by-case development."

The final case that makes up the 'privacy quintet' in India was the case of *PUCL v. Union of India*[7] in which the court was called upon to consider whether wiretapping was an unconstitutional infringement of a citizen's right to privacy. The court held:

> The right 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 a '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.

The court also read this right to privacy as simultaneously deriving from Article 19. "When a person is talking on telephone, he is exercising his right to freedom of speech

[7] AIR 1997 SC 568

and expression", the court observed, and therefore "telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1) (a) of the Constitution."

However, the court in this case made two observations which would have a lasting impact on privacy jurisprudence in India –firstly, it rejected the contention that 'prior judicial scrutiny' should be mandated before any wiretapping could take place and accepted the contention that administrative safeguards would be sufficient.

Thus, to conclude this section of this chapter, it may be observed that the right to privacy in India is, at its foundations a *limited* right rather than an absolute one. In the sections that follow, it will become apparent that this limited nature of the right provides a somewhat unstable assurance of privacy since it is frequently made to yield to all manners of competing interests which happen to have a more pronounced legal standing.

3 Vocabularies of Privacy Limitation

Article 12 of the Universal Declaration of Human Rights (1948) defines privacy in the following terms:
"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Similarly, Article 17 of the International Covenant of Civil and Political Rights (to which India is a party) declares that:
"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

In this section, we look briefly at sections in some statutes that authorize the deprivation of privacy. These statutes have been classified under three headings, following the aforementioned international covenants, each dealing with a) our communications, b) our homes and c) bodily privacy.

3.1 Privacy of Communications

3.1.1 Communications laws

All laws dealing with mediums of inter-personal communication – post, telegraph and telephony and email – contain similarly worded provisions permitting interception under specified conditions.

Thus, section 26 of the India Post Office Act 1898 confers powers of interception of postal articles for the 'public good'. According to this section, this power may be invoked "On the occurrence of any public emergency, or in the interest of the public safety or tranquillity". The section further clarifies that "a certificate from the State or Central Government" would be conclusive proof as to the existence of a public emergency or interest of public safety or tranquillity.

Similarly, section 5(2) of the Telegraph Act authorizes the interception of any message

a) on the occurrence of any *public emergency*, or in the interest of the *public safety*; and
b) 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,

Thus, the events that trigger an action of interception are the occurrence of any 'public emergency' or in the interests of 'public safety'.

Most recently, section 69 of the Information Technology Act 2008 contains a more expanded power of interception which may be exercised "when they [the authorised officers] are satisfied that it is necessary or expedient" to do so in the interest of

a) sovereignty or integrity of India,
b) defence of India,
c) security of the State,
d) friendly relations with foreign States or

e) public order or

f) preventing incitement to the commission of any cognizable offence relating to above or

g) for investigation of any offence,

[More details of the occasions and the mandatory procedural safeguards before these powers may be exercised are contained in our briefing notes on Privacy and Telecommunications and Privacy and the IT Act]

From a plain reading of these sections, there appears to be a gradual loosening of standards from the Post Office Act to the latest Information Technology Act. The Post Office Act requires the existence of a 'state of public emergency' or a 'threat to public safety and tranquillity' as a precursor to the exercise of the power of interception. This requirement is continued in the Telegraph Act with the addition of a few more conditions, such as expediency in the interests of sovereignty, etc. Under the most recent IT Act, the requirement of a public emergency or a threat to public safety is dispensed with entirely – here, the government may intercept merely if it feels it 'necessary or expedient'.

How much of a difference does it make?

In *Hukam Chand Shyam Lal v. Union of India and ors*[8], the Supreme Court was required to interpret the meaning of 'public emergency'. Here, the court was required to consider whether disconnection of a telephone could be ordered due to an 'economic emergency'. The Government of Delhi had ordered the disconnection of the petitioner's telephones due to their alleged involvement, through the use of telephones, in (then forbidden) forward trading in agricultural commodities. According to the government, this constituted an 'economic emergency' due to the escalating prices of food. Declining this contention, the Supreme Court held that:

> a 'public emergency' within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity

[8] AIR 1976 SC 789 , 1976 SCR (2)1060 , (1976) 2 SCC 128

> of India, the security of the State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence.
>
> Economic emergency is not one of those matters expressly mentioned in the statute. Mere 'economic emergency'— as the high court calls it—may not necessarily amount to a 'public emergency' and justify action under this section unless it raises problems relating to the matters indicated in the section

In addition the other qualifying term, 'public safety' was interpreted in an early case by the Supreme Court to mean "security of the public or their freedom from danger. In that sense, anything which tends to prevent dangers to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context."[9]

Thus, the words 'public emergency' and 'public safety' does provide some legal buffer before the government may impinge on our privacy in the case of post and telecommunications. In a sense, they operate both as limits on our privacy as well as limits on the government's ability to impinge on our privacy – since the government must demonstrate their existence to the satisfaction of the court, failing which their actions would be illegal.

However, as mentioned, even these requirements have been dispensed with in the case of electronic communications falling under the purview of the Information Technology Act where sweeping powers of interception have been provided extending from matters affecting the sovereignty of the nation, to the more mundane "investigation of any offence".

[9] Romesh Thappar vs The State Of Madras AIR 1950 SC 124 , 1950 SCR 594

3.1.2 Privileged Communications

In addition to laying down procedural safeguards which restrict the conditions under which our communication may be intercepted, the law also safeguards our privacy in certain contexts by *taking away the evidentiary value of certain communications.*
Thus, for instance, under the Evidence Act, communications between spouses and communications with legal advisors are accorded a special privilege.

Section 122 of the Evidence Act forbids married couples from disclosing any communications made *between them* during marriage without the consent of the person who made it. This however, does not apply in suits "between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other."
This rule was applied in a case before the Kerala High Court, *T.J. Ponnen vs M.C. Varghese*[10] where a man sued his son-in-law for defamation based on statements about him written in a letter addressed to his daughter. The trial court held that the prosecution was invalid since it was based on privileged communications between the couple. This was upheld by the high court. The petitioner had attempted to argue that it was immaterial how he gained possession of the letter. The high court disagreed with this contention holding that this would defeat the purpose of section 122.

Similarly section 126 forbids "barristers, attorneys, pleaders or vakils" from disclosing, without their client's express consent "any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil... or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment."
As with section 122, this privilege also comes with exceptions. Thus, the following kinds of communications are exempted from the privilege:
1. any communication made in furtherance of any illegal purpose,
2. any fact observed by any barrister, pleader, attorney or vakil, in the course of his

[10] 1966 AIR 1967 Ker 228, 1967 CriLJ 1511

employment as such showing that any crime or fraud has been committed since the commencement of his employment.

Section 127 extends the scope attorney-client privilege to include any interpreters, clerks and servants of the attorney or barrister. They are also not permitted to disclose the contents of any communication between the attorney and her client.

Section 129 enacts a reciprocal protection and provides that clients shall not be compelled to disclose to the court any "confidential communication which has taken place between him and his legal professional adviser."

Section 131 of the Evidence Act further cements the legal protection afforded to married couples, attorneys and their clients by providing that "No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession" unless that person consents to the production of such documents.

Note that these privileges do not limit the ability of the state to intercept communications – they merely negate the evidentiary value of any communications so intercepted.

3.2 Privacy of the Home: Search and Seizure Provisions

Under what circumstances may the State invade the privacy of our homes? What are the limits of these powers? Technically, any law that authorizes "search and seizure" can be said to authorize an invasion of our privacy. Many laws permit searches, for various grounds — ranging from the Income Tax Act which authorizes searches to recover undisclosed income, to the Narcotics Act which prescribes a procedure to search and sieze drugs, to the Excise Act and the Customs Act which do so in order to discover goods that are manufactured or imported in violation of those respective statutes. In this section we deal only with the general provisions for search and seizure under the Code of Criminal Procedure.

The Code of Criminal Procedure (CrPC) provides that a house or premises may be

searched either under a *search warrant issued by a court*, or, in the absence of a court-issued-warrant, *by a police officer in the course of investigation of offences*.

Thus, a court may issue a search warrant where
(a) it has *reason to believe* that a person to whom a summons has been, or might be, addressed, will not or would not produce the document or thing as required by such summons; or
(b) where such document or thing is not known to the court to be in the possession of any person, or
(c) where the court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

Similarly, section 165 of the Code of Criminal Procedure permits for searches to be conducted by "police officers in charge of police station or a police officer making an investigation" without first obtaining a warrant. Such a search may be conducted if he has "*reasonable grounds* for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached", and if, in his opinion, such thing *cannot "be otherwise obtained without undue delay*".
Such officer must record in writing the grounds of his belief and specify "so far as possible" the thing for which search is to be made.

In both cases, the Code of Criminal Procedure requires the search to conform to procedures including the presence of "two or more independent and respectable inhabitants of the locality". The preparation, in their presence, of "a list of all things seized in the course of such search, and of the places in which they are respectively found", the delivery of this list to the occupant of the place being searched.

However, in reality, these requirements are observed more in the breach. Courts have consistently held that *not* following these provisions would not make evidence obtained

inadmissible — it would make the search irregular, not unlawful. Thus, in *State Of Maharashtra v. Natwarlal Damodardas Soni*[11], where a search was conducted under the Customs Act to recover smuggled gold, the Supreme Court held that

> Assuming that the search was illegal it would not affect either the validity of the seizure and further investigation by the customs authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.

In a different case, *Radhakrishan v. State of U.P.*[12] which involved an illegal search in contravention of the Code of Criminal Procedure , the Supreme Court held that:

> "So far as the alleged illegality of the search is concerned, it is sufficient to say that even assuming that the search was illegal the seizure of the Articles is not vitiated. It may be that where the provisions of ... Code of Criminal Procedure, are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues."

India inherits the common law notion that "a man's house is his castle". In the light of the cases discussed above, this claim certainly appears to be lofty. However, there is still hope. In a recent case, the Supreme Court struck down provisions of a legislation on grounds that it was too intrusive of citizens' right to privacy. The case involved an evaluation of the Andhra Pradesh Stamp Act which authorized the collector to delegate "any person" to enter any premises in order to search for and impound any document that was found to be improperly stamped. Thus, for instance, banks could be compelled to cede all documents in their custody, including clients documents, for inspection on the mere chance that some of them may be improperly stamped. These banks were then compelled under law to pay the deficit stamp duty on the documents, even if they themselves were not party to the transactions recorded in the documents.

[11] AIR 1980 SC 593 , 1980 SCR (2) 340
[12] [1963] Supp. 1 S.C.R. 408

After an exhaustive analysis of privacy laws across the world, and in India, the Supreme Court held that in the absence of any safeguards as to probable or reasonable cause or reasonable basis, this provision was violative of the constitutionally guaranteed right to privacy "both of the house and of the person". [13]

The case marks a welcome redrawing of the boundaries of the right to privacy against state intrusion.

3.3 Privacy of the Body

To what extent do we have a right to privacy that protects what we may do with our own bodies and may be done to them? This section deals with this question in the context of four issues that have arisen before courts a) the ability of the state to order persons to undergo medical-examination, b) to undergo a range of "truth technologies" including narco analysis, brain mapping, etc., c) to submit to DNA testing and d) to abortion. In most cases, as we shall see, the right to privacy cedes ground to any available competing interest.

3.3.1 Court-ordered Medical Examinations

Can courts compel persons to undergo medical examinations against their will? In the case of *Sharda v. Dharmpal*[14], decided in 2003, the Supreme Court held that they could. Here a man filed for divorce on that grounds that his wife suffered from a mental illness. In order to establish his case, he requested the court to direct his wife to submit herself to a medical examination. The trial court and the high court both granted his application. On appeal to the Supreme Court, the woman contested the order on grounds firstly, that compelling a person to undergo a medical examination by an order of the court would be violative of her right to 'personal liberty' guaranteed under Article 21 of the Constitution of India. Secondly, in absence of a specific empowering provision, a court dealing with matrimonial cases cannot subject a party to undergo medical examination against his her volition. The court could merely draw an adverse inference.

[13] *Distt. Registrar & Collector, Hyderabad v. Canara bank etc*. AIR 2005 SC 186
[14] (2003) 4 SCC 493

The Supreme Court rejected these contentions holding that the right to privacy in India was not absolute. If the "respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory."

The court upheld the rights of matrimonial courts to order a person to undergo medical test. Such an order, the court held, would not be in violation of the right to personal liberty under Article 21 of the Constitution of India. However, this power could only be exercised if the applicant had a strong prima facie case, and there was sufficient material before the court. Crucially, the court held that if, despite the order of the court, the respondent refused to submit herself to medical examination, the court would be entitled to draw an adverse inference against him.

Thus, oddly, one limitation on the right to privacy appears to be the statutory rights of others. One is entitled to the privacy of one's body, to the extent that another person is not, thereby, deprived of a statutory right – as in this case, to divorce.

3.3.2 Reproductive Rights

> Ahmedabad: A 13-year-old girl, who conceived after being repeatedly raped, has moved the Gujarat High Court and sought permission to medically terminate her pregnancy after a sessions court rejected her plea.
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> Express India(April 2010) [15]

To what extent do pregnant women enjoy a right to privacy over their bodies and their reproductive decisions? Are there circumstances when the State can intervene and either order or forbid an abortion?

[15] 13-yr-old rape victim to HC: let me abort -, EXPRESS INDIA, April 21, 2010, http://tinyurl.com/13yrindian (last visited May 2, 2010).

According to the Medical Termination of Pregnancy Act, 1971 a pregnancy may be terminated before the twentieth week if:
(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.
(iii) where any pregnancy is alleged by the pregnant woman to have been caused by rape,
(iv) where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children,

Consent for termination needs to be obtained from the guardian in cases of minors or women who are mentally ill. In all other cases, the woman herself must consent.

Beyond the period of 20 weeks, the pregnancy may only be terminated if there is immediate danger to the life of the woman.

In August 2009, the Supreme Court heard an expedited appeal that was filed on behalf of a destitute mentally retarded woman who had become pregnant consequent to having been raped at a government run shelter. The government had approached the high court seeking permission to terminate her pregnancy, which had been granted by that court despite the finding by an 'expert body' of medical practitioners that she was keen on continuing the pregnancy. On appeal the Supreme Court held, very curiously, that the woman was not 'mentally ill', but 'mentally retarded', and consequently her consent was imperative under the Act.[16] However, not content to stop there, the court made several puzzling and contradictory observations:

[16] *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1. http://courtnic.nic.in/supremecourt/temp/dc%201798509p.txt (last visited May 2, 2010).

Firstly, the court took the opportunity to affirm, generally, women's rights to make reproductive choices as a dimension of their `personal liberty' as guaranteed by Article 21 (Right to Life and Personal Liberty) of the Constitution of India. The court observed:

> "It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. *The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected*. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as 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. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. (emphasis mine) [17]

However, the court went on to affirm, in language that curiously imitates *Roe v Wade*[18], that there was "a `compelling state interest' in protecting the life of the prospective child.[19]

Secondly, the Supreme Court upheld the woman's consent as determinative and in doing so, categorically rejected the high court approach. The court held that since she suffered from `mild mental retardation' this did not render her "incapable of making decisions for herself". Simultaneously, however, the Supreme Court proceeded gratuitously to apply the common law doctrine of `parens patriae' to resume jurisdiction over the woman in her "best interests". According to a court-appointed expert committee, her mental age was "close to that of a nine-year old child" and she was capable of "learning through rote memorisation and imitation" and of performing "basic bodily functions".[20] In this light, the court deemed in her 'best interests', as defined by an expert committee, to defer to her wishes.

> The findings recorded by the expert body indicate that her mental age is close to that of a nine-year old child and that she is capable of learning through rote-

[17] *Ibid*
[18] 410 U.S. 113 (1973)
[19] Article 21 does not limit the abridgement of the right to life by the state to only cases where the state has compelling state interest. The Article reads "No person shall be deprived of his life or personal librty except according to *procedure established by law*"
[20] *Ibid*

> memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the `best interests' test alone which should govern the inquiry in the present case and not the `substituted judgment' test.[21]

If one disregards the liberalism of its outcome, there are various problems with this decision. Chiefly, the Supreme Court relied on the woman's expressed consent to deny the legitimacy of the high court's decision in favour of abortion. Inexplicably, however, in the same move, the Supreme Court reserved to itself the right to adjudicate the 'best interests' of the woman. Thus, in relation to abortion, mentally retarded women are more autonomous than minor girls (since their own consent is determinative, rather than their guardians) but they are still less autonomous than 'normal' women (since their decisions are subject to adjudication based on what the court thinks is in their best interests)!

3.3.3 DNA Tests in Civil Suits

Do we have a right to privacy over the interiors of our body – our blood, our tissue, our DNA? There is, by now, a strong line of cases decided by the Supreme Court in which our right to 'bodily integrity' has been held to not be absolute, and may be interfered with in order to settle many terrestrial issues. In most cases, this question has arisen in the context of the determination of paternity – either in divorce or maintenance proceedings. Central in the determination of these issues is section 112 of the Evidence Act which stipulates that birth of a child during the continuance of a valid marriage (or within 280 days of its dissolution) would be conclusive proof of legitimacy of that child, "*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.*"

As is evident, this section creates a strong *legal* presumption of legitimacy that leaves no room for a scientific rebuttal. Various litigants have, nevertheless, sought the courts' indulgence in accepting medical evidence to displace this formidable legal presumption. These efforts have yielded a measure of success, and a steady line of precedents since the early 1990s now affirms the right of courts to direct medical evidence in cases they

[21] *Ibid*

consider fit. In these cases, the court has frequently invoked privacy rights as an important consideration to be weighed before ordering a person to submit to any test.

In one of the earliest and most frequently invoked cases, *Goutam Kundu vs State of West Bengal and Anr* (1993)[22] the Supreme Court laid down guidelines governing the power of courts to order blood tests. The court held:

> "1) courts in India cannot order blood test as matter of course;
>
> (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
>
> (3) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.
>
> (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> (5) No one can be compelled to give sample of blood for analysis."

On the particular facts of this case, the Supreme Court refused to order the respondent to submit to the test, since in its view, there was no *prima facie* case made out that cast doubts on the legal presumption of legitimacy.

These guidelines have been frequently invoked in subsequent cases. In a complex set of facts, in *Ms. X vs Mr. Z and Anr* [23](2001), the Delhi High Court was called to consider whether a foetus had a 'right to privacy' – or whether the mother of the foetus could assert a right to privacy on it's behalf. A woman had given birth to a still-born child and tissues from the foetus had been stored at the All India Institute of Medical Sciences. Her husband approached to obtain an order permitting a DNA test to be carried out to determine if he was the father. In her defence, the woman claimed that this would offend her right to privacy. The high court reaffirmed the guidelines laid down in the *Gautam*

[22] AIR 1993 SC 2295, 1993 SCR (3) 917 <http://indiankanoon.org/doc/1259126/>
[23] AIR 2002 Delhi 217 <http://indiankanoon.org/doc/627683/>

Kundu case (supra), and also upheld the petitioner's right to privacy over her own body. However, the court took the stance that she did not have a right of privacy over the foetus once it had been discharged from her body:

> "The petitioner indeed has a right of privacy but is being not an absolute right, therefore, when a foetus has been preserved in All India Institute of Medical Science, the petitioner, who has already discharged the same cannot claim that it affects her right of privacy.
>
> However, if the petitioner was being compelled to subject herself to blood test or otherwise, she indeed could raise a defense that she cannot be compelled to be a witness against herself in a criminal case or compelled to give evidence against her own even in a civil case but the position herein is different. The petitioner is not being compelled to do any such act. Something that she herself has discharged, probably with her consent, is claimed to be subjected to DNA test. In that view of the matter, in the peculiar facts, it cannot be termed that the petitioner has any right of privacy."

The decision has wide-ranging implications since it virtually divests control and ownership over any material that has been discarded from the body – from nails to hair to tissue samples. In an interesting case in the US, *Moore v. Regents of the University of California*[24], the Supreme Court of California was faced with a suit to determine whether a man retained ownership over cells that had been removed from his body through a surgical procedure. In this case, cells from a patient's spleen were used to conduct research which resulted in the patenting of a cell-line by the defendant. The patient sued for a share in the profits, but this was rejected by the court which held that he had no property rights to his discarded cells or any profits made from them. The court specifically rejected the argument that his spleen should be protected as property as an aspect of his privacy and dignity. The court held these interests were already protected by informed consent.

[24] 51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479

In a sense the *Ms. X vs Mr. Z* case arrives at identical conclusions without as much deliberation on its implications. It would be interesting to see how subsequent courts interpret and apply this precedent.

One of the most critical factors, consistently weighed by courts alongside the privacy rights implicated, is the 'best interests' of the child. Thus, in *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women & Anr*.[25], the Supreme Court quashed a high court-mandated DNA test to determine the paternity of an unborn child in a woman's womb. In doing so, the SC observed:

> "In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. *The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child.* Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. *In our view, 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 whether, for a just decision in the matter, DNA is eminently needed.* (emphasis added)

A strong trend, evident in this case, is the bussing of the interests of the child (in not being declared illegitimate), along with the privacy rights of the mother. The two create a composite interest opposed to that of the putative father, which the courts have been reluctant to interfere with except for the most compelling reasons. But what happens when then the interests of the child conflict with the privacy rights of either parent?

[25] AIR 2010 SC 2851 <http://indiankanoon.org/doc/486945/>

In a high profile case in 2010, *Shri Rohit Shekhar vs Shri Narayan Dutt Tiwari*[26], the Delhi High was called upon to determine whether a man had a right to subject the person he named as his biological father to a DNA test. Contrary to the trend in the preceding cases, it was the biological father who pleaded his right to privacy in this case. The court relied on international covenants to affirm the "right of the child to know of her (or his) biological antecedents" irrespective of her (or his) legitimacy. The court ruled:

> There is of course the vital interest of child to not be branded illegitimate; yet the conclusiveness of the presumption created by the law in this regard must not act detriment to the interests of the child. If the interests of the child are best sub-served by establishing paternity of someone who is not the husband of her (or his) mother, the court should not shut that consideration altogether.
>
> The protective cocoon of legitimacy, in such case, should not entomb the child's aspiration to learn the truth of her or his paternity.

The court went on to draw a distinction between legitimacy and paternity that may both "be accorded recognition under Indian law without prejudice to each other. While legitimacy may be established by a legal presumption [under section 112 of the Evidence Act], paternity has to be established by science and other reliable evidence"[27] The court, however, reaffirmed that the same considerations would apply as was laid down in previous cases – i.e., the plaintiff would have to establish a prima facie case and weigh the competing interests of privacy and justice before it could order a DNA test. In this case, the petitioner was able to produce DNA evidence that excluded the possibility that his legal father was his biological father. In addition, photographic and testimonial evidence suggested that the respondent could be his biological father. On these grounds the Delhi High Court ordered the respondent to undergo a DNA test. This was upheld in an appeal to the Supreme Court.

[26] 23 December, 2010 <http://indiankanoon.org/doc/504408/>
[27] *Ibid*

So from the foregoing cases, it appears that it is the 'best interests of the child' that undergrids the right to privacy of either parent. When the two are in conflict it is the former that will, the case law suggests, invariably prevail.

3.3.4 Bodily Effects — Fingerprints, handwriting samples, photographs, Irises, narco-analysis, brain maps and DNA

The human body easily betrays itself. We are incessantly dropping residues of our existence wherever we go – from shedding hair and fingernails, to fingerprints and footprints, handwriting – which, through use of modern technology, can implicate our bodies, and identify us against our will. Not even our thoughts are immune as new technologies like brain mapping pretend to be able to harvest psychic clues from our physiology.

In this section we explore occasions when the state may compel us to 'perform' our existence for instance, by submitting to photography, providing finger impressions or handwriting samples, submit to narco-analysis and truth tests, and more recently to provide iris scan data or our DNA.

Section 73 of the Evidence Act stipulates that the court "may direct any person present in the court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person."

This section was interpreted by the Supreme Court in *State of U.P. v. Ram Babu Misra*[28] where it was held that there must be "some proceeding before the court in which...it might be necessary... to compare such writings". This specifically excludes, say, a situation where the case is still under investigation and there is no present proceeding before the court. "The language of section 73 does not permit a court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the court."

[28] AIR 1980 SC 791 , 1980 SCR (2)1067 , (1980) 2 SCC 343

The pre-independence Identification of Prisoners Act, 1920 provides for the mandatory taking, by police officers, of "measurements" and photograph of persons arrested or convicted for any offence punishable with rigorous imprisonment for a term of one year of upwards or ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure.[29] The Act also empowers a magistrate to order a person to be measured or photographed if he is satisfied that it is required for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898.[30]

The Act also provides for the destruction of all photographs and records of measurements on discharge or acquittal.[31]

In addition, the Code of Criminal Procedure was amended in 2005 to enable the collection of a host of medical details from accused persons upon their arrest. Section 53 of the Code of Criminal Procedure provides that upon arrest, an accused person may be subjected to a medical examination if there are "reasonable grounds for believing" that such examination will afford evidence as to the crime. The scope of this examination was expanded in 2005 to include "the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling *and such other tests which the registered medical practitioner thinks necessary* in a particular case."

In a case in 2004, the Orissa High Court affirmed the legality of ordering a DNA test in criminal cases to ascertain the involvement of persons accused. Refusal to co-operate would result in an adverse inference drawn against the accused.

After weighing the privacy concerns involved, the court laid down the following considerations as relevant before the DNA test could be ordered.

[29] Sections 3 & 4 of the Identification of Prisoners Act, 1920
[30] Ibid, Section 5
[31] Section 7

> "(i) the extent to which the accused may have participated in the commission of the crime;
> (ii) the gravity of the offence and the circumstances in which it is committed;
> (iii) age, physical and mental health of the accused to the extent they are known;
> (iv) whether there is less intrusive and practical way of collecting evidence tending to confirm or disprove the involvement of the accused in the crime;
> (v) the reasons, if any, for the accused for refusing consent"[32]

Most recently the draft DNA Profiling Bill pending before the Parliament attempts to create an ambitious centralized DNA bank that would store DNA records of virtually anyone who comes within any proximity to the criminal justice system. Specifically, records are maintained of suspects, offenders, missing persons and "volunteers". The schedule to the Bill contains an expansive list of both civil and criminal cases where DNA data will be collected including cases of abortion, paternity suits and organ transplant. Provisions exist in the bill that limit access to and use of information contained in the records, and provide for their deletion on acquittal. These are welcome minimal guarantors of privacy.

It is evident that the utility of this mass of information – fingerprints, handwriting samples and photographs, DNA data – in solving crimes is immense. Without saying a word, it is possible for a person to be convicted based on these various bodily affects – the human body constantly bears witness and self-incriminates itself. Both handwriting and finger impressions beg the question of whether these would offend the protection against self-incrimination contained in Article 20(3) of our Constitution which provides that "No person accused of any offence shall be compelled to be a witness against himself." This argument was considered by the Supreme Court in *The State of Bombay vs Kathi Kalu Oghad and Others*[33] The petitioner contended that the obtaining of evidence through legislations such as the Identification of Prisoners Act amounted to compelling the person accused of an offence "to be a witness against himself" in contravention of

[32] *Thogorani Alias K. Damayanti vs State Of Orissa And Ors* 2004 Cri L J 4003 (Ori) < http://indiankanoon.org/doc/860378/>
[33] AIR 1961 SC 1808 < http://indiankanoon.org/doc/1626264/>

Article 20(3) of the Constitution. The court held that "there was no infringement of Article 20(3) of the Constitution in compelling an accused person to give his specimen handwriting or signature, or impressions of his thumb, fingers, palm or foot to the investigating officer or under orders of a court for the purposes of comparison. *...Compulsion was not inherent in the receipt of information from an accused person in the custody of a police officer; it will be a question of fact in each case to be determined by the court on the evidence before it whether compulsion had been used in obtaining the information*."[34]

Over the past two decades, forensics has shifted from trying to track down a criminal by following the trail left by her bodily traces, to attempting to apply a host of invasive technologies upon suspects in an attempt to 'exorcise' truth and lies directly from their body. One statement by Dr M.S. Rao, Chief Forensic Scientist, Government of India captures this shift:

> Forensic psychology plays a vital role in detecting terrorist cases. Narco-analysis and brainwave fingerprinting can reveal future plans of terrorists and can be deciphered to prevent terror activities⁄ Preventive forensics will play a key role in countering terror acts. Forensic potentials must be harnessed to detect and nullify their plans. Traditional methods have proved to be a failure to handle them. Forensic facilities should be brought to the doorstep of the common man⁄ Forensic activism is the solution for better crime management.[35]

Although there are several such 'technologies' which operate on principles ranging from changes in respiration, to mapping the electrical activity in different areas of the brain, what is common to them all, in Lawrence Liang's words is that they "maintain that there is a connection between body and mind; that physiological changes are indicative of mental states and emotions; and that information about an individual's subjectivity and

[34] *Ibid*

[35] Keynote address given to the 93rd Indian Science Congress. See http://mindjustice.org/india2-06.htm, cited in Liang, L., 2007. And nothing but the truth, so help me science. In *Sarai Reader 07 - Frontiers*. Delhi: CSDS, Delhi, pp. 100-110. Available at: http://www.sarai.net/publications/readers/07-frontiers/100-110_lawrence.pdf [Accessed April 11, 2011].

identity can be derived from these physiological and physiological measures of deception"[36]

So, how legal are these technologies, in view of the constitutional protections against self-incrimination? In a case in 2004 the Bombay High Court upheld these technologies by applying the logic of the *Kathi Kalu Oghad* case discussed above. 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."[37]

This position was however overturned recently by the Supreme Court in *Selvi v. State of Karnataka*[38] (2010). In contrast with the Bombay High Court, the Supreme Court expressly invoked the right of privacy to hold these technologies unconstitutional.

> "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."

Further down, the court held that such techniques invaded the accused's mental privacy which was an integral aspect of their personal liberty.

> "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 drug-induced revelations or the substantive inferences drawn from the measurement of

[36] *Ibid*
[37] Ramchandra Ram Reddy v. State of Maharashtra [1 (2205) CCR 355 (DB)
[38] (2010) 7 SCC 263 http://indiankanoon.org/doc/338008/

> the subject's physiological responses can be described as an intrusion into the subject's mental privacy"

Following a thorough-going examination of the issue, the Supreme Court directed that "no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. *Doing so would amount to an unwarranted intrusion into personal liberty*." The court however, left open the option of voluntary submission to such techniques and endorsed the following guidelines framed by the National Human Rights Commission

> (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
>
> (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
>
> (iii) The consent should be recorded before a judicial magistrate.
>
> (iv) During the hearing before the magistrate, the person alleged to have agreed should be duly represented by a lawyer.
>
> (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a `confessional' statement to the magistrate but will have the status of a statement made to the police.
>
> (vi) The magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
>
> (vii) The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer. 250
>
> (viii) A full medical and factual narration of the manner of the information received must be taken on record.

Although the right against self-incrimination and the inherent fallaciousness of the technologies were the main ground on which decision ultimately rested, this case is valuable for the court's articulation of a right of 'mental privacy' grounded on the

fundamental right to life and personal liberty. It remains to be seen whether this articulation will find resonance in other determinations in domains such as, say, communications.

3.4 Privacy of Records

Since at least the mid-nineteenth century, we have been living in what Nicholas Dirks has termed an "ethnographic state" – engaged relentlessly and fetishistically in the production and accumulation of facts about us. From records of birth and death, to our academic records, most of our important transactions, our income tax filings, our food entitlements and our citizenship, most of us have assuredly been documented and lead a shadow existence somewhere on the files. Not only does the government keep records about us, but a host of private service providers including banks, hospitals, insurance and telecommunications companies maintain volumes of records about us. In this last section of this paper, we look at the privacy expectation of records both maintained by the government and the private sector.

Various statutes require records to be maintained of activities conducted under their authority and entire bureaucracies exist solely in service of these documents. Thus, for instance, the Registration Act requires various registers to be kept which record documents which have been registered under the Act. [39] Once registered under this Act, all documents become public documents and State Rules typically contain provisions enabling the public to obtain copies of all documents for a fee. Similarly, a number of legislation – typically dealing with land records at the state level contain enabling provisions that allow the public to access them upon payment of a fee.
Where no provisions are provided within the statute itself that enable the public to obtain records, two recourses are still available.

Firstly, the Evidence Act enables courts to access records maintained by any government body. Secondly, private citizens may access records kept in public offices through the Right to Information Act. Each of these avenues is described in some details below:

[39] See Section 52 of the Registration Act 1908

Section 74 of the Evidence Act defines "public documents" as including the following

1. Documents forming the acts, or records of the acts

(i) Of the sovereign authority,

(ii) Of Official bodies and the Tribunals, and

(iii) Of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country.

2. Public records kept in any state of private documents.

It is clear from this definition that most records maintained by any government body are regarded as public documents. Section 76 mandates that every public officer "having custody of a public document, *which any person has a right to inspect*, shall give that person on demand a copy of it on payment of the legal fees therefor together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof".

Since there is no legislative guidance within the Evidence Act to indicate who may be said to possess "a right to inspect", this has been interpreted to mean that where the right to inspect and take a copy is not expressly conferred by a statute (as in the Registration Act mentioned above), "the extent of such right depends on the interest which the applicant has in what he wants to copy, and what is reasonably necessary for the protection of such interest". So it isn't any officious meddler who may access such records – only persons with genuine interests in the matter, either personal or pecuniary, may obtain copies through this route.

In addition to the Evidence Act, copies of documents may also be obtained under the Right to Information Act 2005 which confers on citizens the right to inspect and take copies of any information held by or under the control of any public authority. Information is defined widely to include "any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and

information relating to any private body which can be accessed by a public authority under any other law for the time being in force".

Section 8 (j) of the Act exempts "disclosure of 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" unless the relevant authority "is satisfied that the larger public interest justifies the disclosure of such information".

In an interesting case *Mr.Ansari Masud A.K vs Ministry Of External Affairs* (2008)[40], the Central Information Commission has held that "details of a passport are readily made available by any individual in a number of instances, example to travel agents, at airline counters, and whenever proof of residence for telephone connections etc. is required. For this reason, disclosure of details of a passport cannot be considered as causing unwarranted invasion of the privacy of an individual and, therefore, is not exempted from disclosure under Section 8(1)(j) of the RTI Act." This is despite the fact that nothing in the Passport Act itself authorizes disclosure of any documents under any circumstances. However, the Right to Information Act isn't as convenient a vehicle for privacy abuse as this case may suggest. The RTI adjudicatory apparatus has on several occasions upheld the denial of information on grounds of privacy violation – most famously in a case where an applicant sought information from the Census Department on the 'religion and faith' of Sonia Gandhi – the President of the largest party currently in power in India. Both the Central Information Commission – the apex body adjudicating RTI appeals as well as the Punjab and Haryana High Court upheld the denial of information as it would otherwise lead to an unwarranted incursion into her privacy. [41]

A similar concept of 'public interest' would seem to apply when private companies disclose personal information without a person's consent. Without delving into the issue in too much detail, it would suffice here to mention one of the most important cases to

[40] CIC/OK/A/2008/987/AD dated December 22, 2008 <http://indiankanoon.org/doc/1479476/>

[41] Anon, 2010. High Court dismisses appeal seeking information on Sonia Gandhi's religion. *NDTV Online*. Available at: http://www.ndtv.com/article/india/high-court-dismisses-appeal-seeking-information-on-sonia-gandhi-s-religion-69356 [Accessed April 12, 2011].

have come up on the issue. In *Mr. X vs Hospital Z*[42], a person sued a hospital for having disclosed his HIV status to his fiancé without his knowledge resulting in their wedding being called off. The Supreme Court held that the hospital was not guilty of a violation of privacy since the disclosure was made to protect the public interest. While affirming the duty of confidentiality owed to patients, the court ruled that the right to privacy was not absolute and was "subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others."

[42] (2003) 1 SCC 500 40

4 Conclusion

Reflecting on the volume of case law that we have in India on privacy, one is struck at once, both by the elasticity of the concept of privacy – spanning, as it does, diverse fields from criminal law to paternity suits to wiretapping – as well as its fragility – the flag of privacy is constantly being raised only to be ultimately overridden on pretexts that range from security of state, to a competing private interest.

On the one hand, one marvels at the success of the concept, only a few decades old in Indian law, in insinuating itself into legal arguments across diverse contexts. On the other hand, one is dismayed by the fact that rarely does the concept seem to score a victory. There is an almost ritual quality to the way in which the "right to privacy" is invoked in these cases - always named as a relevant factor; it never seems to substantially influence the outcome of the case at hand.

The right to privacy in India was an 'Oops' baby, born on the ventilator of a minority decision of the Supreme Court, and nourished in the decades that followed by sympathetic judges, who never failed to point out that this right was contingent – not absolute, not *meant to be* under the Constitution, but carved out anyway. Some five decades after its first invocation by the Supreme Court, one gets the feeling that the right to privacy, *conceptually*, hasn't moved, and is still what it was then. We don't, today, for the many times it has been invoked by courts, have a thicker, more robust concept of privacy than we started out with. So the question, that one is stuck with is, what work does this concept of privacy *do*?

One of the failings of the concept of privacy in India is that it doesn't exist as a positive right, but is merely a resistive right against targeted intrusion. So for instance, the right to privacy would be useless as a concept to resist something like generalized street video surveillance – as long as a citizen is not singled out for a disadvantage, this right would be of no use. So this right to privacy is a negative right to not be interfered with. Under it

one does not have the right to be as private as one wishes, but only no less than the next person. Still, even this limited concept could be useful, if it were applied more rigorously.

Unfortunately, as the case law indicates, the right to privacy cedes too quickly to competing interests. An incomplete rough catalog of these competing rights, drawn from the case law surveyed in this paper include

a) public emergency and public safety (communications)
b) criminal investigation (search and seizure/communications)
c) competing private interests (divorce proceedings)
d) best interests of the child (paternity suits)
e) public interest (Right to Information)
f) competing fundamental rights (HIV status)

One may perhaps add judicial inactivity as one of the limiting factors on privacy. By holding that violations of procedure by investigating agencies would not vitiate trials, the judiciary has been complicit in perhaps some of the more damaging incursions into privacy. Once a person is implicated in any manner in the criminal justice system – either as a victim, a witness or an offender, investigating agencies are immediately invested with plenary powers. They can search his house without warrant. They can place him arrest. Subject him to 'medical examinations', take his fingerprints and DNA and hold it in a bank and there is nothing you can do. In this context, perhaps the strongest privacy safeguard can come from a reform in criminal procedure alone.