

VOYEURISM: A COMPARATIVE STUDY

*Shivani Kabra**

Abstract

The recently amended Indian Penal Code provides for an independent provision, §354 C, to criminalize the act of voyeurism. Owing to its recent addition, the provision has not been interpreted or analyzed in detail. Hence, the primary focus of this paper is the interpretation of Section 354C in light of foreign jurisdictions of Canada (Criminal Code (R.S.C., 1985, c. C-46)), Australia (Crimes Act 1900 - SECT 91J), United Kingdom (Sexual Offenses Act, 2003 S. 63) and District of Columbia Code (DC Code: Omnibus Public Safety Amendment Act, 2006).

The right to privacy has not been specifically defined in the Indian legal sphere but has only been read in as a constitutional right for the purpose of Civilian- State surveillance. However, it lacks a separate recognition of an independent right not only against State supervision but also against civilian supervision. Curiously, the offence of

*Shivani Kabra is a second-year student at West Bengal National University of Juridical Sciences, Kolkata. The author may be reached at shivanikabra1997@gmail.com.

voyeurism seeks to protect private acts of individuals under a legal structure that refuses to acknowledge privacy rights. Owing to such logical inconsistencies, it is pertinent to delineate on this subject and attempt to explain the same in light of recent developments.

Therefore, the main objective of the author is to characterize and interpret the current statuesque of the crime in Indian jurisdiction while verifying the utility of the clause against foreign case laws.

I. INTRODUCTION

The Criminal Amendment Act, 2013 (“the **Act**”) was enacted in response to the public fervor in wake of the ‘*Nirbhaya*’ gang rape. Subsequently the JS Verma Committee was constituted in an attempt to overhaul the criminal legal system and make it more gender neutral. The committee realized that several sexual offenses such as *voyeurism*, *eve-teasing*, and *stalking* were considered to be minor offenses even though they severely oppressed fundamental rights of the female gender. Keeping in mind the lackadaisical attitude of the Indian legislature towards sexual offenses primarily committed against females, the committee recommended, amongst other things, the creation of a provision for criminalization of voyeurism.¹

Voyeurism is predominantly defined as an activity through which the culprit (*voyeur*) derives sexual gratification from covert observations

¹JS Verma Committee, Report on Amendments to Criminal Law, <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

of others while they undress or engage in sexual activities. Parallely, it is also an indicator of sexual disorder and can be categorized as a form of sexual deviance. However, irrespective of either definition, it is deduced that voyeurism acts as a two-fold crime- (i) in capacity of a privacy offense and (ii) in capacity of a sexual offense. In the Indian context, the said crime has been outlawed under **§354 C of the Indian Penal Code** that explicitly illegalizes **observations, capturing and publication of any private act** of an individual in a place where the **individual has an expectation to not be observed**.²

On account of the changing legal sphere, it is necessary to characterize the offence in the current contextual scenario. This paper attempts to do the same by analyzing voyeurism in the Indian context. However, owing to its recent addition, the provision has not been structured or extensively critiqued in relation to criminal law. Therefore, it is necessary to analyze the same in context of foreign jurisdiction, specifically: *Canada, Australia, United Kingdom, and United States of America*.

Thus, this paper seeks to address the attributes that comprise the crime of voyeurism. Part II of the paper compares right to privacy across foreign jurisprudences while advocating for a right to bodily privacy for individuals under Indian laws. Similarly, Part III begins analyzing the elements of S. 345(c) with the principles laid down under foreign jurisprudences. It tries to define the nature of voyeuristic acts in India as opposed to other jurisprudences and argues for inclusion of the component of *mens rea*. Owing to the inclusion of the said element, it makes a case for diminished accountability and rehabilitative means of punishment for the voyeur. Additionally, the section questions the mutual exclusivity of consent given by the victim viz. right to expectation of privacy, and advocates

²Thus, the elements of voyeurism in India include- (i) watching, (ii) capturing, (iii) publication, (iv) private act of an individual, (v) expectation of not being observed.

for extension of this provision in the public and private sphere. In conclusion, Part IV summarizes the paper and elucidates the shortcomings faced by the Indian statute in comparison to foreign jurisprudence.

II. RIGHT TO PRIVACY

The right to privacy has not been expressly defined in the **Indian Constitution**; however through judicial pronouncements, it has been recognized as a facet of Article 21.³ The dissent in *Kharak Singh v State of Uttar Pradesh*⁴ interpreted the right to liberty to mean freedom from any restrictions imposed on a citizen's private life. Similarly, *R. Rajagopal v. State of Tamil Nadu*⁵ positively recognized this right by including it in the right to life and liberty. However, these judgments have only recognized privacy rights in connection to state surveillance. In contrast, the offense of voyeurism infringes upon a separate facet of privacy law- *bodily privacy or privacy in controlling access to one's body*.

A. *Right to Bodily Privacy*

In *Govind v. State of Maharashtra*⁶, the court held that "Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing"⁷, thus establishing privacy of home and all the activities that take place within it. Conceptually though, it solely related to state surveillance even though their reasoning subscribed to Fourteenth

³Protection of life and personal liberty.

⁴AIR 1963 SC 1295.

⁵AIR 1995 SC 264.

⁶AIR 1975 SC 1378.

⁷Id. at ¶24.

Amendment US privacy rights cases regarding bodily privacy and integrity.⁸ Consequently, the right was upheld in *T. Sareetha*⁹ where the idea of privacy comprised of body inviolability, integrity and intimacy of personal identity. Subsequently though, the case was overruled along with the Delhi High Court judgment in *Naz Foundation*¹⁰ case that had previously ascribed privacy rights to body autonomy. Thus, in this manner, the right over body autonomy has experienced varying degrees of acceptance and retractions.¹¹

B. Need for bodily Privacy

A framework to protect privacy rights for bodily autonomy seeks to criminalize intentional intrusions on private acts of an individual.¹² Thereafter, the privacy rights would not only protect an individual against illegal state surveillance, but also civilian surveillance and non-consensual access of body by another. This need for bodily autonomy primarily arises due to increasing transparency and encroachment of the public sphere in the private lives of individuals. Increased modernization has enabled newer technology to develop newer ways of invading privacy.¹³

The idea of body autonomy and privacy arises from the concern that certain bodily actions need to be hidden from others, and one should

⁸Cases like *Roe v Wade* (410 U.S. 113 (1973)): The 14th Amendment incorporated the Liberty Clause that restricted the State from depriving any individual of their life and liberty without due process of law.

⁹*T Sareetha v. T VenkataSubbaiah*, AIR 1983 AP 356.

¹⁰*Naz Foundation v. Government of NCT*, 2010 CriLJ 94- decriminalized consensual homosexual relationships.

¹¹BhairavAcharya, *The Battle for a Right to Privacy Still has a long way to go*, THE WIRE (Aug. 8, 2015), <https://thewire.in/7685/the-battle-for-a-right-to-privacy-still-has-a-long-way-to-go/>.

¹²Mark A Rothstein, *Genetic Stalking and Voyeurism: A new challenge to privacy*, 57(3) UNIVERSITY OF KANSAS LAW REVIEW 539–578 (2009).

¹³Warren and Brandeis, *The Right to Privacy*, 4 Harvard Law Review, 193 (Dec. 15, 1980).

not be watched while engaging in private acts without one's consent.¹⁴ It essentially creates the concept of an *individual sphere*, which protects personal beliefs, thoughts, and sensations.¹⁵ Therefore, it is seen that there is an imminent need to formalize bodily privacy rights and aid in creation of individual sphere in context of body autonomy. This necessity was recently reflected in a Delhi court judgment that reintroduced the right to bodily privacy by concluding the offense of voyeurism to infringe upon the said right.¹⁶

Comparably, in the Australian Jurisprudence, the right to privacy is not protected by the Australian Constitution and has only been partially recognized. The position of the right is highly unsettled as different courts have held contradicting stances on the same. In *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd*,¹⁷ the court recognized the legal cause of action on grounds of unjustified invasion of privacy, and held covert capturing of the operations at a factory in violation of the right. Extending this principle, the court in *Grosse v. Purvis*¹⁸ acknowledged the right to privacy and held the defendant guilty for the offense of stalking and harassment. However, in complete contravention to the *Grosse case*, subsequent courts rejected claims for breach of privacy on the grounds that Australian law had not been developed to recognize such a right.¹⁹

¹⁴Martha C Nussbaum, Is privacy bad for women?, THE BOSTON REVIEW (Apr./ May 2000), <http://new.bostonreview.net/BR25.2/nussbaum.html>.

¹⁵Deva Prasad, Analysing the right to privacy and dignity with respect to UID, THE CENTRE FOR INTERNET AND SOCIETY (Jan. 26, 2011), <http://cis-india.org/internet-governance/blog/privacy/privacy-uiddevaprasad>.

¹⁶Express News Service, Voyeurism violates women's right to privacy says Delhi HC, THE INDIAN EXPRESS, Apr. 9, 2016, <http://indianexpress.com/article/cities/delhi/voyeurism-violates-womens-right-to-privacy-says-delhi-court/>.

¹⁷(2002) 208 CLR 199.

¹⁸(2003) QDC 151.

¹⁹Milne v. Haynes, (2005) NSWSC 1107.

Likewise, the status of the right is uncertain in the **Canadian jurisprudence**. The Canadian Charter of Jurisdiction considers the right to privacy between an individual and the State but not of that between individuals. Nevertheless, this right has been held to be a necessary segment of liberty in a modern state²⁰ and has been given the status of a general constitutional right. Furthermore, the courts have started importing the basic principles of privacy and have guaranteed the individuals a basic right to reasonable expectation of privacy as against the state and other people.²¹

Similarly, in the **United Kingdom**, the right to privacy is not enshrined in the constitution and thus, is not constitutionally protected. However, with the enactment of the Human Rights Act, 1998, the right to privacy has been formalized. The Human Rights Act, 1998 gives effect to article 8 and article 10 of the ECHR that contain the rights of privacy and freedom of expression²² and empower the courts to interpret the legislation in consonance with Convention rights.²³ Though, it is significant to note that the English legislation has indirectly acknowledged the right to privacy and the right against intrusion by enforcing a statutory framework for protection of the same.²⁴

In contrast with the preceding jurisdictions, the **United States** formally recognizes and legally protects torts relating to invasion of privacy.²⁵ There are four distinct privacy torts that have been recognized- (i) intrusion upon seclusion,²⁶ (ii) public disclosure of public facts, (iii) publicity which places the plaintiff in a false light in

²⁰R v Dymont, 1988 2 RCS.

²¹R. v. Keough, 2011 ABQB 48; R v Mills, (1999) 3 S.C.R.

²²Human Rights Act, 1998, § 1.

²³Human Rights Act, 1998, § 2(1)(a).

²⁴The Data Protection Act, 1998; The Protection from Harassment Act, 1997; The Regulation of Investigatory Powers Act, 2000.

²⁵Griswold v Connecticut, 381 U.S. 479 (1965).

²⁶Daily Times Democrat v Graham, (1964) 276 Ala 380.

public eye, and (iv) appropriation of the plaintiff's name or likeness.²⁷ Thus, by allowing torts for intrusion in private affairs/ seclusion, the courts have accepted and acknowledged bodily privacy. Nevertheless, this right is not absolute and can be challenged using the First Amendment.²⁸

In conclusion, it is deduced that the basic principles of privacy have been used by courts, especially, for criminalizing acts that infringe upon a reasonable expectation of privacy. However, formal recognition of the same is needed since an individual has a right not to be looked at or known about, even if this right is curtailed to circumstances in which the observations cannot be reasonably expected to occur.²⁹

III. ELEMENTS OF VOYEURISM: *COMPARATIVE ANALYSIS*

The clause included under §354C details voyeurism as: “Any man who **watches, or captures** the image of a **woman engaging in a private act** in circumstances where she would usually have the **expectation of not being observed** either by the perpetrator or by any other person at the behest of the perpetrator or **disseminates such image** ... and shall also be liable to fine.”³⁰

In order to further interpretation of the provision, Part III of the paper seeks to explain the Indian law on voyeurism in context of foreign jurisprudential portrayal of the same.

²⁷William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960).

²⁸Freedom of speech and expression of the Media; Florida Star v BJF, 491 U.S. 524 (1989).

²⁹Daniel O. Nathan, Just Looking: Voyeurism And The Grounds of Privacy, 4(4) Public Affairs Quarterly 365- 386 (Oct. 1990).

³⁰Indian Penal Code, 1860, § 354C.

A. *Nature Of The Offense*

Voyeurism in the Indian context requires the voyeur to (i) watch, (ii) capture, and (iii) publish the private acts of another individual. While the methods of capture and dissemination have been defined in the provision, the term ‘watch(es)’ has not been explained and thus entails a broad avenue of acts. For instance, the spectrum of watching ranges from mere glances to active and deliberate observations.

The Australian jurisdiction restraints from confining the definition of ‘observing’ to specific acts; however, it recognizes watching, staring and peeping as ways of committing voyeuristic acts.³¹ Contradictorily, the Canadian jurisdiction explicitly requires an act to be surreptitious in order for it to be voyeuristic. The term, surreptitious, was added to limit voyeuristic acts and has been construed to mean “*any act that is done in secret, or by stealth or by illicit means.*” The standard for the same has been held to be hidden or disguised acts of observations done without consent of the party being observed. Thus, the Canadian law requires the voyeur to *actively and deliberately* observe certain private acts while simultaneously criminalizing capturing of the acts and their subsequent distribution.³²

Similarly, the UK laws criminalize observation, capture and subsequent publication of private acts of individuals. They further determine ‘*observation*’ to be the deliberate watching of private acts as opposed to incidental seeing. This requirement enables the law to exclude accidental and negligent observations occurring due to careless and reckless conduct.³³ The same principle has been extended to the US jurisprudence which requires observations to be done

³¹Delaney & Carberry, (2008) FamCA 1113.

³²R. v. Lebenfish, 2014 ONCJ 130.

³³R v B, (2012) EWCA Crim 770.

secretly or in a surreptitious manner.³⁴ Moreover, the acts of ‘viewing’ and ‘observing’ have been defined as the intentional looking upon of people for a brief period of time in a manner that is not casual or cursory.³⁵ The contradictory stand of the Australian law viz. other jurisprudences show the combined efforts of the foreign jurisprudence to place more emphasis on the manner of observation than outline, specific acts to narrow its meaning. Accordingly, owing to the broad interpretations of the terms, determination of the same should be done on a case by case basis.

Significantly, Indian laws do not explicitly require the act of observation to be done in a deliberate or secret manner. Non-inclusion of such a clause creates a fallacy that allows accidental viewing of private acts to be termed as voyeuristic. For instance, circumstances involving a man passing by a washroom with an open door and accidentally glancing inside would be termed as a voyeuristic under the Indian law. In actuality, the observations in this situation were purely incidental, involuntary and due to the negligent acts of the person who left the door open. Nevertheless, due to the unclear terminology of S. 345(B), this act can be considered as voyeuristic under Indian laws.

Alternatively, due to ambiguous explanations, one is unable to determine whether the Indian jurisdiction criminalizes observation done in a casual or cursory manner contrary to acts undertaken for a specific purpose. On a plain reading of the provision, it is realized that if a man was to coincidentally look inside the bedroom of another due to their undrawn curtains, and would have chanced upon the individual engaging in a private act; the same would be considered voyeuristic under the law. Therefore, it is noted that the Indian provision utilizes a broad umbrella term that blindly criminalizes

³⁴United States of America v. Bernard Freundal, 2014 CMD 18262.

³⁵District of Columbia Code: Omnibus Public Safety Amendment Act, 2006.

every act- active participation or casual viewing; deliberate or incidental observations- irrespective of their intended purpose or impact.

Under the provision, the term ‘private acts’ of an individual has been greatly reduced to include a mandatory condition of exposure of the victim’s genitals, posterior or breasts for watching of these acts to constitute as breach of privacy.³⁶ This principle finds support in *Australian Broadcasting Corporation case*³⁷ where the court distinguished between privacy and voyeuristic offense by categorizing unauthorized capturing of private acts of people in a secret, underground factory as a privacy offense and not as a voyeuristic act. However, such an interpretation disregards scenarios of observations that blatantly invade a reasonable expectation of privacy but do not involve the exposure of genitals, posterior or breasts. For instance, situations of a voyeur observing private acts such as cooking or watching television of another inside their house, cannot be termed as voyeuristic. Any observations/ capture made in this capacity without exposure of the private parts of the victims would thus constitute as violations of privacy rights not included under the voyeurism clauses.

In comparison though, the law has prescribed and detailed adequate protection from illegal capture and publication of private acts. They have also withheld from defining the methods of ‘capturing’ or ‘publication’, thereby including a wide spectrum of conventional methods (*video, film, and camera*) as well as developing methods such as paintings. Summarily, it is contended that the Indian legislation must be widened to not only include a broadened

³⁶Explanation I of the Act requires the private acts to be done in circumstances- (1) of reasonable expectation of privacy AND where the victims genitals, posterior or breasts are exposed, or (2) victim using the lavatory, or (3) victim doing a sexual act out of the ordinary in the public.

³⁷(2002) 208 CLR 199.

interpretation of mediums for committing voyeuristic acts but to also extend the provision to include instances that infringe even the most basic circumstances of expectation of privacy.

***B. Does The Act Of Voyeurism Require An Element Of Mens Rea/
Intention Of The Voyeur?***

The Indian provision on voyeurism does not explicitly consider intention of the perpetrator; however, the same is necessary to be read in, in order to distinguish between incidental and deliberate acts of voyeurism.

The Canadian courts have upheld the necessity of testing the intention of the voyeur by including the element of *mens rea* in their concept of *surreptitious* behavior. Herein, the element of *mens rea* entails that the voyeur must actively intend to not let his victims know about his observations.³⁸ Evidently thus, actions lacking specific intent and the necessary purpose have been held to be insufficient and not within the ambit of voyeurism.³⁹ Such an inclusion has favourable impact of excluding acts committed on account of third party negligence from the ambit of voyeurism. On re-analysing the *washroom example* mentioned in the previous sub- section, it is contended that another ground for the person's actions to not constitute the offence of voyeurism is the lack of required intention. The person did not possess the requisite *mens rea* to invade bodily privacy of the occupants of the washroom and was an innocent passerby. Therefore, nature of the offence requires certain degrees of intention to commit the same. In order to distinguish deliberate acts from accidental ones such as the one committed in the preceding example, it is necessary for the man to possess an intention of committing the crime.

³⁸R v. Men, 2014 ONCA 69, ¶3.

³⁹Supra note 20.

IV. DIMINISHED ACCOUNTABILITY: A CASE FOR REHABILITATION

Voyeuristic disorders can also be described as mental conditions, categorized under paraphilic disorders by the American Psychiatric Association.⁴⁰ It has been established that voyeuristic acts involve an element of *mens rea*. However, in the current circumstances it is argued that the requisite element of *mens rea* has a mitigating effect on the voyeur's accountability. It is noted that severe psycho-sexual disorders can result in diminished accountability; however, to ascertain the same, one needs to analyze the nature, location, procedure and behavior of the offender.⁴¹

Several statutes have made provisions for rehabilitation of individuals suffering from paraphilic disorders. The German law allows suspension of sentence for exhibitionists⁴² if it is determined that the offender can cease his actions only through medical treatment.⁴³ Likewise, the UK Mental Health Bill includes sexual deviance (*sexual disorders*) as a mental disorder and provides for mitigated accountability of the same.⁴⁴ These jurisdictions have acknowledged sexual disorders to contain an element of mental illness and

⁴⁰Diagnostic and Statistical Manual of Mental Disorders (5th ed.), AMERICAN PSYCHIATRIC ASSOCIATION, <http://psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596>.

⁴¹Klaus M. Beier & Kurt K. Loewit, Sexual Medicine in Clinical Practice 67-69 (2013).

⁴²Exhibitionism and voyeurism are closely related acts- Blake Morrison, Exposed: Voyeurism, Surveillance and the Camera, THE GUARDIAN (May 22, 2010), <https://www.theguardian.com/culture/2010/may/22/exposed-voyuerism-exhibition-blake-morrison>.

⁴³German Criminal Code, Criminal Code in the version promulgated on 13 November 1998.

⁴⁴Mary Ruck, Vulnerability and the law: A practitioner's perspective, BYROM STREET CHAMBERS (Sept. 17, 2008), <http://www.byromstreet.com/news/wp-content/uploads/2011/04/Vulnerability-and-the-law-public.pdf>.

accordingly have opted for rehabilitative steps. In *R v. IP*⁴⁵ the court had realized the accused to previously be of a good character. Throughout the incident, the accused had cooperated in admitting his crime and his tendencies were capable of being treated through medical therapy. Keeping in mind these external considerations, the court had taken a rehabilitative step and ordered for community service. Similarly, in *R v. Weinheimer*⁴⁶ the court had considered external factors such as good conduct, previous responsible contributions as a member of society, and guilt induced behavior of the accused to grant a rehabilitative order. Likewise, in *Public Prosecutor v. Chong Hou En*,⁴⁷ the court had opted for rehabilitation since it had considered voyeurism to be a psychiatric disorder. Though this case was subsequently overruled on the grounds that voyeurism is not a disorder, arguably this overrule is bad in law since it fails to consider extensive medical evidence that have established voyeurism as a psychiatric disorder.⁴⁸

In conclusion, it is seen that statutes and courts have acknowledged medically treatable psychiatric disorder to act as a mitigating factor. Due to the presence of an element of involuntariness, the courts have thus considered external factors in such situations and extrapolated the same to diminish accountability on a case to case basis.

⁴⁵(2005) 1 Cr. App. R. (S.) 102 (Eng. C.A.).

⁴⁶2007 ABPC 349.

⁴⁷(2015) SGHC 69.

⁴⁸Sexual Health Issues, WORLD HEALTH ORGANIZATION, http://www.who.int/reproductivehealth/topics/sexual_health/issues/en/; Supra note 35.

V. NEED FOR ‘CONSENT’ ALONGSIDE THE ELEMENT OF ‘REASONABLE EXPECTATION OF PRIVACY’

Another significant feature of the crime in India is that the observation, capture and publication of private acts of another needs to occur when the person has an expectation to not be observed. §354 (c) of the IPC lays down certain places and circumstances that give an individual a reasonable expectation of privacy, but fails to define the elements of this expectation. While the terms used in the provision are ‘expectation to not be observed’, it can be inferred that this expectation directly relates to an expectation of privacy.⁴⁹ The legislation has incorporated an objective standard of reasonability for adjudging an individual’s right to expect privacy in certain places. In absence of such a standard, a subjective reading of the provision would render the expectation of privacy dependent on the varying degrees of sensitivities of individuals rather than the intention, purpose or nature of the actions. For instance, a person sitting in a restaurant would have a subjective expectation of privacy in that place which would render every glance at him voyeuristic.⁵⁰ Therefore, in order to avoid this lacuna, it is imperative to consider an objective standard for checking expectations of privacy. However, this raises the question of whether an individual’s *reasonable expectation of privacy overwrites the need for consent?*

The Canadian courts have held reasonable expectation of privacy to be normative⁵¹ and have given importance to cognizable privacy over

⁴⁹Indian Penal Code, 1860, § 354 C Explanation 1. Further, voyeurism infringes on the right to privacy which implies that one has an inherent right to privacy (since a right can only be violated if it is possessed by an individual).

⁵⁰The Indian law excludes a specific purpose for voyeuristic acts (Part III (5) of this paper) and disregards the need for intention of the voyeur as noted in IV (2).

⁵¹R v. Tessling, (2004) 3 S.C.R. 432.

absolute privacy.⁵² Subsequently, this right has been upheld in the context of public sphere. The courts have based reasonable expectation of privacy on circumstances and extended the same to public places.⁵³ It has been realized that an expectation of privacy is not inherent in certain situations but arises due to the nature or utility of the place and should be decided on a case to case basis. For instance, a person in a closed room is supposed to have a reasonable expectation of privacy, however, this privacy ceases if the room has a multipurpose utility.⁵⁴

Similar approaches to expectation of privacy have been found in the UK and US.⁵⁵ In contrast, the Australian jurisdiction absolutely disregards an expectation of privacy and only considers consent and awareness of the victim. This approach of the Australian courts leads to a situation of mutual exclusivity of ‘consent’ and ‘expectation of privacy’. As noted earlier, the Australian jurisdiction only considers consent of the victim while the foreign jurisdictions of US and UK consider both- consent and reasonable expectation of privacy; which begs the question: is there a need for an element of consent besides that of a reasonable expectation of privacy?

The courts have recognized that absence of express consent of the victim is an essential element for a surreptitious act. Lack of an individual’s knowledge and awareness about the voyeur’s actions, thus, makes the conduct voyeuristic in nature.⁵⁶ Furthermore, it is noted that lack of a reasonable expectation of privacy does not imply consent to being observed for the purpose of sexual gratification.⁵⁷

⁵²Supra note 31.

⁵³R v. Rudiger, 2011 BCSC 1397.

⁵⁴R v Ross Hamilton, 2009 BCPC 0381; Supra note 20.

⁵⁵Supra note 33; Supra note 34; R v Hamilton, (2007) EWCA Crim 2062.

⁵⁶Supra note 20; Supra note 34.

⁵⁷R v. Kevin Bassett, (2008) EWCA Crim 1174; Supra note 52.

Considering the hypothesis of a public swimming pool, it is noted that the people using the public facilities do not have a reasonable expectation of privacy to not be watched by others using the facilities in a similar manner. However, this does not imply their consent to be watched for sexual gratification or any other purposes. Similarly, in the context of public washrooms, it is noted that individuals do not have a reasonable expectation to privacy against people using the washrooms, but this does not deride them from an expectation of privacy against people who might drill holes in walls to observe them.⁵⁸ Thus, the offense of voyeurism depends on the consent and knowledge of the person being observed since affirmation of the same makes the act legal even in circumstances of reasonable expectation of privacy. In the Indian scenario, observation and capturing of acts of an individual in places of reasonable privacy is legal if the said individual consents to the observation/capture. The provision only criminalizes publication of private acts if the individual does not consent to the said dissemination.⁵⁹ Hence, it is seen that the law, though indirectly, makes a provision for the element of consent. The element of consent is as essential as that of an expectation of privacy. Considering their lack of mutual exclusivity, logically it follows that a person can be legally observed in places of reasonable expectation of privacy if done so with their consent and knowledge.

⁵⁸See sources cited, Supra note 55.

⁵⁹Indian Penal Code, 1860, § 354 C Explanation 2: Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

VI. THE NECESSITY TO EXTEND RIGHT OF PRIVACY IN THE PUBLIC SPHERE

Traditionally, the courts have distinguished between public and private sphere and refused to extend the right to privacy to the public sphere on the basis that the public nature of the place excludes a legitimate expectation of privacy.⁶⁰

A. *Need For Right To Privacy In the Public Sphere*

With the advent of technological influx, right to bodily privacy in a public environment has become a necessity. Modern technology has made voyeurism more accessible through zoom lenses, CCTVs, camera phones etc.⁶¹ The same was acknowledged in *Washington v. Glas*⁶² where the perpetrators were charged with voyeurism for taking pictures underneath women's skirt in public places (*Upskirt voyeurism*). However, the perpetrators were acquitted because the statute did not support extension of right to privacy to public places. The necessity for such a right was furthered in *Department of Transport v. State Employees Ins.*⁶³ where it was stated that; "*people preserve their bodily privacy by wearing clothes in public and undressing in private. Thus, it makes no sense to protect the privacy of undressing unless privacy while clothed is presumed.*"⁶⁴

In pursuance of the same, several jurisdictions have followed the US-DC laws and extrapolated the right to privacy in public places. In *R v Hamilton*⁶⁵ the accused photographed underneath the skirts of women in a supermarket and subsequently argued that privacy rights did not

⁶⁰United States v Vasquez, 31 F Supp2d 85 (D Conn 1998).

⁶¹Supra note 40.

⁶²54 P.3d 147 (Wash. 2002).

⁶³97 Wash.2d 454, 458.

⁶⁴Supra note 61.

⁶⁵(2007) EWCA Crim 2062.

extend to a supermarket due to its public nature. However, the court rejected this argument and acknowledged that lack of privacy rights creates a lacuna since it legalizes voyeuristic acts in public places. Similarly, the Californian legislation on voyeurism was amended to criminalize secret, non-consensual filming ‘under or through’ clothing in places of reasonable privacy.⁶⁶ The inclusion of ‘under or through clothing’ implies the statute’s intention to criminalize voyeurism in private and public places.⁶⁷

The need for privacy rights in public places directly correlates to the need to protect one’s body from non-consensual association at all times. It implies an individual’s decisional autonomy over their bodies, and therefore, the Indian legislation must be interpreted to extend privacy rights to public sphere. However, such an interpretation cannot be made without acknowledging the right to bodily autonomy. The phraseology of the provision requires the act to be committed in circumstances where the victim had “*an expectation to not be observed*.”⁶⁸ Currently, the private and the public denominations are getting blurred due to more inclusive technologies. Therefore, it is only reasonable to expand the expectation of privacy in the public sphere. However, the right to expect privacy at any place cannot be construed without implying the extension of an overarching right to privacy to the public sphere.

⁶⁶The California Penal Code, 1872, § 647(k) (2).

⁶⁷Lance E. Rothenberg, Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space, 49(5) AMERICAN UNIVERSITY LAW REVIEW, 1128 (June 18, 2001).

⁶⁸This expectation has been detailed in the previous section.

VII. CONCLUSION: NEED FOR A GENDER NEUTRAL PROVISION

Owing to its recent addition, the provision on voyeurism can be interpreted through a progressive outlook by comparing and scrutinizing the shortcomings and success of foreign jurisdictions. Though it is a commendable step forward in the fight for women's rights and security, the gender biased wordings paradoxically deny protection to another section of the society. The provision only criminalizes voyeuristic acts undertaken by males, and refuses to acknowledge the existence of female culprits. It only protects females against voyeuristic tendencies of males, thereby excluding the presence of male victims. Furthermore, it completely disregards the third gender to an extent that trans-genders can be the culprits or the victims of voyeurism, and still cannot be penalized or protected (*respectively*) under the act due to lacking provision. Consequently, the provision eliminates instances of voyeuristic acts against males by both- males and females, as well as, voyeuristic acts against females committed by female culprits. This deliberate attempt to exclude certain sections of societies contradicts the JS Verma report⁶⁹ that allowed for culprits to be of any gender, though the victims were still considered to be only females.⁷⁰

To surmise, the paper argues for a more complete interpretation of the provision while seeking rectifications of the shortcomings. The intention behind introduction of this provision, though commendable, lack proper analysis that makes the right to expectation of privacy and an inferred right to privacy absolute. While incorporation of a right to privacy is necessary for body autonomy, the same is fraught with several loopholes that rectifications. However, since the provision is

⁶⁹Supra note 1.

⁷⁰§ 354B: Voyeurism, The Indian Penal Code, 1860- "Whoever watches a women engaging in a private act..."

in its early stages, interpreting it in context of foreign jurisprudence can help transcend loopholes that might arise due to inadequate wordings and explanation provided in the clause.

VIII. ANNEXURE: TABULATED ANALYSIS

ELEMENTS OF VOYEURISM: COMPARATIVE JURISDICTION

	India	Australia	Canada	Washington DC	United Kingdom
What is the Nature / Means of Offense under each jurisprudence?	Watches	Watches/ Observations	Surreptitious observations - Mechanical or electronic means	Watches/ views	Observes/ Deceptively observes through concealed equipment
	Captures	No	Captures (Nudity is irrelevant)	Captures: i) person in a place of privacy ii) Intimate areas of a person	Captures
	Publication	No	Distribution	Distribution	Distribution
Does the provision provide for a right of expectation to not be observed?	Expectation of not being observed	No	No	No	No
Does the provision include and element of intention of the voyeur to commit the crime?	No	No	No	No	No
Does the provision include an element of consent?	No	No	No	No	No

Does the provision require for a specific purpose on part of the voyeur?	No	Yes. Specific purpose of sexual arousal or gratification of perpetrator	Yes. Specific purpose of Sexual gratification of perpetrator or another	Yes. Specific purpose of arousing or gratification of sexual desire of any person	Yes. Specific purpose of sexual gratification of perpetrator or another person
Is there a right of expectation of privacy	Yes	No	Yes.	Yes	Yes
Does the provision extend to public and private sphere?	Only Private Sphere. [Private acts: Sexual acts usually not done in public / Lavatories/ Exposed intimate parts or covered only by underwear.]	Only Private Sphere. [Where the person is engaged in a private act]	Private Sphere	Public and Private Sphere	Private Sphere. [Private acts: Sexual acts usually not done in public / Lavatories/ Exposed intimate parts or covered by only underwear]