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RIGHT TO PRIVACY IN A 'POSTHUMAN WORLD': DECONSTRUCTING TRANSCENDENTAL LEGACIES & IMPLICATIONS OF EUROPEAN RENAISSANCE IN INDIA

Mritunjay Kumar

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Right to Privacy in a 'Posthuman World':[*] Deconstructing Transcendental Legacies & Implications of European Renaissance in India

Mritunjay Kumar[**]

I do not want my house to be walled in on sides and my windows to be stuffed. I want the cultures of all the lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any.

- M.K. Gandhi.[***]

Writing is all about imaginative literary flight which owes much to the earth for being an originary base, air for its support, and sky for its openness, whose deep horizons ambitiously inspire to look at the world from different perspectives. This paper owes much to them who, in spite of being the members of civilization, die for loneliness and solitude. They deserve much thumping applauses for their incredible commitment to circumscribe 'being' within a presupposed-semiotic private domain; for they coined a term, 'right to privacy', juxtaposed in an anatomical relationship with 'duty not to violate the privacy'.[1] Right is a brainchild of European renaissance, which was conceived in the critical tradition, revolutionized by German philosopher Immanuel Kant in the eighteenth century. The basic characteristics of critical tradition is that its sovereignty asks everyone and everything to submit before it, in ways, it violently attempts to demolish what is fraternal in its bonding. Right as a child was born in violent

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[*] *See generally* Cary Wolfe, WHAT IS POSTHUMANISM 1-30 (2009). A 'Posthuman World' is here not simply a metaphor, depicting no life of humans on the Earth or in the Universe, but a possible reality of a new 'Epistemocidal World'; Michel Foucault remarked that, '[M]an is an invention of recent date. And one perhaps nearing its end'. Michel Foucault, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES 387 (1973).

[**] Research Scholar of Law, Faculty of Law, University of Delhi. Email: mritunjaykumbhi@gmail.com. The Author is really grateful to his teachers, Mr. Chanchal Kr. Singh, Dr. Raman Mittal, Ms. Meena Panickar, and his inspirational mentors, Prof. Upendra Baxi and Prof. M.P. Singh for encouragement and guidance in writing this paper.

[***] *See* Rajmohan Gandhi, GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE 241 (2007). *See also* M K Gandhi YOUNG INDIA (01 June, 1921).

[1] Wesley Newcomb Hohfeld, *Fundamental legal conceptions as applied in judicial reasoning: and other legal essays* 5 (1920).

formative practices, endowed with all the violent characteristics; since it asks and its task is to maintain, exclusivity against what is called 'other' or 'other's'. For its realization and enforcement, one is obliged, if not obligated; avoiding Austinian command-duty-sanction trilogy, towards a right holder. This structure of right contains or brings forth in itself transcendental violence,[2] to refer Jacques Derrida, just forget about contents of right and its true character!

In this paper, I will try to examine the 'right to privacy' in context of transcendental violence, especially the way by which it has been upheld by the Supreme Court of India in *K.S. Puttaswami* v. *Union of India*[3] (hereafter cited as *Privacy Judgment*) as one of the fundamental rights guaranteed by the Constitution of Indian. Right in its form, as discussed above, constructs its own castle of violence, meanwhile privacy in its illusory contents entail 'the violent solitude'. And combining both somehow help in installing the popular slogan of liberals, known as 'right to be let alone' or 'right to be left alone'. The first section of this paper deals with the modern day public-private dilemma and the inherent impossibility to fall back to the state of nature from the state of society, even when the big brother or brothers as the case may be (Sovereign State, Non-Governmental-Organizations, Multi Nationals Corporations, to name a few) is/are watching you! The second section of this paper is related to the historical study, nay genealogical glance of privacy right, that is, from the hunter gatherer society to modern state and then postmodernist pluralistic communities. The third section initiates a discourse upon a comparative analysis upon a duty based republic of hospitality versus right based republic of inhospitality and how far privacy in the context of duty is complete or compatible and self-sufficient without juxtaposition of right against duty in hohfeldian sense? The fourth section takes up the discussion on philosophical foundations of right to privacy, which is an attempt to initiate a deconstructive analysis upon the transcendental-but-perplexed legacies of renaissance; consisting of autonomy, dignity, liberty, security, identity, and anonymity with reference to violence of right. The next section is devoted to the study of scope and relevance of the right to privacy in a Posthuman Age. The section attacks essentialist philosophical tradition that is trivialized by postmodernist thinkers entailing the death of human, i.e., the death of universality and objectivity of what we know as human knowledge. It is generally argued that this is how the posthuman world is possible to appear before the sightscreen only after human as an ethical, metaphysical, or legal construction of European renaissance succumbs to death. This is an age where artificial intelligence is becoming capable here-and-now or have enormous capabilities to outsmart, what is generally referred for human intelligence, natural intelligence. The Twenty first century is or becoming, the virtual, instead of virtuous age erasing all distinctions of natural *vs.* cultural or human *vs.* animal, etc. How far the right to privacy is really meaningful in

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[2] Eddo Evink, *On Transcendental Violence* in STUDIES IN CONTEMPORARY PHENOMENOLOGY 65 (Chris Bremmers, Arthur Cools, *et. al*. (eds.), 2014). Transcendental violence here means all the rationale activities which might be considered as the violent appropriation of objects and themes.

[3] (2017) S.C.C. 996.

such an age, where data knows better than humans know about themselves? The sixth section of this paper attempts to establish an important link to the discourse of privacy in the context of constitutional interpretation in India, especially the way seminal transformations and mutations of constitutional interpretation *vis-à-vis* the right to privacy has taken place hitherto in India. The last section of this paper reflects on practical applications of the right to privacy in India.

To state, an authorial act of contrition, the paper, as a whole, makes an attempt, to forecast the jurisprudential and demosprudential[4] destiny of India, towards which Indian law and Constitution, exemplified and initiated through policies, such as, Aadhaar project, sexual privacy (adultery), LGBT rights, food choices, and beef ban politics, destined to advance. Most of these issues have been brought before the Supreme Court for their conclusive determination in the solemn interest of our nation.

I

Big Brother is Watching You?[5]

Privacy, alleged to be an elitist construction,[6] literarily signifies, 'something related to private domain', a realm away or outside from imagined public domain. This division

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[4] *See* Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies* 14 MACQ. L. J. 1-23 (2014).

[5] George Orwell, NINETEEN EIGHTY-FOUR 1 (1949, 2013).

[6] D.Y. Chandrachud J., however, is not in agreement with the critique that the right to privacy is an elitist construction. He writes in *K.S. Puttaswami* v. *Union of India* (2017) S.C.C. 996 at para 395:

> In our view, the submission that the right to privacy is an elitist construct which stands apart from the needs and aspirations of the large majority constituting the rest of society, is unsustainable. This submission betrays a misunderstanding of the constitutional position. Our Constitution places the individual at the forefront of its focus, guaranteeing civil and political rights in Part III and embodying an aspiration for achieving socio-economic rights in Part IV. The refrain that the poor need no civil and political rights and are concerned only with economic well-being has been utilized through history to wreak the most egregious violations of human rights.

Even if his opinion is accepted that 'the Civil and Political Rights have equal standing to that of socio-economic rights', is it possible to make it realize all the civil and political rights for the poor citizens without having minimum threshold to touch it? For a homeless poor, the dark night is the roof and wall to hide, nevertheless, the street light makes them visible from the car's windows. But they don't complain against anyone; for them, in effect; since most of them might be unaware about this phraseology, the right to privacy does not qualify even to the fine pamphlet of rhetoric. For they are not born with right to have rights or making it more concrete; their right to be human; right to be divine, paraphrasing Justice V.R. Krishna Iyer and Prof. Upendra Baxi, is being taken away from them. Do we need more examples to argue that the right to privacy is an elitist new legal category which, in its essence, remains elitist? *See* e.*g.*

of public and private domain is a modern day invention when the image savvy humans let their 'state of nature' encaged at home while 'state of society' flourished for animated desires to establish an ideal state of reason and justice. This division could be traced in Cartesian philosophy,[7] when mind precedes over mechanical human body. Here mind, contrary to remaining human body, is a symbol of public realm, intellectually capable to enkindle the spirit for justice, justness, or righteousness. But the rest of human body is prone to food, procreation, and secretion chain, something which is left for the home (private domain) wherein no other has a business to intervene, what is known as 'hobbesean human nature.[8] This division is not often perceptible when one curiously dares to look at instinctive animal kingdom, for they are not ashamed of their nakedness.[9] One who wants to wander in wonder may look at animal kingdom very carefully, they are what they are in their home, in their castle, or nestle as the case may be. Then why do we care for a realm what is unnaturally/artificially imagined, constructed, and considered to be quintessential for the very foundation of human civilization? In spite of the fact that humans are no more than animals in Darwinian evolutionary chain. Nevertheless, theologians do not agree with this hypothesis, for them, humans are the superior kind of creation of God and for a superior creature like human, artificial creations are their mastery, for they devise private ownership which is essentially a characteristic of privacy, which even nature has not endowed to its creations. This is really an endeavour of the highest pedigree which, in essence, justify all known-time binary division, *i.e., human (as a rationale being)* v. *the rest of the animal kingdom (as instinctive being)*. Whether privacy is at all a necessity for better human conditions is a utilitarian question, which, in its answer, advocates for a secluded anthropocentric world, devoid of nature's harmonic symphony. Only human, all too humans[10] appear as a compelling condition to master over other animal kingdom, to subject their freedoms by unimaginable human cruelty and to subjugate them under human narratives; for science brings power for human, economics provides justification for their commodification, and perhaps, politics brings public-private division, ironically, in which animals have no access. For creatures other than humans the world must not be more than a prison where only humans are only destined to become masters-jailors for the rest of the creatures and for them only, private domain is a place and sanctuary to repose. However, remaining animal kingdom, in general, cannot be kept in public-private dichotomy.

Upendra Baxi, *Right to be Human: Some Heresies* 13 (3/4) INDIA INT'L CENT. Q. 185-200 (1986). *See also* Justice V.R. Krishna, *Iyer's lecture at Jurist Conference on Values for a Better World, available at*: https://www.youtube.com/watch?v=tSS9EoTIhQo (last visited 17 Jan., 2018).

7 *See* Gary Hatfield, *René Descartes*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer edn., 2016). *Available at*: https://plato.stanford.edu/entries/descartes/ (last visited 10 Jan., 2018).

8 *See* Julius Stone, LAW AND THE SOCIAL SCIENCES IN THE SECOND HALF CENTURY 94-121 (1966).

9 *See* Jacques Derrida, THE ANIMAL THAT THEREFORE I AM 28 (2) *Critical Inquiry: University of Chicago Press* 269-418 (David Wills trans. 2002).

10 *See* Friedrich Nietzsche, HUMAN, ALL TOO HUMAN 1-399 (1996).

When one attempts to look at the term privacy while keeping Derrida's deconstruction, Nietzsche's genealogy, or Michel Foucault's archaeology in mind: private and public division appears as a dubious and a vague kind of characterization of human life and social space.[11] The social space, nay let's name it 'human space', distorted in this way and then transformed into public sphere by statist activism, bringing in fixed consequence thereof where certain societal affairs, transactions, or events are changed into the dichotomous relationship of legality-illegality, the public space is liberalised to ensure unrestricted and smooth private transactions in the sacrosanct realm of free

[11] In 2003, The Law Commission of Canada came out with its report on *New Perspectives on the Public-Private Divide*, which extensively deals about transformation of social space into public and then public space into private. For example, anti-panhandling by-laws within Canada were enacted to prohibit alms begging with this objective, though it was not explicitly enunciated, but the commission expressed it in these few words:

> [T]he unsightly and untrustworthy beggar whose presence in public space may variously annoy, frustrate, and disconcert. The physical presence of the homeless and destitute begging for alms on the street is a stark and very public reminder of social marginalization and economic polarization, which potentially undermines carefully crafted urban images…The profusion of anti-panhandling by-laws may be interpreted as signaling a growing mistrust of the ideal of a truly inclusive public space and the hegemony of those private interests that assert that if cities are to compete in a global economy, they must "purify" the urban landscape.

The commission further exclaims about the current predicament in a liberal society with this erudite remark :

> There appears to be considerable irony in the contemporary criminalization of panhandling. Downtown corporate complexes, which facilitate the movement of billions of dollars, are seen to be threatened by a few modest financial exchanges. At the same time that capital flows of billions of dollars are proceeding relatively unregulated by the state, begging on the streets of North America for dimes and quarters is increasingly subject to governmental sanction. When the local state responds to such anxieties with intensive regulation, thereby circumscribing the beggar's ability to initiate relatively minor monetary transactions, an additional layer of irony may be added. This irony is linked to the fact that money has occupied a central role within the private sphere of classical liberalism.

For details, *See* The Law Commission of Canada, *Report on New Perspectives on the Public-Private Divide* 58-60 (2003); *See also* Jurgen Habermas, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 14-26, 117-129 (Thomas Burger trans. 1991). Jurgen Habermas rightly says that in the era of classical liberalism, the private sphere consisted of a civil society centred upon a market economy in which freely contracting individuals engaged in trade and acquired property, facilitated by various forms of currency. These individuals established a 'bourgeois public sphere' in large part to secure and extend the freedom of market from the state.

market. This division, in its essence, reflects Nietzschean 'will-to-power'[12] as *numero uno* formula to 'subjugate powerless',[13] including women, in the name of privacy.[14]

One is confronted with the seminal question when she adventures to inquire the very contours of public and private domain, which remains alive like ever before! That is, ultimately, by which method one can know or can decide that something is in private or public domain? How would one come to the conclusion that someone has a reasonable expectation of privacy from others? Is a choice to withhold information or to share it with a reasonable expectation of privacy that other will not expose it in public, is a dividing line between public and a private domain as far as informational privacy is concerned. What is a private information which is not generally perceived or assumed in a public domain and which is the information in a public domain, is also not perceptible in a private domain? Interestingly, the very escape from 'state of nature', justified by philosophers of eighteenth and nineteenth centuries, to establish a shared community for common security, (one may identify: for preservation of life, liberty, and property), has impoverishing effects on human conditions. Their destinies plumed into a slumber up to such an extent that 'the right to be left alone' becomes a desirable slogans

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[12] *See* Friedrich Nietzsche, THE WILL TO POWER 382-402 (Walter Kaufman ed. 1968).

[13] Frederick Engels, ORIGIN OF FAMILY, PRIVATE PROPERTY AND THE STATE 13-16 (1884). Engels writes:

> Human civilization has evolved from three stages; savagery, barbarism, and civilization. On the first stage, men lived like animal. There were nothing like marriages or private properties. On the second stage, men learnt arts of hunting and gathering. Women used to live in home to taking caring of children but they had power over Men. Men started domesticating animals, they also understood the principle of impregnation. They developed weapons for bigger hunt, which were then used in inter-group fights. Slavery developed in due course of time. Men acquired power over others and started accumulating wealth in the form of animals and slaves. All this lead to establishment of private property. Men wanted to retain their power and property, and pass it to on their own children. This methodology is known in third state of human civilization as inheritance.

[14] *Id*. The feminist critique of privacy reflects upon the public and private division and its ramifications in these words:

> The public/private delineation emerged out of the burgeoning capitalist production of the nineteenth century, a division that fed the growth of capitalism and patriarchy. With neoliberalism magnifying the characteristics of capitalism such as private property, individualism and unhampered accumulation, the separation between public and private is even more rigidly adhered to. The public/private divide serves as the mechanism of the neoliberal political project of governing and persuasion intent on producing new forms of subjectivity and particular modes of conduct. The private realm becomes a place of invisibility, so that the work, the violence, and the identities immersed in the private sphere are hidden from public consciousness.

See Trish Van Katwyk & Denise Soueidan Oleary, *Uncovering the Public/Private Dilemma for Rural Youth Using Participatory Action Research*, 18 (1) CRIT. SOC'Y. WORK 76 (2017). *Available at*: http://www1.uwindsor.ca/criticalsocialwork/PublicPrivateDilemma (last visited 14 Jan., 2018).

for liberals, as if, enlightened father/big brothers have taken away every serious business from their children leaving them in a desert where every single individual finds herself in system akin to panopticon,[15] by establishing a permanent structure of surveillance. Most noticeably, such governance arrangements create a condition where docility is the first and the last resort for survival.

II

Privacy in Glance of Genealogy

Vinton Cerf was right when he openly declared that privacy may actually be an anomaly.[16] Privacy is a modern day concept, which is not more than 150 years old. In the history of humankind there has been very little debate about privacy, especially sex, breastfeeding, and bathing were performed in front of friends and family without any sense of shame. 'In Tribal societies, however, about 200,000 B.C. to 6,000 B.C., people preferred to love in solitude. Though adherence of strict privacy is not found as one traces the footprint of their history'.[17] The Greeks displayed similar preferences for privacy when they used sophisticated geometry to create house with minimum exposure to public view while maximizing available light. But a wise man like Socrates vehemently opposed the idea of privacy in his strongest possible words.[18] Interestingly an empiricist or to say so, a scientist like Aristotle did not accept the idea what a rationalist Socrates professed in his dialectical style. Aristotle preferred a division of human sphere into *Oikos* and *Polis*.[19] To move further in the brief history of time, Romans constructed their homes with open gardens. And to turn one's house into a

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[15] *See* Michel Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 195-229 (2nd edn. 1995).

[16] *See* Jacob Kastrenakes, *Google's chief internet evangelist says 'privacy may actually be an anomaly* THE VERGE (20 Nov., 2013). *Available at*: https://www.theverge.com/2013/11/20/5125922/vint-cerf-google-internet-evangelist-says-privacy-may-be-anomaly (last visited 15 Jan., 2018).

[17] Anthropologist Jared Diamond writes, "Because hunter-gatherer children sleep with their parents, either in the same bed or in the same hut, there is no privacy…parents took no special precautions to prevent their children from watching them having sex: they just scolded the child and told it to cover its head with a mat". *See* Jared Diamond, *Best Practices for Raising Kids? Look to Hunter-Gatherers* NEWS WEEK (17 Dec., 2012). *Available at*: www.newsweek.com/best-practices-raising-kids-look-hunter-gatherers-63611 (last visited 20 Oct., 2017).

[18] Socrates was of the view that "for where men conceal their ways from one another in darkness rather than light, there no man will ever rightly gain either his due honour or office or the justice that is befitting". *See generally* Barrington Moore, Jr., PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY 1-342 (3rd edn. 2017).

[19] Chandrachud J. in *the Privacy Judgment* writes, "The Greek philosopher Aristotle emphasized on a division between the public sphere of political affairs (which he termed the *Polis*) and the personal sphere of human life (termed *Oikos*)".

public museum was like an open display of wealth.[20] The majority of Romans preferred to dwell in crowded apartments with thin walls which had some inherent limitations to circumscribe every single whisper and noise.

The picture that entails from above discussion is that the privacy became an elitist demand for privileged while commoners had nothing to protect their whispers. In early middle Ages (Fourth Century A.D. to 1,200 A.D.) privacy appeared as 'isolation and seclusion' pioneered by early Christian saints.[21] Later on, the European renaissance brought reason and science to the civilization-table when privacy, as an individualist notion, became an inevitable necessity. As Peter Smith rightly wrote, 'Privacy is the ultimate achievement of the renaissance'.[22] In 1215, Fourth Council of Lateran professed that confessions should be mandatory for the masses.[23] Therefore, to refer Peter Loy, 'the apparatus of moral governance was shifted inward, to a private space which had nothing to do with the community'.[24] The printing press invention, one of the great blessings of science, helped canonisation on massive level while reading remained as an elite luxury until universal book ownership. From a single large bed to modern day individual-bed is itself a big transformation of private sphere. Nevertheless, the individual bed did not affect the custom of witnessing consummation of marriage for religious or other logistical reasons.[25] After the European renaissance, it became a common phenomenon for at least the rich people to shelter themselves in the home, but for those who could not afford separate spaces, for them, it was more expedient to live in close quarters with family. It was just prior to the industrial revolution that citizens, for the first time, demanded the fictional private space, for that the law started to leap with the newly-evolving needs for secret activities.[26] Notwithstanding the shifting

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[20] Pliny the Elder, THE NATURAL HISTORY (Circa, 77 A.D.). He was of the view that the 'Great fortune has this characteristic, that it allows nothing to be concealed, nothing hidden; it opens up the homes of prices, and not only that but their bedrooms and intimate retreats, and it opens up and exposes to talk all the arcane secrets'.

[21] St. Antony of Egypt preached for a monk, 'Just as a fish die if they stay too long out of water, so the monks who loiter outside their cells or pass their time with men of the world lose the intensity of inner peace. So like a fish going towards the sea, we must hurry to reach our cell'. *See e.g.* David G. R. Keller, OASIS OF WISDOM: THE WORLDS OF THE DESERT FATHERS AND MOTHERS 15 (2005).

[22] Peter Smith, HOUSES OF THE WELSH COUNTRYSIDE: A STUDY IN HISTORICAL GEOGRAPHY 235 (Royal Commission on the Ancient and Historical Monuments of Wales, 1988).

[23] *See* Javier Belda Iniesta, *The Pleasure of Privacy: Confession and Inquisition as Means to Cause the Correction of Sinful Consciences around the IV Lateran Council* 7(1) JOUR. EUR. HIST. L. 54-59 (2016).

[24] *See* R. Jay Magill, CHIC IRONIC BITTERNESS 179 (2007).

[25] Georges Dudy & Philippe Braunstein, *The Emergence of the Individual* in A HISTORY OF PRIVATE LIFE: REVELATIONS OF THE MEDIEVAL WORLD 507-535 (Philippe Aries & Georges Duby eds. 1988), narrate one common phenomenon of medieval age, 'Newlyweds climbed into bed before the eyes of family and friends and the next day exhibit the sheets as proof that the marriage had been consummated'.

[26] In this early handwritten note on August 20th, 1770, revolutionist and future President of the United States, John Adams, voiced his support for the concept of privacy. *See* Allison L.

public outlook *vis-à-vis* privacy, the first American Census was posted publicly for transparency and accuracy. However, the privacy-conscious citizens found more adhesion with the America's first privacy law, The Post Office Act, 1710, which banned sorting through the mail by postal employees.[27] By the time the industrial revolution started serving up material wealth to the people, the state apparatus began recognizing privacy as an important facet of human life. For the poor, nevertheless, life was still very much on sightscreen. The legendary philosopher of twentieth century Jean Paul-Sartre observed the poor streets of Naples and described in following words:

> The ground floor of every building contains a host of tiny rooms that open directly onto the street and each of these tiny rooms contains a family…they drag tables and chairs out into the street or leave them on the threshold, half outside, half inside…outside is organically linked to inside…yesterday I saw a mother and a father dining outdoors, while their baby slept in a crib next to the parents' bed and an older daughter did her homework at another table by the light of a kerosene lantern…if a woman falls ill and stays in bed all day, it's open knowledge and everyone can see her.[28]

The right to privacy as a specific right emerged after a discourse established by two distinguished authors through their well-known paper published in *Harvard Law Review*. Samuel D. Warren and Louis D. Brandeis argued:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected

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LaCroix, *Bound Fast and Brought Under the Yokes: John Adams and the Regulation of Privacy at the Founding*" 72 (6) FORDHAM L. REV. 2331 (2004).

[27] *See* The Post Office Act 1710, 9 Ann c 11. *See also* Katharine Leigh *Developments on the Fourth Amendment and Privacy to the 21st Century* in PRIVACY IN THE DIGITAL AGE: 21ST-CENTURY CHALLENGES TO THE FOURTH AMENDMENT 2-3 (Nancy S. Lind & Erik T. Rankin eds. 2015). The author explains about the objectives of the act in these words:

> This act, also known as, Queen Anne's Act, was passed by the British Parliament and took effect in North America on June 1, 1711, and remained in effect until 1789. It established fixed rates for transporting letters and created a deputy postmaster general for the colonies. Additionally , it included wording concerning privacy , stating that 'No Person or Persons shall presume wittingly, willingly, or knowingly, to open, detain, or delay, or cause, procure, permit, or suffer to be opened, detained, or delayed, any Letter or Letters, Packet, or Packets.' Postal employees were required to take oath an oath swearing to the above, and violaters faced a fine of up to 25 pounds.

[28] Antoine Prost & Philippe Ariès, *et. al.*, A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES 4 (1991).

> him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[29]

They further put emphasis on spiritual and intellectual cognitive developments in human beings and for these very needs right to be let alone is quintessential:

> Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses…Then, the 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later on, there came a recognition of human's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life-the right to be let alone.[30]

The United States' Constitution, however, had already recognized the right to privacy in its penumbral zone, meanwhile, after Second World War, it was also recognized as one of the quintessential human rights under UDHR[31] as well as under ICCPR.[32]

III

Right to Privacy and 'Republic of Inhospitality'[33]

The historical narratives *vis-à-vis* the right to privacy, though romanticized by liberals as a right to have their paradise, evolves from the very mother womb to the graveyard and beyond. The strange archaeology and genealogy helped liberal hegemony in law and an apparent contempt for public space, if any. The latter came to be regarded solely as a place for merchandise where law, as a manipulative tool, helps them to create and to sustain particular power-domination relationship. This, in the end, help them to

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[29] Samuel D. Warren & Louis D. Brandeis, THE RIGHT TO PRIVACY 4 (5) HAR. L. REV. 196 (1890).

[30] *Id*. at 193. 'Right to be let alone' is generally accepted as the fundamental meaning of the right to privacy. Though in the cyber age, the meaning has been stretched up to an extent that it was impossible to imagine at the time this nomenclature was coined in the context of right to privacy.

[31] Art. 12 of the Universal Declaration of Human Rights (1948) recognizes the right to privacy in 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'.

[32] Art. 17 of the International Covenant on 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'.

[33] Vinay Lal, *What has been critical to the idea of the republic everywhere is the notion of inclusiveness* INDIAN EXPRESS (27 Jan., 2018).

develop a republic of inhospitality in which privacy is really private, a privilege for a few at the cost of dominations over large populations, either call them disable, politically-intellectually weak, or misfit in the larger narratives of rationality.

In a way, the tragedy of modernity is that it encompasses and embraces an irrational form and content of rationality which does not seek the value from this world, rather every single value is conceived with the idea of self and desert, which tears apart those values which are communitarian and family based. The right to privacy, in sense of entitlement, power, liberty, privilege, and immunity from the public gaze, is conceptualized in a particular framework, which challenges the other egalitarian and fraternal way of life, understood and internalized by community without adhering to any thread of sanitation and exclusion. In that sense, non-discursive formative practices of the right to privacy, unlike discursive formation, remains at far distance from the politico-juridical enunciation of the right to privacy. But for liberals, duty is incomplete in itself unless right, in form of power, liberty, privilege, or immunity complements it. Which has trans-located the other notions of duty, like *Dharma*, which doesn't exist in sign chain of 'difference' or 'deference' of other text like right. This notion of duty exists, as self-independent and self-sufficient, promotes harmony at the same time brings hospitality for common good. In the end, duty to maintain privacy is not asked but expected in such a community, in a way, duty exists intrinsically, like all parts of body, including Cartesian mind, respect the needs of others and function in harmony, without prioritizing or hierarchizing one over other as per utilitarian's 'hedonistic calculus'.[34]

IV

Philosophical Foundations of Right to Privacy

Philosophy as a father of all the disciplines dwells upon 'privacy' as a metaphysics of presence, a presence of absence like a Derridian 'trace', in a sense, one treats it as an 'inviolable or spiritual property',[35] which is not an accomplished property in itself. So to

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[34] Utilitarian's prioritization of pleasures over pain on the hedonistic calculus is a mirror reflection of the value judgments at per dichotomous yardstick, even though a utilitarian like David Hume professes not to do so.

[35] *Id. Supra* note 29. According to the authors, 'The triviality destroys at once robustness of thought and delicacy of feeling'. *Cf.* Madison writes *Essay on Property* in THE WRITINGS OF JAMES MADISON Vol. 6, 101-103 (Gaillard Hunt ed. 1906):

> In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has property in his opinions and the free communication of them… He has an equal property interest in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions…Conscience is the most sacred of all property;

say, every human, is an ocean of thoughts and emotions-in-making, not a singular being but a transforming ego. Spirituality, on the one hand, is not a synonym of ego, rather it is inviolably connected to the 'soul force' mentally or intellectually capable to comprehend the very language and the gesture of soul, for spirituality is not a property liable to be appropriation or misappropriation in 'right' oriented or 'interest' oriented jurisprudence or 'humanprudence'.

If privacy is at all an aspect of spirituality it does not fit into the caption of right or entitlement for that matter. Philosophers like Locke, Kant, and Nozick, though caricature a beautiful picture of inviolable extension of self in the right to property. But privacy as a spiritual property barely finds a dot of imagination in their mind. Reading the right to privacy through hohfeldian and Brandeis's texts may metamorphose one towards a supposition that every human has a claim over his or her thoughts and emotions and therefore, there is a correlative duty upon the world at large not to appropriate his or her feelings, emotions, or thoughts as the case may be. Samuel D. Warren and Louis D. Brandeis articulate that, the complexity of life demands for an opening of the horizon of right to life and in analogous to that the right to property, which does not only include tangible, but also intangible property, that is fundamentally connected to the 'process and product of mind'.[36] In extension to this argument they argue that privacy is nothing but a process or a product of mind. As a process, mental faculty in its free exercise asks for its loneliness, it wants to be free from unwarranted encroachments of whispers and must be taken to be requiring protection from permanent or impulsive gaze of others. As a product (read spiritual property), however, privacy is yet to be accomplished, since spiritual property is nothing like a property to be ascertained as a one or some, but a mystically vague supposition. It is nothing more than a 'semiosis'[37] or a 'semiotic symptomology'.[38]

The Supreme Court of India in *K S Puttaswami* v. *Union of India*[39] has declared that the right to privacy as a fundamental right guaranteed by Indian Constitution on various philosophical-juridical grounds, including the right to be left alone, the right to life with human dignity, the right to liberty, security, and autonomy, the right to have an identity, the right to anonymity, the right to repose and sanctuary, the right to make intimate decisions, the inalienability of rights, and the reasonable expectation of privacy, etc.

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other property depending in part on positive law, the exercise of that, being a natural and inalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

[36] *Id*. at 194.

[37] According to Nietzsche (*On the Genealogy of Moralily)*, 'Purposes and utilities are only signs that 'a will to power' has become master of something less powerful and has in turn imprinted the meaning of a function upon it. *See generally* Gayatri Chakravorty Spivak's *Preface to the English Edition* of Jacques Derrida, OF GRAMMATOLOGY XXI-XXV (1998).

[38] *Id*.

[39] *Supra* note 3.

Particularly, Chandrachud J., in his erudite judgment provides lucid details about the evolution or, so to say, rationalizing justifications of the right to privacy under international legal framework and under Indian constitutional as well as jurisprudential history. It is interesting to see that how far privacy in the context of right, entails any significance for all human being, irrespective of their differences of belonging, background, status, and gender, etc.?

(a) Violence of 'Right' in the Context of Privacy

The right to privacy was recognized as a human right under UDHR and also under ICCPR. But 'right' in its form, as discussed earlier, is not so fraternal with every individual in any given society. For one can trace the very historical origin and growth of right in context of critical tradition',[40] a contingent product of European Renaissance. Critical tradition, unlike ecological epistemological tradition prevalent in Asia, is basically a violent epistemological tradition.[41] To discern this kind of violence, one has to demolish the artefacts of 'others', to establish a new fact or a new truth, in a way, to critique a tradition or a culture successfully one has to question constantly the idea of other/others and, in the end, one who is more persuasive does impose his/her own 'perspective as truth'[42] on other or others. It is in this context, the notion of right, human rights, fundamental rights, basic rights, or inalienable rights etc., which conceive in critical tradition, always oblige for a correlative duty from other or others. If one further meditates on grammar of rights, right for one or for some, with its birth, brings forth rightlessness for other or others: right as a power or entitlement for one or for some entails 'powerlessness' for other or others. Prof. Baxi, in his *The Future of Human Rights,* questions the very form of (human) rights in context of its 'universality', 'hierarchy', 'essentialism', 'identity and difference', 'justice', and 'narrative monopoly'.[43] In process of liberating the self from all sorts of un-freedoms, right does encage self in petty individualism, therefore, selfishness is inculcated and cultivated through the grammar of right.

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[40] *See* Talal Asad, *Free Speech, Blasphemy, and Secular Criticism* in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH 20-64 (Talal Asad, & Wendy Brown eds. 2009).

[41] *Id*. *See also* Akeel Bilgrami, SECULARISM, IDENTITY, AND ENCHANTMENT 101-121 (2014).

[42] *Id.* Akeel Bilgrami argues that 'the criticism reflects an impurity of heart and is easily corrupted to breed hostility and, eventually, violence'. While reflecting upon the Western philosophical traditions, he goes on saying that the universalizable maxims of Kant as categorical imperatives could be understood as a violent imposition of one's perspective as the truth for others. Second, J S Mills' respect for criticism, which is based upon the arguments that a truth is not the truth forever, since the historical truths are generally proved to be a false sense of understandings, does propagate the violent oppositions nevertheless, according to him, there is nothing qualifies as the truth. Then question arises, what would be the threshold of criticism if the very premise of criticism is not necessarily true? He points out that, however, there is nothing qualifies as the universal truth, but at least, as believed by Gandhi, one can find his/her truth and may become an exemplar for others.

[43] *See* Upendra Baxi, THE FUTURE OF HUMAN RIGHTS 121 (3rd edn. 2008).

There must have cogent reasons why Hannah Arendt was one of the greatest believers of 'community life', reason being, a solitary life is not conducive for a social and ideological animal like human, that is why she thought, 'that free thinking is an activity that can only really go on in the presence of others, in a community, rather than in the quiet withdrawal and meditation demanded by theory'.[44] But the totalitarian regimes before, during, and even after the Second World War, have destroyed the community cultures. And comparable to them, philosophy of right, in the Western sense, has achieved identical objects by regimenting the idea of freedom into the right to have property and free market subverting what we have seen the natural sense of duty towards other fellow brothers, sisters, and citizens of the world.

Privacy, as a right presupposes and contains an idea of 'individual' at its highest pedestal in hierarchy of fraternal and social bonding, which, in its essence, accepts the human as a subject, at the same time object, owning himself or herself for own sake. In effect, one is a property of oneself. As John Locke in *Second Treatise,*[45] passionately argues that every person has by his/her birth certain inalienable rights, including the right to life, liberty, and property. It is due to self-execution of all these rights, escaping from 'state of nature' becomes an inevitable necessity, for state of society was established to ensure that these inalienable rights could be protected from external and internal aggressions.

Moreover, in the same seminal work he goes on saying that these rights could be curtailed or encroached upon if due procedure established by law permits it to do so. Of course, that law should be a valid law as agreed by a majority of the political community. This commonwealth dilemma sufficiently diminishes the very idea of inalienability of rights, because, on the one hand these rights, including the right to privacy, as upheld by the Supreme Court of India, are inalienable rights, meaning thereby, one is not capable to dispose it off to other or others. On other hand, however, state is capable to encroach upon these rights, including the right to privacy, subject to the condition that due procedure established by a valid law is successfully manufactured. Interestingly, if one is inherently incapable to dispose it off, then, how can any entity; be it natural or artificial, enter into an agreement to restrict or encroach upon any of or all such rights?

(b) Right to be 'Let Alone/Left Alone'

Let's start with the right to be left alone,[46] which has been defined by Adam Carlyle as 'the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place, and circumstances to

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[44] *See* Simon Swift ed., HANNAH ARENDT 5 (2009).

[45] *See* John Locke, THE TWO TREATISE OF GOVERNMENT 1- 266 (2016).

[46] *Supra* note 29 at 193. Samuel D. Warren & Louis D. Brandeis supposedly coined this term while establishing the foundation of right to privacy; according to them, t[T]he right to life has come to mean the right to enjoy life-the right to be let alone'. (Emphasis Supplied).

communicate with others'.[47] It means his right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself that is his own personal possession. Literally, 'right to be let alone' is defined as 'the condition or state of being free from public attention or intrusion into or interference with one's acts or decisions'.[48] Though many contemporary accounts attribute the modern conception of the right to privacy to the Warren and Brandeis's article, however, historical material indicates that it was Thomas Cooley who adopted the phrase the right to be let alone, in his *Treatise on the Law of Torts*.[49] Discussing personal immunity, Cooley stated, the right of one's person may be said to be a right of complete immunity, the right to be alone.[50] Brandeis J. in *Olmstead* v. *United States*[51] links this right (to be alone) to the 'pursuit of happiness'.[52] Analogously, in India, Mathew J. echoed almost the same view in *Gobind* v. *State of M.P.*[53] Right to be let alone, if defined literally, means separation[54] or isolation,[55] from the society at large. Why is this solitude[56] too

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[47] *See* Adam Carlyle Breckenridge, THE RIGHT TO PRIVACY (1971).

[48] BLACK'S LAW DICTIONARY 3783 (7th edn. 2004).

[49] *See* Thomas Cooley, TREATISE ON THE LAW OF TORTS (1888).

[50] *Id*. at 29.

[51] 277 U.S. 438, 478-479 (1928).

[52] *Id*. at 478-479. According to Brandeis J.:

> The makers of our Constitution undertook to secure conditions favourable to the pursuit of happiness. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights, and the right most valued by civilized men.

[53] *Gobind* v. *State of M.P.* (1975) 3 S.C.R. 946 at para 20. According to Mathew J.:

> There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in *Olmstead* v. *United States* {277 U.S. 438, 478-479 (1928)}, the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone. (Emphasis Supplied).

[54] 'Separation' as a text comes from *Latin Separare*, which means 'disjoin' or 'divide'. Every human condition nurtured in unity and in community is the best lived condition; right to be let alone appears to be a narrow and parochial nomenclature. *See* ILLUSTRATED OXFORD DICTIONARY 614 (2011).

[55] 'Isolation' as a text has its origin in *Latin Insuala*, which means 'Inland'; every being is an inland in himself or herself. *See* ENGLISH OXFORD LIVING DICTIONARY, *available at*: https://en.oxforddictionaries.com/definition/isolation (last visited 05 Jan., 2018). *See also* ILLUSTRATED OXFORD DICTIONARY 361 (2011). Isolation as a word, though generally used to connotes a negative or a sadist sentiment. This term reflects the vision of 'individualism'. *See* Ervin N. Griswold, The Right to be Let Alone 55 NW. UNIV. L. REV. 216 (1960-1961): The author writes that, the founding fathers gave us a country with a written constitution. One of the major concepts underlying it was the worth of *Individual Citizen*'.

[56] *See* P. Halmos, SOLITUDE AND PRIVACY 51, 121-122 (1952). According to him:

> While the material needs of man…have been increasingly satisfied, since the Industrial Revolution, the bio-social needs have been more and more neglected. Culture, a

essential for human being, especially knowing that the humans are believed to be social (political) animal?[57] To recollect, 'man (human) is an ideological animal by nature,[58] for them *Polis* is quintessential to 'cultivate civic virtues'.[59] The Aristotelian construction of human nature, though, not quite similar to one Hobbesian human nature, suggests for, however, both suspect the notion of state of nature and advocates for a civic life, a social life. To the contrary, privacy or right to be let alone is an individualistic[60] claim because, within the state apparatus, one asks for autonomy to remain or not to remain in a selfish cell. This cry for loneliness is heard nowadays, the question arises, for what purpose? If the very telos for which the nation-state was imagined in multiple discursive enunciations is not realized, i.e., to cultivate civic virtues!

An argument can be made against the state monopoly to civilize humans what other institutions, including family and social community effectively does. Does it not mean that right to be left alone as demanded by some, are expecting a corresponding duty, not only from their State but also, sometimes, from their family or communities as well,

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> fortuitous expression of the basic principia of life, rarely favored man's pacific, creative gregariousness…The nepotistic solidarity of the family is another symptom of the contemporary attitude according to which the world is hostile and dangerous and the family is the only solid rock which is to be protected against all comers.

[57] *See generally* Aristotle, HISTORY OF ANIMALS. (D'Arcy Wentworth Thompson trans. 2005); *See also* Aristotle POLITICS (Benjamin Jowett trans. 2017).

[58] *See* Louis Althusser, *Ideology and Ideological State Apparatuses (Notes towards an Investigation)* in THE ANTHROPOLOGY OF STATE: A READER 104 (Aradhana sharma & Anil Gupta eds. 2006).

[59] *Supra* note 57. Aristotle in *Politics* writes:

> The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society or who has no need because he is sufficient for himself, must be either a beast or a god, he is no part of a state. A social instinct is implanted in all men by nature, and yet he who first founded the state was the greatest of benefactors. For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with arms, meant to be used by intelligence and virtue, which he may use for the worst ends. Wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony. But justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society.

See Peter Loptson ed., READINGS ON HUMAN NATURE 20 (1998).

[60] *See* H. W. Arndt, *The Cult of Privacy* 21 (3) A. Q. 69, 70-71 (1969). According to him:

> The cult of privacy seems specifically designed as a defence mechanism for the protection of anti-social behaviour…The cult of privacy rests on an individualist conception of society, not merely in the innocent and beneficial sense of a society in which the welfare of individuals is conceived as the end of all social organisation, but in the more specific sense of 'each for himself and the devil take the hindmost'…An individualist of this sort sees 'the Government' where we might see 'the public interest', and this Government will appear to him often as no more than one antagonist in the battle of wits which is life-or business.

i.e., not to intrude in their vaguely understood or misunderstood private life? The worrisome aspect of this discourse is that not only the privacy of personal relations may be invoked to rationalize an obsessive preoccupation with the restricted family, to the exclusion of all other human concerns, but also right to privacy of the free citizens may be invoked 'to rationalize a selfish economic individualism'.[61]

A genealogical[62] understanding needs to be developed, which will necessarily put right to be left alone as a 'transcendental signified'[63] '*under erasure*'[64] in order to know the Derridean trace, an absence which was always already there. The right to be left alone is nothing but a further expansion or extension of the burdensome legacies of European renaissance, on the anvil of which, a new grammar of right, nowadays popularly known as 'human rights', is construed, modified, essentialized, and rationalized.

The normative semantics of human rights owes much to the theological-ontological dialectics than exclusive ontological or teleological rationalization. Moreover, the protestant or secularization movement in Europe, later on, rationalized every single idea that appeared to be meaningful for certain elite classes. For one needs to look at the seminal work of Max Webber who discovered the connections between protestant ethic and the spirit of capitalism.[65] In a passing reference, it would not be wrong to say that the privacy is a modern day invention,[66] however, privacy in the context of right could be understood only if one enters into the mansion of secularisation, which could be traced across various literatures available of European renaissance, rationalising the notion of inalienability of rights for the whole humankind.[67] The birth of Euro-centric

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[61] *See* Stanley I. Benn, *Privacy, Freedom, and Respect for Persons* in PRIVACY & PERSONALITY 23 (J. Ronald Pennock & John W. Chapman eds. 2007).

[62] *See generally* Friedrich Nietzsche, ON THE GENEALOGY OF MORALS 1-170 (Douglas Smith trans. 1996).

[63] Gayatri Chakravorty Spivak *Preface to the English Edition* of Jacques Derrida's OF GRAMMATOLOGY XVI (1998). 'Transcendental signified' means, to paraphrase Jacques Derrida, 'anything that is conceived of in its being-present must lead us to the already-answered question of Being.

[64] *Id*. at 15-16. 'Under Erasure' is a strategy devised by Heidegger and later on developed by Jacques Derrida. This means 'to write a word, cross it out, and then print both word and deletion. (Since the word is inaccurate, it is crossed out. Since it is necessary, it remains legible).

[65] *See generally* Max Weber & Talcott Parsons, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 1-185 (2003).

[66] Hannah Arendt, among others, has argued that the importance ascribed to 'intimacy' is distinctively modern; and that modern liberals' ways of marking off some forms of private life (including those extending beyond personal and family relations) as freedoms of the individual stand in contrast to the ancient Greeks' equations of freedom with participation in public activities and of privacy (in the household, the realm of women, children, and slaves) with deprivation of the highest human status. *See e.g.* Hannah Arendt, THE HUMAN CONDITION Ch. 4-9 (1958). *See also* Isaiah Berlin, FOUR ESSAYS ON LIBERTY 40-42 (1969).

[67] Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the

trinity, in form of inalienable rights, is a manifestation of 'universalizability', also complicates the very conceptual understanding of privacy with reference to moral relativism *qua* ethical subjectivity across diverse societies and cultures.

(c) The Birth of 'Trinity'[68]

The grammar of right *vis-à-vis* privacy owes immensely to the fecund creativity of Immanuel Kant, because of his 'trinity',[69] namely; freedom (read it liberty), autonomy, and human dignity. Here right to be let alone could be understood in the context of individual self, something the rest of animal kingdom are unaware of, that is how, the human way of human condition, the 'human, all too human'[70] emerged, while separating themselves from allegedly an irrational animal kingdom. The two terms, autonomy and privacy must be the twin princes of a so called 'rationale kingdom', which was conceptualised in terms of ontology, utility, and teleology. Kantian personhood was conceptually tied to autonomy and the ability to form a life plan. To respect someone is to treat him or her as an 'end in himself or herself and not merely a means to an end'.[71] Kant observed while philosophising the metaphysics of morals that, the human as a sentient being is capable to act autonomously, meaning thereby, they are capable to create their own law, universal law. The idea of the 'will', Kant writes, of

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human personality. The human element in life is impossible to conceive without the existence of natural rights. In 1690, John Locke had in his *Second Treatise of Government* observed that "the lives, liberties, and estates of individuals are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference". *See* John Locke, THE TWO TREATISE OF GOVERNMENT 124, 137-152 (2016). The notion that the certain rights are inalienable was embodied in the American Declaration of Independence (1776), which declares, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness" (Emphasis Supplied). The term inalienable rights was also incorporated in the Declaration of the Rights of Man and of the Citizen (1789) adopted by the French National Assembly in the following terms:

> For its drafters, to ignore, to forget or to depreciate the rights of man are the sole causes of public misfortune and government corruption. These rights are natural rights, inalienable and sacred, the National Assembly recognizes and proclaims them-it does not grant, concede or establish them-and their conservation is the reason for all political communities; within these rights figures resistance to oppression.

[68] Here 'Trinity' means, Liberty (read also freedom), Autonomy, and Human Dignity.

[69] *See* Upendra Baxi, *Opening New Doors* INDIAN EXPRESS (30 Aug., 2017). *Available at*: http://indianexpress.com/article/opinion/columns/right-to-privacy-supreme-court-4819896/ (last visited 10 Dec., 2017). According to Upendra Baxi, 'Human dignity and liberty as well as autonomy thus emerge as core values, as these are not conceivable without the 'Right to Privacy' (R2P)'.

[70] *See* Friedrich Nietzsche, HUMAN, ALL TOO HUMAN 1-399 (1996).

[71] Immanuel Kant in *A Groundwork for the Metaphysics of Morals* writes, 'Act so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means'. *See* Immanuel Kant, GROUNDWORK FOR THE METAPHYSICS OF MORALS 54 (Allan W. Wood ed. 2002).

every rational being as a will giving universal law.[72] Alternatively, to read this maxim in a different context, '[D]o not choose otherwise than so that the maxims of one's choice are at the same time comprehended with it in the same volition as universal law'.[73] To treat human as an end in herself and not merely a means to an end, signifies to be a referent of human dignity,[74] which is conceived in the 'mansion of autonomy'.[75] In extension to this maxim, 'autonomy'[76] has its philosophical foundation in free exercise of choices which reduces the right to privacy in terms of free exercise of choices *vis-à-vis* food, shelter, association, non-association, theism-atheism, sexual orientation, and even free choice to disseminate, propagate, or withhold spatial-personal information. Autonomy in terms of instrumentalist arguments characterizes the very choice of love, if it is 'official love' or 'free love'? For instance, the Supreme Court of India had passed

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[72] *Ib*.

[73] *Id*.

[74] Chandrachud J. in the *Privacy Judgment* at para 433, cements the bond of trinity with these words:

> Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life.

[75] Immanuel Kant's metaphysical meditations on human dignity and autonomy comes out in these words: [N]othing has a worth except that which the law determines for it. The legislation itself, however, which determines all worth, must precisely for this reason have a dignity, i.e., an unconditioned, incomparable worth; the word respect alone yields a becoming expression for the estimation that a rational being must assign to it. Autonomy is thus the ground of the dignity of the human and of every rational nature. *Supra* note 71 at 54.

[76] Chandrachud J. writes in the *Privacy Judgment* (at para 3):

> The autonomy of the individual is conditioned by her relationships with the rest of society. Those relationships may and do often pose questions to autonomy and free choice. The overarching presence of state and non-state entities regulates aspects of social existence which bear upon the freedom of the individual. The preservation of constitutional liberty is, so to speak, work in progress…What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy.

an order, requiring every person who is watching a movie in a cinema hall, to compulsorily stand up in the cinema hall as a symbol of respect for the national anthem. However, this order is no more effective now. But could it not be safely concluded that it was an unsuccessful attempt on the part of Court to promote official love? Similarly the rhetorical politics of 'love jihad' in India to create fear among minority communities goes against the notion of autonomy. To move in a similar direction, the 'politics of desexualisation'[77] and 'beef ban'[78] are some of the issues in contemporary India which needs to be debated afresh, particularly after the *Privacy Judgment*, when right to privacy, based upon the principle of autonomy, is now called as an 'elemental principle', nevertheless the very contours of right to privacy in unclear.[79] The principle of autonomy was the product of rationalization and secularization, under the philosophical leadership of the 'masters of order',[80] Thomas Hobbes, John Locke, and Jean Jacques Rousseau, even Immanuel Kant fits in this 'order' tradition. The values such as human worth, considered as intrinsic value, was attached to the very birth of human which was missing according to them, in the rest of the animal kingdom. This value further crystallised under the grammar of right as signifiers, like human dignity, autonomy, and liberty, also presupposed to be constituent of foundational normative and ethical structure which, according to Kant and Locke, ensured the human life a worthy life. Particularly, John Locke's powerful advocacy for natural rights and its manifestation in American and French revolutions[81] facilitate enough scope to rationalize the 'politics of human rights',[82] which has been, hitherto, unheard and

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[77] *See* note 43 at 6.

[78] *See* Upendra Baxi, *Supra* note 69. In his erudite remark Upendra Baxi makes a prophecy in his signature style:

> The Right to Privacy decision is significant for opening many doors to the future. In effect, it rules that the two-judge bench that overruled the *Naz* Delhi High Court decision offended the R2P and the curative bench will now have to follow that decision. Further entailments on the politics of beef will unfold in relation to the human right to food, nutrition, and health.

[79] *Id*. He is of the view that the right to privacy is understood as a right, a principle, and a value. According to him: 'It is an 'elemental principle', 'a protected constitutional value' such that 'would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection' and as a 'standard': The Court asserts the need to protect the privacy of the being when 'development and technological change continuously threaten… public gaze and portend to submerge the individual into a seamless web of inter-connected lives'.

[80] *See* Upendra Baxi's lecture on *Is the Whole World Becoming the Third World*? *Available at*: https://www.youtube.com/watch?v=kHChUbjQLUs (last visited 27 Jan., 2018).

[81] *E.g.* The writings of Locke, Kant and other philosophers who determined the general course and content of the modern western philosophy upon which all practical human institutions seem to have been developed and rationalized.

[82] *See* note 43 at 33-56. When repression was the most severe and sustained, summoning terms like 'liberation', 'democracy' and even 'human rights' conveyed images and reality of aggressive state-terrorism. It is in this historic womb that the protean foetal life of the Politics of human rights, in contradiction to the politics for human rights begins its almost caesarean birth pangs.

unknown in pre-human rights age. In the colonial and post-colonial world, the politics of human rights entailed colossal ramifications in terms of impact on social psyche, social system, law and courts.[83]

The belief in the private sphere as freedom-producing sphere, seems to require at least two presuppositions. First, freedom is a principle, and any interferences with it require justification. Second, there ought to be an area of individual involvements which is not the normal province of a wider community. There are two well-known seminal approaches on the value of freedom: instrumentalist and non-instrumentalist. Interestingly, a non-instrumentalist, who is interested in better ends instead of means, adopts hedonistic calculus whereby the intrusions with the freedom of choices are endorsed on the ground of efficiency. But an instrumentalist like Immanuel Kant argues for the very worth which is attached to the freedom of choice (autonomy) for a human being, as an autonomous subject, who is capable to exercise this choice rationally and is capable to make his or her own laws.[84] It is believed that Liberty is the greatest blessing for the humankind. While natural liberty, as valorised by some philosophers, including Rousseau, it is at the same time criticised by many thinkers, including Thomas Hobbes. Selfish human nature, according to Hobbes, yields chaos in the state of nature. However, after social contract, as conceptualized by Rousseau, natural liberty is replaced by civil liberty, inviting reasonable restrictions based on harm principle.[85] In order to realize civil and personal liberty in its new spirit, every human being at least in metaphysics of presence, conceived as 'an end in herself',[86] or 'Self-Sovereign'.[87] The whole argument *vis-à-vis* trinity, which was the product of European renaissance, revolves around the

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[83] *See* note 43 at 3. Prof. Baxi reflects on this issue:

> This Potentiality not to haunts even the millennial dream of 'turning swords into ploughshares'. But its narratives also extraordinarily demystify the extraordinary histories of the centuries-long political terrorism involved in the colonization of the non-European peoples, Politics of organized intolerance, genocide, and ethnic cleansing stand universalized in the killing fields of postcolonial and post-socialist experience. The early, middle, and late phases of the Cold War orchestrate prodigious human suffering as well as the exponential growth of human rights enunciations…now the so-called pre-emptive disarmament wars ominously birthed through the Second Gulf War and the 'war on terror' also. At one and the same time, mark ways of reproduction of human rights as well as of imposition of rightlessness.

[84] *Supra* note 71 at 119. Kant writes, "Act only in accordance with that maxim through which you can at the same time will that it become a universal law'.

[85] *See* J. S. Mill, *On Liberty* 21-22 (Oxford University Press, 1859). He argues, "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others".

[86] This phrase is related with one of the categorical imperatives formulated by the German Philosopher Immanuel Kant. See A. Wood, *Humanity as end in itself* 1 (1) *In Proceedings of the Eighth International Kant congress* 3013-319 (Feb., 1995).

[87] *See* J. S. Mill, ON LIBERTY 13 (1859). He argues that, 'the only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign'.

sovereignty of an individual, be it an instrumentalist (for whom means as well as ends are equally important) or a non-instrumentalist (for whom only ends matter). The right to privacy, for them, is quintessential and basis for mastering power to maintain and to sustain individual's sovereignty. The Supreme Court of India makes reflection on the golden trinity *vis-à-vis* privacy in these words:

> The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.

The right to privacy has been upheld as one of the fundamental rights by the Apex Court on the ground that no life is life without human dignity and human dignity remains sacrosanct only when privacy is maintained. Freedom and autonomy cannot be exercised in its essence, unless and until privacy as a core foundational value is preserved. The *Privacy Judgment* in its substance grounded on one basic understanding, nay misunderstanding of liberty, which has its origin from the secularised and bourgeois tradition, emanated to liberate being from the interference of church. The critical tradition emerged against irrational collectivism to ensure freedom against prefixed status. The Enlightenment thinker Immanuel Kant philosophised the liberty in metaphysical sense, free will. And the political thinker such as John Locke established the very foundation of capitalism in the name of liberty or, to be specific, the right to property. For he justified acquisition of private property in extension of the misplaced idea of 'self-possession'.[88] Liberal philosophy, in some sense, rationalized 'possessive individualism'[89] and stood for sovereign isolation of human being like a supernatural

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[88] John Locke, FIRST TREATISE ON GOVERNMENT 27 (1690), (Lock holds: 'though the Earth…be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the 'common state nature' placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men); *See also* C.B. Mcpherson, THE POLITICAL THEORY POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 44 (1962), explaining that, 'Though the things of nature are given in common, yet man, by being master of himself and proprietor of his own person and the actions and labour of it, had still in himself the great foundation of property'.

[89] *See generally* Macpherson, *Id.*

God,[90] which resulted into freedoms for a few at the cost of un-freedoms for many others.

To understand freedom in a socialist perspective, freedom is the consciousness of necessity.[91] For one has to realise that whatever 'free will' is not will alone, but action which is also involved in liberty,[92] for an individual is conscious of the motive that dictates his action.[93] It is not enough to leave a being on its own fate; in such a condition a lion shall eat a sheep and the Darwinian natural's nature will prevail over the possibilities of co-existential realization of equal liberty. It is for this purpose only that human chose to be a part of the civil society, to maximize the realisation of liberty in the fullest sense, irrespective of their diverse/pluralistic wants and demands. Our true freedom lies in realisation of free will, for one has to be capable enough to fulfil all the basic needs, which is possible only when our community and our neighbours have a sense of belonging and a sense of duty to take care of the needs and wants of fellow beings. 'A free will is not enough to secure liberty, but our actions also must be unconstrained'.[94] To quote Christopher Caudwell, it is knowledge that brings freedom.[95] He rightly argues:

> Society is a creation by which man attains a fuller measure of freedom than the beasts. It is society and society alone, that differentiates man qualitatively from the beasts…Man, the individual, cannot do what he wants alone. He is unfree alone…the man alone, unconstrained, answerable only to his instinct is Russell's free man. Thus all man's painful progress from the beasts is held to be useless.[96]

In contemporary time humans are not chained because of the companionship of fellow brothers and sisters, in fact, they are caged in individualism, as Caudwell argues that 'a man is a social product in a sense that consciousness, like that of all useful objects, is a creation'.[97] According to him, 'the torch of liberty is handed on and burns still brighter. But it is in living that man's consciousness takes its distinctive stamp and living is simply

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[90] *See* Bhikhu Parekh, THE MODERN CONCEPTION OF RIGHT AND ITS MARXIST CRITIQUE in THE RIGHT TO BE HUMANE 1-22 (Upendra Baxi ed. 1987).

[91] *See* Christopher Caudwell, STUDIES IN A DYING CULTURE 206-212 (1938, 2017).

[92] *Id*. at 209.

[93] *Id*. at 205.

[94] *Id*. at 208-210. Christopher Caudwell writes about the subjective mental phenomenon and the external phenomenon in true realization of our freedoms. According to him, we see that we attain freedom by our consciousness of the causality of subjective mental phenomenon together with our consciousness of external phenomenon…the more gain of this double understanding, the more free we become, possessing both free will and free action…however, animals are less free than men. Creatures of impulse, acting they know not why, subject to all the chances of nature, of other animals, of geographical accidents and climate change, they are at the mercy of necessity, precisely because they are unconscious of it.

[95] *Id*.

[96] *Id*. at 210-211.

[97] *Id*. at 214.

entering into social relations'.[98] He further goes on saying that 'both knowledge and effort are only possible in cooperation and both are made necessary by man's struggle to be freer'.[99] However for him, 'this individual freedom through unconsciousness is delusion'.[100] And as per his understanding, 'these very un-freedoms expressed as individualism-in the basic function of society, ultimately generates every form of external constraint'.[101] To substantiate it further, the radical individuality appears to be a by-product of the liberal notion of right and the right to freedom.

Privacy in context of right denotes an aggressive assertion of individuality which, in its effects, creates a violent structure of un-freedoms. Autonomy, as a metaphysical exemplification, is an empty word unless social reality is conducive for the free exercise of will. For the right to be let alone might be suitable for those who have luxury to think beyond the basic needs, but for a person who is struggling for two times meal, clothes, and shelter this is merely an elitist slogan. The author does not want to go into the discussion that the 'right to privacy' is really a fundamental (read 'basic') need of individual. This conception has its own history, encompassing only some dominant modes of human right production, whereas few prevailing understandings of liberty as bourgeois phantoms are 'hegemonized' as per 'lexical priority'[102] over every other subaltern cries for basic needs, in a sense, denying the very 'right to be human'.[103]

To argue further, this mode of enunciation and interpretation has changed the very spirit of Indian Constitution. Instead of promoting the deontological jurisprudence in India, judges, legislators, executives, and bureaucrats are continuing on the same old path for what western society has been infamous till date. Can't we say that the social justice, as added after 42nd Constitutional Amendment Act, has been reduced to a mere symbolic presence in an era where right to be let alone in form of individualism is breaking traditional Indian ethos for what India was known for in ancient time?

V

Right to be forgotten in a Posthuman Age

The posthuman world is becoming a new phenomenon whereas humans are, according to Joseph Weizenbaum, the 'centre of technological progress, rather being its subject'.[104]

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[98] *Id*. at 215.

[99] *Id*. at 216.

[100] *Id*. at 220.

[101] *Id*.

[102] *See* John Rawls, A THEORY OF JUSTICE 37 (Revised edition, 1999).

[103] *See* Baxi, *supra* note 6.

[104] *See* Apar Gupta, *Rights in the Age of Big Data* THE HINDU (13 Jan., 2018). *See generally* Joseph Weizenbaum, COMPUTER POWER AND HUMAN REASON: FROM JUDGMENT TO CALCULATION 1-300 (1993).

This is truly an age where the idea of human is already dead, for one can recall Foucauldian prophecy, which reflects upon it in a slightly different note, 'Man is an invention of recent date and one perhaps nearing its end'.[105]

Upendra Baxi in his epoch-making work, *Human Right in a Posthuman World: Critical Essays*, reflects upon the apocalyptic constructions of the posthuman in following words:

> Perhaps, it is unwise to use the term 'apocalyptic' to describe the nature of new techno-science developments; yet, the posthuman marks a narrative of many endings. It marks an end of the human in so far as the 'human' stood conceived theologically and cosmologically as the locus as well as the terminus of divinely authored imagination of the best of all possible material and normative worlds… it marks also a decisive shift through the notion that whatever counts as being 'human' is not so much 'born' as 'made'.[106]

This is truly an information age which creates and decimates the very idea of human or rather reconstructs it. In that sense identity of self does not allow to reflect within subjective-objective-intersubjective understanding of being. Cartesian philosophy is redundant today when it suggests that two different laws of nature apply on mind and body. 'Information' as a new 'form of power'[107] is misfit in Cartesian dualism. For information does not belong to the 'metaphysics of presence'. It is believed to be a 'pattern instead of presence, a form in which information loses its body, readily transferable to other media such as the robotic forms of artificial intelligence'.[108] That human 'body' is viewed just one such medium among many coding information if information may be successfully coded across other media which is made possible by contemporary genetics and nanotechnologies, in a way, human consciousness could be uploaded to a computer.[109] In that sense, those old distinctions between human-nature, male-female, and human-animal would be redundant if Ray Kurzweil's prophecy

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[105] *See* Upendra Baxi, HUMAN RIGHTS IN POSTHUMAN WORLD: CRITICAL ESSAYS 202 (2009). To substantiate it further, Cary Wolfe writes: Michel Foucault seeks to challenge the universal, objective, and progressive image of unified science inherited from the Enlightenment and instead embarks on an attempt to discover an irreducible plurality of 'territories' and 'objects' of knowledge, characterized by anonymous tacit procedures, an account that emphasizes the relative autonomy of discourses...Foucault, in short, undertakes a trenchant posthumanism on the terrain of the subject to match his anti-universalism in the domain of the object. *See* Cary Wolfe, WHAT IS POSTHUMANISM? 109 (2009).

[106] *See* Baxi, *Id*. at 208.

[107] Chandrachud J. in the *Privacy Judgment* at para 435, explains about a new form of power, something Francis Bacon had not imagined when he said, 'Knowledge is Power'. 'Ours is an age of information. Information is knowledge. The old adage that 'knowledge is power' has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence'.

[108] *See* N. Katherine Hayles, HOW WE BECAME POSTHUMAN: VIRTUAL BODIES IN CYBERNETICS, LITERATURE, AND INFORMATICS 18 (1999).

[109] *See* Baxi, *supra* note 105 at 209.

comes true.[110] It would not be a baseless hypothesis that information, in a posthuman age, creates the identities of the human individual, which were earlier determined by theological-ontological-teleological epistemology. For political-juridical narratives, identity was created, deconstructed, recreated, and recognized as a slave, subject, citizen across the various 'governmental apparatuses'[111] and rationalized under the hypothetical social contract'.[112]

To elucidate further, the posthumanist construction of identity or say its soul, is found in the body of 'big data'.[113] The big data, consisting of huge information, does challenge 'the right to be forgotten', as sloganeered by liberals, nevertheless, any such a right is almost incomprehensible and illusory in the big data age, reason being, the right to be forgotten cannot be protected by a consent based[114] or right based legal framework.[115] For which, the counter technological progressions are required. Notably, the Supreme Court of India rightly observed in the *Privacy Judgment*:

> Informational privacy is 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. We commend to the Union Government the need to

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[110] Ray Kurzweil, THE AGE OF SPIRITUAL MACHINES: WHEN COMPUTERS EXCEED HUMAN INTELLIGENCE 317 (2000). Kurzweil make prophecies that, [T]he next inevitable step is merger of the technology-inventing species with the computational technology it initiated the creation… . The law of Accelerating Returns predicts a complete merger of the species with the technology it originally created'. *Id.*

[111] *See* Michel Foucault, THE BIRTH OF BIOPOLITICS 15-47 (Graham Burchell trans. 1978-79).

[112] *See generally* Martha C. Nussbaum, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2007).

[113] The term has been in use since the 1990s, with some giving credit to John Mashey for coining or at least making it popular. *See* John R. Mashey, *Big Data and the Next Wave of InfraStress* (Seminar Proceedings, Computer Science Division Seminar, 1997, University of California). *Available at*: www.usenix.net/publications/library/proceedings/usenix99/invited.../mashey.pdf (last visited 28 Jan., 2018). A consensual definition is accepted that the 'Big Data' represents the information assets characterized by such a high volume, velocity and variety to require specific technology and analytical methods for its transformation into value. *See also* Andrea De Mauro *et. al., A formal Definition of Big Data based on its Essential Features* 65 (3) LIBR. REV. 122-135 (2016). The Supreme Court of India in the *Privacy Judgment* throws some lights on Big Data:

> The contemporary age has been aptly regarded as an era of ubiquitous dataveilance, or the systematic monitoring of citizen's communications or actions through the use of information technology. It is also an age of "Big Data" or the collection of data sets. These data sets are capable of being searched; they have linkages with other data sets…The challenges which big data poses to privacy interests emanate from State and non-State entities. Users of wearable devices and social media networks may not conceive of themselves as having volunteered data but their activities of use and engagement result in the generation of vast amounts of data about individual lifestyles, choices and preferences.

[114] *See* Yvonne McDermott, *Conceptualising the Right to Data Protection in an Era of Big Data*, 4 (1) BIG DATA AND SOCIETY 1-7 (2017).

[115] *See* The *Privacy Judgment* at para 440.

> 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.[116]

Justice B.N. Srikrishna committee, in India, was tasked to make recommendations on drafting a data protection law to harness the benefits of the digital economy and mitigate the harms consequent to it.[117] And the committee in its white paper explains the need behind data protection laws in these following words:

> Since technologies such as Big Data, internet of things, and Artificial Intelligence are here to stay and hold out the promise of welfare and innovation, India will have to develop a data protection law…to ensure a balance between innovation and privacy.[118]

Any data protection law, howsoever robust it is, would turn out to be useless, unless technological innovations are promoted to counter any such possibility of the breach of data. Interestingly, the posthuman world is now going to become a new reality since the idea of human, originated and nurtured under the transcendental legacies of European Renaissance, is already dead, moreover the new 'technological Gods' are prepared for its burial. Here the very notion of human is shaped in bits and bytes, in ways, the data creates a new human identity. And its breach, of course, is considered, not less than the very breach of human identity which could be overcome only by developing new technological antidotes.

A discourse[119] such as privileging right over innovation or innovation over right would be an unnecessary exercise. Moreover, right to have anonymity or right to be forgotten is recognized as one the most fundamental rights, though any such recognition might be appropriate for political-juridical-constitutional discourse, but not necessarily effective, especially in a posthuman world whereas CCTV cameras are the new made masters, permanently gazing the activities of humans, in a way, humans are now object for someone; not necessarily for the theological or political God, but of course for a technological God, ready to overpower and outsmart the very human intelligence.

Paradoxically, the humans live and die for their identity, recognition, and glory; but now their own technological creations are possibly smart and intelligent enough to put them in a very uncomfortable position. To avoid any sorts of surveillance or 'dataveilance', the humans are asking for anonymity from the reach of Artificial Intelligence. This transformative biopolitics, which is not limited only to the state-subject dichotomy, but applicable to all possible cyborgs, transcending this human world into a posthuman age, which simply cannot be countered by any such reactionary cries. The

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[116] *Id*. at para 457.

[117] *See White Paper of the Committee of Experts on a Data Protection Framework for India* 4 (2017). *Available at:* http://www.meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_171127_final_v2.pdf (last visited 15 Jan., 2018). *See also* Apar Gupta, *Rights in the Age of Big Data* THE HINDU (13 Jan., 2018).

[118] *Id*. *White Paper*, at 10.

[119] *Id.* Apar Gupta note 117.

right to have an identity or not to have an identity, believed by liberals as one of the facets of liberty or privacy, cannot liberate them unless they embrace their newly created child, though it is uncertain if the apocalyptic posthuman world will progress in the dialectical circle from where all carbon life started or will it move into a new circle of silicon life, is a question only future will answer?

VI

Right to Privacy: Constitutional Interpretations in India

Interpretation as a term signifies the way something is explained or understood.[120] However, the methods of interpreting a constitution is not the same that of an ordinary statute. For it is apt to remember Marshal J., who wrote in *McCulloch* v. *Maryland*, 'it is a constitution that we are expounding'.[121] The constitution of a modern day state is the ultimate source of governing powers. It not only recognizes certain fundamental-inalienable rights of citizens and non-citizens, but also enunciates the whole schemata of good and just governance. Since society moves on running wheels of time, a constitution must anticipate and conform to the changing aspirations of a society. Amendment, as a method, is used by legislatures across the world, to change constitutional provisions, but it is not one and only method to make a constitution dynamic. Instead interpretation as a tool enlivens the very spirit of a constitution. Judges devise some unique methods, in common law system and in its judicial process.

Whether the right to privacy is fundamental right under Indian Constitution has have chequered history starting from *M.P. Sharma* v. *Satish Chandra*[122] to *K.S. Puttaswami* v. *Union of India* where the Supreme Court has finally, it appears, decided it positively. However, it is appropriate to look upon the evolutionary path of the right to privacy with special reference to constitutional interpretations given and supposition, adopted by the Supreme Court.

In *M.P. Sharma* certain searches were made as a result of which voluminous mass of records was seized from various places. The petitioners prayed that the search warrants which allowed such searches and seizures to take place be quashed, as violative of Article 20(3) of the Constitution providing for that no person accused of any offence shall be compelled to be a witness against himself. The argument, which was turned down by the Court, was that since this kind of search would lead to the discovery of several incriminating documents, a person accused of an offence would be compelled to be a witness against himself as such documents would incriminate him. The argument was rejected with reference to the law of testimonial compulsion in the U.S.,

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[120] *See* OXFORD DICTIONARY OF LAW 294 (7th edn. 2009).

[121] *McCulloch* v. *Maryland* 17 U.S. 316 at 407 (1819).

[122] (1954) S.C.R. 1077.

the U.K., and in India. While dealing with the argument, the Apex Court noticed that 'there is nothing in our Constitution corresponding to the Fourth Amendment of the U.S. Constitution, which interdicts unreasonable searches and seizures'. In so holding the Court observed: [123]

> A power of search and seizure is in any system of jurisprudence an 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 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.

The issue of the right to privacy came up again before the Supreme Court in *Kharak Singh* v. *State of U.P.*,[124] the petitioner namely Kharak Singh was challaned in a case of dacoity in 1941, subsequently he was released for want of evidence. But the police compiled a 'history sheet' against him. History sheets were defined in Regulation 228 of Chapter XX of the U P Police Regulations as 'the personal records of criminals under surveillance'. Kharak Singh, who was subjected to regular surveillance, including midnight knocks, moved before the Supreme Court for a declaration that his fundamental rights, including the right to privacy, were infringed.

When *Kharak Singh* was decided, the principles governing the inter-relationship between the rights protected by Article 19 and the right to life and personal liberty under Article 21 were governed by the judgment of the Apex Court, delivered in *A.K. Gopalan* v. *The State of Madras*.[125] In that case the Apex Court considered each of the articles in the chapter on fundamental rights as embodying distinct, as opposed to over-lapping, freedoms. Hence in *Kharak Singh*, the Court ruled:

> In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the 'liberties' in Article 19(1)(a) & (d) on the one hand and that in Article 21 on the other, or the content and significance of the words 'procedure established by law' in the latter Article, both of which were the subject of elaborate consideration by this Court in *A.K. Gopalan* v. *State of Madras*.

The decision in *Kharak Singh*, although held 'that clause (b) of Regulation 236 which provided for domiciliary visits at night was violative of Article 21'.[126] While the Court observed that the Indian Constitution does not contain a guarantee similar to the Fourth Amendment of the US Constitution, the Court further held:

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[123] (1954) S.C.R. 1096.
[124] A.I.R. 1963 S.C. 1295.
[125] (1950) S.C.R. 88.
[126] *Supra* note 124.

> Nevertheless, these extracts would show 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 civilisation.

However, the Court upheld the validity of clause (c), (d), and (e) of the said regulation, on the ground that the right to privacy is not a fundamental right guaranteed by Indian Constitution. According to the Court:

> [T]he freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned counsel for the petitioner. As already pointed out, 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.[127]

But a minority voice, from K. Subbarao J., knocked the door, with a clear view that Art. 19 or Art. 21 of Indian Constitution is not isolated island in themselves, rather each article complements and supplements to each other. Moving further, Rao J. declared that the right to privacy as a prerequisite necessity for enjoyment of the right to freedoms:

> [T]he right to personal liberty takes in 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. The pregnant words of that famous Judge, Frankfurter J., in *Wolf* v. *Colorado*[128] pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one.[129]

In *Gobind* v. *State of M.P.*,[130] a bench of three judges of the Supreme Court considered a challenge to the validity of regulations 855 and 856 of State Police Regulations under which a history sheet was opened against the petitioner who had been placed under surveillance. The Bench of three judges adverted to the decision in *Kharak Singh* and to the validation of the police regulations (other than domiciliary visits at night).

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[127] *Id.* at 351.
[128] [(1949) 238 US 25].
[129] A.I.R. 1963 S.C. 1295.
[130] 1975 A.I.R S.C. 1378.

By the time *Gobind* was decided the law in the US had evolved and the Supreme Court of India took note of the decision in *Griswold* v. *Connecticut*,[131] in which a conviction under a statute on a charge of giving information and advice to married persons on contraceptive methods was held to be invalid. The Supreme Court relied on the dictum that specific guarantees of the Bill of Rights have penumbras which create zones of privacy. The Apex Court also relied upon the US Supreme Court decision in *Jane Roe* v. *Henry Wade*,[132] in which the Court upheld the right of a married woman to terminate her pregnancy as a part of the right of personal privacy. The following observations of Mathew J. in the judgment indicate the constitutional recognition of the right to privacy:

> There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in *Olmstead v. United States*,[133] the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore, they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone.

Gobind was decided on a supposition that the right to privacy is a fundamental right already decided by the Apex Court in *M.P. Sharma* case, however, *M.P. Sharma* and *Kharak Singh*, which were decided by comparably the bigger benches, in comparison to *Gobind*, negated this very argument, in that sense, *Gobind* was *per incurium*. Subsequently, many judgments of the Apex Court relied *Gobind* and decided that the right to privacy is fundamental right guaranteed under the Indian Constitution. It is only after the introduction of Aadhaar project by the successive governments of the centre, some petitioners challenged this project while basing their arguments on the right to privacy, which was vehemently denied by then attorney general of India. It is for this purpose only, the Apex Court of India referred this matter before the nine judges' constitutional bench to decide the validity of right to privacy under Indian Constitution. And finally, in *K.S. Puttaswami* v. *Union of India*, the Apex Court unanimously upheld its validity and declared it as a fundamental right under Indian Constitution. *Puttaswami* has been decided after a sea change occurred in the basic understanding of various civil liberties and its relationship, especially after some landmark decisions of the Apex Court, for example, *R.C. Cooper* v. *Union of India*[134] and *Maneka Gandhi* v. *Union of India*.[135] These decisions established the golden thread of Indian Constitution in complementarity and supplemental relationship of one fundamental right to another, in a way, no one article remains alone in its status or functionality: something the modern day liberal activists are not willing to accept for people of the world, for them, solitude and loneliness have become desirable slogan to

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[131] 381 US 479 (1965).
[132] 410 US 113 (1973).
[133] 277 US 438 (1928).
[134] (1970) 3 S.C.R. 530.
[135] 1978 A.I.R. 597.

raise in the name of freedom. However, question remains: freedom from whom, for what, by what?

VII

Emerging Jurisprudence

The *privacy judgment*, howsoever misplaced it appears, especially in context of right, endows enough ammunitions for liberals to push in the crisis ridden jurisprudential principles, which has not been accepted and recognized by judiciary or the parliament as the case may be. The trinity; liberty, autonomy, and human dignity, as burdensome and perplexed legacy of renaissance, are now understood and imbibed as an incomplete thread, unless the right to privacy, as a new matrix of metaphysics becomes a complementing limb or a new normativity in it. Once the Court has recognised and upheld the right to privacy as a fundamental right, inherent in the penumbral reading of the various articles of Indian Constitution, the Pandora box is now open to subsume and consume many a "theologico-politico" traces or categories that will replace or misplace them with another illusion. If it is an elemental principle, as conceptualized by Prof. Baxi, then of course, a new grammar of liberty, autonomy, and human dignity would redefine its content.

(a) Aadhaar; A New Grammar of 'Biopolitics'[136]

One has certain belonging as a species, be it animals or ideological animals. For ideological animals, the Westphalian nation-state has now become the creator of their identity and of course destiny: a *pater familias* only who is capable and entitled to engrave, create, and mitigate the very identity of the ideological beings. For example, the Aadhaar project in India, Aadhaar here is a Hindi text, if translated into English, means base/foundation: the foundation of identity, so to say, with or without which a person is a citizen or non-citizen respectively in India. This belonging to a unit, a nation state, decides if one is entitled to be human and human rights; those who are left out from the province of nation-states are now the new wretched people of the Earth. Likewise people, who are owned by the nation-states as its citizens, are permanently observed by big brothers or at least, the fear factor remains there in form of 'surveillancophobia'.

In India, Aadhaar has nowadays become the base line of the permanent surveillance, which is not limited to the guardianship of father, but also for the curiosity of 'invisible

[136] Biopolitics here means a tool to replace the human as a subject to an object, in a way, the nation state becomes the self-existing subject who acquires the power of metamorphosis the subject, whereby all the rationalization of nation- state in terms of social contract theories, are replaced with a secularized-sovereignty of the nation state, which creates, engrave, and mitigate the very identity of 'being'.

hands', who governs the cosmos of social and economic production and exchange. In that sense, historical and cultural identities are destroyed to create a new one.

Aadhaar project, which was introduced by earlier UPA government and now embraced by NDA government like its own child, has become a contentious issue between the government of the day and civil society, especially, the way Aadhaar project has been handled or mishandled, raises some serious questions with reference to the right to privacy. Earlier, this project had no support of law, but later on, the legislation as a method of rationalization, was thought of and executed in a hasty way and was passed by the parliament after considering it as a Money Bill. The government of the day has embraced this project as a tool to eliminate corruption and to bring out transparency in governance. The problem is, as argued by the government, also related to the integrity, as the duplication of identity records and fraud are well-known everywhere in India. And for that now, every welfare program which is initiated by the government requires Aadhaar identity. The civil society in India, especially the lawyers, academicians, and other social-political activists are vocal in their criticisms against the project, for a simple reason that it violates the right to privacy, which is a fundamental right.

For the enrolment for Aadhaar one has to share, as argued by Jean Dreze, 'three different types of private information: biometric information, identity information, and personal information'.[137] The first two are formally defined in the Aadhaar Act itself and protected to some extent. Aadhaar's biggest threat to privacy relates to the third type of information.[138] In the Aadhaar Act, biometric information refers to photograph, finger print, Iris scan, or such other biological attributes of an individual as may be specified by the Unique Identification Authority of India (hereafter referred as UIDAI).[139] The term 'core biometric information' basically means 'biometric information minus photograph',[140] but it can be modified at the discretion of the UIDAI. 'Identity information' is also defined in the Act which includes Aadhaar number, biometric information, and demographic information',[141] such as name, address, date of birth, and phone number, etc. Though personal information is not defined in the Aadhaar Act, but it basically means, 'Identity information as well as information about a person'.[142] Aadhaar Act puts into place certain safeguards to protect biometric and identity protection,[143] but new technologies are efficient enough to hack all the biometric information which will risk everyone, including national security and financial stability of the country, moreover, the most serious concern is that a biometric information

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[137] Jean Dreze, *All that data that Aadhaar captures* THE HINDU (9 Sep., 2017).

[138] *Id*.

[139] Section 2(g) of The Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (Act 18 of 2016), (herein after referred as 'The Aadhar Act').

[140] *Supra* note 137. *See also* Section 2(g) of the Aadhar Act, provides, 'Core biometric information" means finger print, Iris scan, or such other biological attribute of an individual as may be specified by regulations'.

[141] *Id*. Section 2(n).

[142] *Supra* note 137.

[143] *Id*.

cannot be changed like any other password. There are certain high definition cameras which are capable to capture the finger print and iris of a person accurately, which could be misused, to create a duplicate identity, in that way, any secret information of a person, secured through biometrics information, may be accessible to the hackers and susceptible to misuse, as already happened in Germany.[144] According to the petitioners, Aadhaar project is a giant electronic leash which will hollow out the Constitution. It has virtually reduced individuals to mere numbers, a way forward to a 'totalitarian state'.[145]

The 'Aadhaar Act puts in place a framework to share identity information with requesting entities'.[146] Jean Dreze has rightly observed on the transmutation of Section 8 of the Aadhaar Act, which deals with authentication. According to him:

> Section 8 underwent a radical change when the draft of the Act was revised. In the initial scheme of things, authentication involved nothing more than a Yes/No response to a query as to whether a person's Aadhaar number matches his/her fingerprints, biometric excluding core biometric or other demographic attributes. In the final version of the Act, however, authentication involves a possible sharing of identity information with the requesting entity.[147]

Though sharing of the data is legally consensual, but one who ticks the box does not care about the terms and conditions, which are prescribed there. The Act provides a blanket exemption from the safeguards applicable to biometric and identity information on 'national security' grounds. Especially knowing the vague and elastic nature of the term, this effectively makes identity information accessible to the government without restrictions.

A bigger danger is that Aadhaar is a tool to have extraordinary power for data mining and collating personal information, which effectively puts the person on 'dataveilance'. In that sense, the Aadhaar project is rewriting effectively the 'grammar of biopolitics', which was unconceivable even in Adolus Huxley's brave in world or in Orwellian big brother's state. After the *Privacy Judgment*, the Apex Court is still pondering on these issues which are under consideration before it.[148] The future of Aadhaar will probably decide the jurisprudential and demosprudential direction of India.

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[144] *See* Shyam Divan, *Lecture on Coercion, Consent, and Our Constitution*, *available at*: https://www.youtube.com/watch?v=EI2H8hQGiJI (last visited 03 Feb., 2018).

[145] *See* Apoorva Mandhani, *Aadhaar is a Switch which can cause Civil Death of an Individual: Senior Advocate Shyam Divan submits before 5-Judge Constitution Bench* LIVE LAW (17 Jan., 2018). *Available at*: http://www.livelaw.in/aadhaar-switch-can-cause-civil-death-individual-senior-advocate-shyam-divan-submits-5-judge-constitution-bench-read-opening-statement/ (last visited 15 Feb., 2018).

[146] *Supra* note 137.

[147] *Id*.

[148] *S.G. Vombatkere* v. *Union of India* {W.P. (C) 797/2016}. *Available at*: http://www.livelaw.in/aadhaar-switch-can-cause-civil-death-individual-senior-advocate-shyam-divan-submits-5-judge-constitution-bench-read-opening-statement/ (last visited 03 Feb., 2018).

(b) Sexual Privacy, Sexual Identity, and Food Choice

The constitutional validity of criminal prohibition of adultery, punishable under Section 497 of the Indian Penal Code has been referred to the constitution bench of the Supreme Court.[149] In preliminary observation, the Apex Court has observed, 'the provision attacks the independent identity of the woman and is archaic in its nature'.[150]

The petitioner argues that the right to privacy is philosophically grounded in autonomy, in a sense, one is free to take intimate decisions. To substantiate it further, 'one is free to err, resolve, and experiment'.[151] Privacy is freedom giving as well as empowering, as argued by Thulasi K. Raj in a recent column.[152] The arguments against archaic laws, including adultery and unnatural offences go further in term of autonomy, a Kantian notion which, according to him, does not emanate out of hypothetical reasoning, but in pure practical reasoning, which asks to choose something not for the sake of desired end, but for the sake of intrinsic moral worth of an action itself. However, the modern day understanding revolves around choosing something for the sake of desired end, like pleasure of sexual activity is conflated with sexual autonomy, even sometimes with teleology to counter it. And it is after this hybrid transformation of autonomy, which moves around a different signified, a new paradigm of sexual autonomy is established through the feminist or queer rights movements across the world. For them, the right to engage in sexual intercourse is one of the facets of sexual autonomy and self-determination which is disregarded by the modern nation-states. It is from this point-of-view that the Court has to decide the constitutional validity of these archaic laws, including 'adultery' and consensual 'homosexuality'[153] between the two adult which is punishable under Section 377, IPC, 1860.[154] On the one hand, liberals are asking not to

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[149] The Supreme Court of India has admitted the Writ Petition challenging the vires of Section 497, Indian Penal Code, 1860. *See Joseph Shine* v. *Union of India* {WP (Crl.) No. 194/2017}. *Available at*: http://www.livelaw.in/statutory-immunity-women-prosecution-adultery-sc-admits-writ-petition-challenging-vires-section-497ipc/ (last visited 03 Feb., 2018).

[150] *See* Thulasi K. Raj, *This too is a right: the right to sexual privacy* THE HINDU (06 Jan., 2018).

[151] *Id*.

[152] *Id*.

[153] In *Navtej Singh Johar* v. *Union of India Ministry of Law and Justice Secretary* {WP (Crl.) No. 76/2016}. The Supreme Court of India, bench of Chief Justice Dipak Misra C.J.I., D.Y. Chandrachud J. & A.M. Khanwilkar J. observed that the Apex Court's judgment in *Suresh Kumar Kaushal* v. *Naz Foundation* {(2014) 1 SCC 1}, upholding the constitutionality of Section 377 of the Indian Penal Code, 1860 requires re-examination. Noting that the matter involves the substantial constitutional issues, the bench decided to refer the same to a constitution bench of the appropriate strength. The Court in its preliminary order observed, "The individual autonomy and also individual orientation cannot be atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution. *Available at*: http://www.livelaw.in/challenge-s-377-ipc-hearing-said/ (last visited 03 Feb., 2018).

[154] *See* Section 377 of Indian Penal Code, 1860 (Act 45 of 1860), Which provides, 'Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'

intrude in bedroom for the sake of sexual autonomy, but on the other hand, they are demanding to criminalize non-consensual sex between an adult husband and his wife as the 'marital rape',[155] which will virtually reduce the bedroom's affairs as a contract based sexual activities, something which will not let it be private!

After the NDA government came to power in India, the cow vigilantism has become the paradigmatic phenomenon to notice everywhere. And one's food choices have become a contesting issue across the country. Rumours and fear mongering activities have created a vicious ecology of violence, in fact, many people have been lynched,[156] allegedly for beef consumption or for its trade. The Bombay High Court has delivered a judgment in *Shaikh Zahid Mukhtar* v. *State of Maharashtra.*[157] In which a division bench of the Bombay High Court struck down the two amendments of the Maharashtra Animal Preservation Act, 1976, while upholding the constitutionality of the rest of the amendments. It declared Section 5D (incriminating possession of flesh of any cow, bull, or bullock slaughtered outside the State of Maharashtra) and Section 9B (casting negative burden on the accused) as the violative of Article 21 of the Indian constitution'.[158] The Court in one of the paragraphs remarked:

> Consumption of food which is not injurious to health is a part of an individual's autonomy or his right to be let alone. Hence, it is an infringement of his right to privacy. In our view, Section 5D violates the *right of privacy* being an integral part of the personal liberty under Article 21.[159]

The *privacy judgment* of the Indian Supreme Court, which has upheld the right to privacy as a fundamental right, may or may not prove to be a paradigmatic sift from the conventional understanding of civil liberties in India, but it has already assembled all the discontents of Indian civilization in contemporary time, to get free from repressive un-freedoms, prevalent and rooted in the old and new conservatism of law, culture,

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[155] *See* Indira Jaisingh, *Crime and Consent* INDIAN EXPRESS (10 Jan., 2018).

[156] For examples, Dadri mob lynching case, in which a mob of villagers attacked the home of Mohammed Ikhlaq Saifi, with sticks and bricks, who they suspected of stealing and slaughtering a stolen cow calf, on the night of 28 September 2015 in Bisara village near Dadri, Uttar Pradesh, India. 52 year old Mohammad Akhlaq Saifi died in the attack and his son, 22 year old Danish, was seriously injured. The government's inquiry concluded that he was not storing beef for consumption.
Similarly, Pehlu Khan died after a group attacked his cattle truck on a road in Alwar in the desert state of Rajasthan. *See* Michael Safi, *Muslim Man dies in India after Attack by Hindu 'Cow Protectors* THE GUARDIAN (o5 Apr., 2017). *Available at*: https://www.theguardian.com/world/2017/apr/05/muslim-man-dies-in-india-after-attack-by-hindu-cow-protectors (last visited 03 Feb., 2018).

[157] *See* Apoorva Mandhani, *Beef Ban: Bombay HC declares Sections 5D and 9B of Maharashtra Animal Preservation Act as unconstitutional* LIVE LAW (06 May. 2016*). Available at*: http://www.livelaw.in/beef-ban-bombay-hc-declares-sections-5d-9b-maharashtra-animal-preservation-act-unconstitutional/ (last visited 03 Feb., 2018).

[158] *Id*.

[159] *Id*.

consciousness, unconsciousness, and sub-consciousness of Indian social and political psyche. Though the right to privacy as a fundamental right was conspicuously missing in the discursivity of Indian Constitution *in limine* and the Supreme Court has just added a footnote of it to establish an alternative paradigm, which appears to be unconvincing in its reasoning and of course in its substance. Right to privacy seems to be a transcendental signified,[160] to refer Jacques Derrida, for many, if not referent, who are knocking the door of the Court for answers. Which remains present and absent at the same time, like always already absent, amidst the metaphysics of trinity; liberty, autonomy, and human dignity. Right to be let alone, howsoever desirable it might be, should not be taken so seriously that a ministry of loneliness[161] remains the last resort for care and survival for elders, who are dying out of compulsive loneliness.

[160] *Supra* note 37 at XVI, XXIII. *See also* Tim Murphy, NIETZSCHE, METAPHOR, RELIGION 73 (2001).

[161] According to a report published in 2017, by *the Jo Cox Commission on Loneliness,* more than nine million people in Britain often or always feel lonely. The issue prompted Prime Minister Theresa May to appoint a minister for loneliness. Mrs. May said in a statement, 'For far too many people, loneliness is the sad reality of modern life'. *See* Ceylan Yeginsu, *U.K. Appoints a Minister for Loneliness* THE NEWYORK TIMES (17 Jan., 2018). *Available at*: https://www.nytimes.com/2018/01/17/world/europe/uk-britain-loneliness.html (last visited 03 Feb., 2018).