THE EVOLUTION OF THE RIGHT TO PRIVACY: TRACING ITS ORIGINS IN EASEMENT LAW

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ABSTRACT

The 'law of privacy' as it stands has transformed from the conventional tort principle to the level of a fundamental right. Despite its origins in the private domain, the law of privacy in Indian jurisprudence has gradually shifted towards the public sphere over time. Undeterred by its untidy and fragmented development in the private domain, the doors of the concept of privacy which has been opened by the judiciary are expected to reach divergent areas through its creativity. The judicial decisions in India show that the right to privacy is intertwined with customary rights having roots in the law of easements. Eventually, it was acknowledged as a personal right and then as a vital component of individual liberty. But, it wasn't until the case of Justice Puttaswamy that privacy was considered a fundamental right. In this paper, the author analyses the evolution of the concept of "right to privacy" and demonstrates its origins in "easement law."

Introduction

The legal and philosophical conceptualisation of privacy has been described as being in "absolute chaos." [1] The philosophical discourse on privacy is an extensive domain that includes sceptical debates about the value, function and content as well as conceptual and moral distinctness of privacy.[2] It encompasses many components such as spatial, informational, decisional, associational, and proprietary privacy.[3] The law of privacy has evolved from a conventional tort principle to a fundamental right.[4] The acts affecting the emotions of human beings were not recognised until the end of the 19th century. Among the common law jurisdictions, it was in the United States of America that, for the first time, emotions, feelings, sensations, and varying thoughts started becoming integral elements of an independent tort that came to be known as privacy. However, the U.K. has been reluctant to accept privacy as an independent tort even in the 21st century.[5]In the legal arena, privacy is a historically young, normative concept, although its presence can be traced back to divergent sources of law, especially legislation, judicial precedents and juristic writings.[6]

The first attempt at showcasing privacy as a full-blown tort was made by Samuel Warren and Louis Brandeis, two Harvard Law Students who became partners at a law firm in Boston. They made the crucial decision to expose the nuances of the "right of privacy" due to an unwarranted intrusion of the media into the private affairs of Warren's personal life.[7]As a long-lasting measure to blackout the peeping of media into one's private affairs, they wrote and published an article titled "The Right of Privacy,"[8] which later became the leading source for the development of privacy as a right. This article was cited in various federal and state courts in the U.S. jurisdiction. The article gained more publicity when it was refined by William

[1] Daniel J. Solove, "Conceptualizing privacy", 90 California Law Review 1087 (2002).
[2] J. Angelo Corlett, The Nature and Value of the Moral Right to Privacy, Public Affairs Quarterly 16, no. 4 (2002): 329–50. http://www.jstor.org/stable/40441333, Julie C. Inness, Intimacy: The core of privacy, Privacy, Intimacy, and Isolation 74–94 (1996).
[3] Anita L. Allen, "Racial privacy", Unpopular PrivacyWhat Must We Hide? 123–155 (2011).
[4] See Olmstead v. United States, 277 U.S. 438 (1928) (J. Brandeis dissenting)(the right to be let alone – the most comprehensive of rights - every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment); Puttaswamy v. Union of India, (2017) 10 SCC 1 (holding that there is "no reason to doubt that the right to privacy is part of the liberty guaranteed by our constitution").
[5] See Wainwright v. Home Office, [2003] 4 All ER 969 (holding that the claims could be considered under the existing causes of action like breach of confidence and if the court attempts to do anything more it would be a distortion of the principles of common law and intrusion into the legislative space).
[6] Scott A. Anderson, "Privacy without the right to privacy", 91 Monist 81–107 (2008).
[7] See generally David W. Leebron, "The Right to Privacy's Place in the Intellectual History of Tort Law", 41 Case Western Reserve Law Review 769, 774 (1991).
[8] Samuel Warren & Louis Brandeis, "The Right of Privacy", 4 Harvard Law Review 193 (1890).

Prosser,[9] a great tort law scholar in the U.S. whose pioneering work defined the concept of privacy. In addition, Prosser gained an opportunity to incorporate his principles in the 2nd Restatement of Torts. This was a path-breaking achievement that paved the way for the rapid growth of the right to privacy in the U.S., as it was established that the claim based on privacy was not suitable for any of the existing pigeonholes in the law of tort.

The concept of right to privacy emerged as common law only in the second half of the 19th century. Interestingly, in India, the right had already started conceptualising through case law. The concept of privacy can be traced back to being a custom prevailing in various parts of India. [10] The judicial decisions validated these traditions and conferred the status of common law. The right was inextricably linked to the property according to American and Indian law. Most of the cases involved concerns of invasion of privacy, especially concerning women's apartments, caused by the construction of new buildings or the installation of new windows near the plaintiffs' homes.[11]Whenever a cause of action arises in a jurisdiction with a preexisting custom or usage, the courts will typically provide the relief sought. There are judicial decisions that state you are entitled to the right to privacy by grant, local usage, or special permission.[12] In a landmark decision, *Gokal Prasad v. Radho*[13]the Allahabad High Court attempted to identify and consolidate the existing custom of privacy in India's North-Western province. John Edge and Mahmood, JJ., opined unanimously that, despite the absence of a similar custom in the English legal system, any Indian custom considered reasonable and prevalent shall be protected. Unfortunately, the facts and decisions in most of the cases made it clear that nobody had any right to privacy other than the right to be left alone while enjoying their property. As a result, a parda-nakshin woman's right to privacy was tied to her place of residence. It was established by the Indian Easements Act of 1882 that an easement may be secured based on a local custom. Section 18(b) of the Act had elevated the customary claim of privacy as a legal right. A person was able to claim the right to privacy in virtue of section

[9] William Prosser, "Privacy", 48 California Law Review 383, 423 (1960).
[10] The decisions rendered in the last phase of the 19th century have reported that due to destruction of records during the Sepoy Mutiny of 1857, it was not possible to trace the existence of custom before 1855. See Gokal Prasad v. Radho, (1888) ILR 10 All 358.
[11] See Nuth Mull v. Zuka-oollah Beg, S. D. A. N.-W. P. Rep. (1855) (holding that the cause of action would arise from the erection of the new house by the defendant adjacent to the plaintiff and thereby intruding into the plaintiffs privacy); Goor Dass v. Manohur Bass, N.-W. P.H. C. Rep. (1867) (the case was remanded for new trial holding that if there was a clear invasion of privacy, the plaintiff was having the right to get closed the window opened by the defendant)
[12] For e.g. see Kalee Pershad Shaha v. Bam Pershad Shaha, 18 W. R., 14.
[13] (1888) ILR 10 All 358.

18(b) as a 'customary easement'.[14] The claimant must establish the presence of a customary easement in his locality in order claim an invasion of privacy.

Following its observation in the Gokal Prasad case, the court has reduced the rigidity of the law in subsequent cases. In *Paduman Das v. Shrimati Parbati,*[15] the court reasoned that if there were houses overlooking the plaintiff's residence on all sides, the plaintiff would have no legal recourse against the defendant for invasion of privacy. In *Laduram v. Sheodev*,[16] The court explained the nature and scope of the concept of the right to privacy as a customary easement right and observed that, "a person is not entitled to a customary easement right of privacy merely on the ground that a custom of "Parda" is observed in his family. A customary easement right of privacy is not a personal right of an individual but is a right attached to property and that although the right cannot be stretched to oppressive lengths, an actionable cause can only arise when there is substantial interference with the privacy of those parts of the house which are used by pardanashin women." From this observation, it is clear that the right to privacy cannot be elevated to the level of a personality right by isolating it from the directives of section 18 of the Easements Act or from the wording of the decided decisions.

A journey through the landscape of the Indian legal system in search of the development of the right to privacy may encounter a variety of impediments. There is a lack of judicial decisions in India regarding the evolution of the privacy tort. Aside from the development of the right to privacy as a customary easement, which is limited to property-based claims, it has not yet extended to personality-based claims in India. One of the reasons for the shortage is that, since the time of British rule, Indian courts have often looked to the history and evolution of legal concepts with their origins in English common law and then applied those ideas with certain adjustments to make them fit Indian customs and usages. Even after the commencement of the constitution, by virtue of Article 372, the Indian legal system may continue to apply pre-constitutional laws until they have been altered, repealed, or amended by the legislature. However, the right to privacy in one's personal life is not widely recognised in Indian jurisprudence and mostly remains silent as it adopts English common law. In *Indu Jain v.*

[14] See the illustration appended to section 18 which says: "by the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house."
[15] AIR 1935 All 649.
[16] AIR 1965 Raj 217.

Forbes Incorporated,[17] the Supreme Court of India made the astute observation that "the right to privacy in relation to the privacy of a house of apartments and easementary rights acquired thereto has been the subject matter of consideration long before the issues were noticed even in the United State of America." One possible interpretation of this is that India's privacy law in personal matters predates that of the U. S. Another observation was that because the "right of privacy" as a customary easement was completely limited as a property right and not as a personal right, the court's liberal interpretation of the age-old customary easement right and inclusion of it in Article 21 of the Constitution was somewhat untidy.

In *R. Rajagopal v. State of T.N.*,[18] the Supreme Court has made a clear analysis about the jurisprudence relating to the right of privacy in the private and public sphere. Since the case relates to the balancing of the freedom of speech and expression on one side and the right to privacy on the other side, the court while elevating the privacy tort as a fundamental right had parenthetically explained the concept of the right in the private sphere. The privacy tort has been recognised by the court as the general law of privacy, providing redress to the injured party in the event of an unauthorised use of a person's name, likeness, or publication of private affairs without his consent. The court, by stating that no one can publish anything invading the privacy of one's own, his family, marriage, procreation, motherhood, child-bearing, and education without his consent, has completely separated the tort of privacy from the tort of defamation.

In another celebrated case *Manisha Koirala v. Shashilal Nair*,[19] Bombay High Court rejected the petitioner's claims that the film "Ek Chhotsi Love Story" violated her right to privacy by including certain shots allegedly acted by a double agent and described them as extremely indecent, vulgar, and repulsive. The court hesitated to adopt the tort of invasion of privacy on the grounds that the tort has not evolved in the English common law. Court was of the view that the right to privacy has not yet received explicit recognition as a tort in England.

Law of privacy as a constitutional right

In the Indian jurisprudence, the concept of privacy as a constitutional right can be traced to the landmark decision *Kharak Singh v. State of U.P.*[20] Before Kharak Singh's case, the Supreme

[17] 2007 SCC OnLine Del 1424.
[18] 1994 SCC (6) 632.
[19] 2002 SCC OnLine Bom 827.
[20] 1963 AIR 1295.

Court ruled *M. P. Sharma v. Satish Chandra*,[21] However, it does not include the right to privacy, which ultimately became essential for tracing its origin and evolution. In *M.P. Sharma*, the petitioners invoking article 32 of the Constitution had challenged the search and seizure conducted by the investigating authorities stating that it was violative of article 19 (1) (f) and 20 (3) of the Constitution. The court had ruled that the search conducted under section 96 (1) of the Code of Criminal Procedure was not a violation of article 19 (1) (f) because it was only a temporary invasion of the right to possess and enjoy property and could be justified as a reasonable restriction in the absence of any illegality. In this instance, the court's deliberations were solely on the one question that related to article 20. (3). The court had hesitated to adopt the fundamental right to privacy incorporated in the fourth amendment of the U.S. constitution to an entirely different fundamental right embodied in article 20 (3).Aside from this remark, the right to privacy was not addressed.

In *Kharak Singh*, the petitioner, invoking article 32 challenged the constitutionality of Chapter XX of the U.P. Police Regulations as violative of article 19(1) (d) and 21 of the Constitution.The challenge was based on the fact that the impugned legislation permits police offices to make "domiciliary visits" at night as part of surveillance, which would interrupt the petitioner's sleep and thus violate his freedom.[22] During the arguments, the court determined that the regulation has no legal existence; the state argued that the entry of the police officers could only be considered a tortious trespass and has no constitutional significance for invoking any of the fundamental rights.[23] The state further argued that the illegal intrusion of police falls under the private law remedy and so Article 32 could not be applied.[24]Negating the state's position and providing a broad interpretation of article 32's scope, the court went on stating that if a fundamental right has been violated as a result of state action, it is not only the party's right, but also the court's responsibility to intervene, even if he has not exhausted all other available remedies.[25]Though the majority has made special reference of the petitioner's right to privacy, the court hesitated to import this into Indian constitutional law, arguing that the right to privacy was not a constitutionally guaranteed right.[26] Justice Subba Rao's dissenting opinion is what gives this case its extraordinary significance. He emphasised the significance

[21] 1954 AIR 300; 1954 SCR 1077.
[22] 1963 AIR 1295 at ¶ 3.
[23] *Id* at ¶ 12.
[24] *Id*.
[25] *Id*.
[26] *Id* at ¶ 17.

of the right to privacy while analysing the term "personal liberty" in Article 21 of the Indian Constitution. He observed:

> …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.[27]

Subba Rao, J., was very particular about unauthorised intrusions into people's homes. There has been a considerable set of arguments in later decisions that the majority opinions in *M.P. Sharma* and *Kharak Singh* were influenced by the path breaking decision in *A.K. Gopalan v. State of Madras*.[28] Though these two decisions were rendered in the aftermath of *A.K. Gopalan's* case, one could not find any residue of *Gopalan* in *M.P. Sharma* case in terms of the interpretation of article 21.In Kharak Singh, however, the majority has directly imported the interpretation in Gopalan's case that article 19 and 21 should be considered separately since the text of article 21 indicates that it was intended by the constitution's drafters to protect the 'physical body' of an individual.[29]

The constitutional analysis on the right of privacy which was initiated in *Kharak Singh's* case was later nourished in a subsequent decision rendered by the Supreme Court in *Gobind v. State of Madhya Pradesh*.[30] The factual situation in this case is the same as *Kharak Singh*. The petitioner had challenged the constitutionality of Regulations 855 and 856 of the Madhya Pradesh Police Regulations, which stemmed from Section 46 (2) (c) of the Police Act, 1961.[31] One of his major contentions was that the provision for domiciliary visits in regulation 856 infringes his right to privacy, which constitutes a fundamental right.[32] Court had made it clear that if the court had identified any claimed right as a fundamental privacy right, it should be balanced with the compelling state interest.[33] Court was of the view that privacy as a concept which was also ingrained in autonomy may overlap with the concept of liberty.[34] Though court emphasised the individual needs to be protected constitutionally under the label of privacy like personal intimacies of the home, the family, marriage, motherhood, procreation, child

[27] *Id* at ¶ 28.
[28] AIR 1950 SC 27; 1950 SCR 88.
[29] 1963 AIR 1295 at ¶ 10.
[30] (1975) 2 SCC 148.
[31] *Id* at 150.
[32] *Id* at 154.
[33] *Id* at 155-156.
[34] *Id* at 156.

rearing etc. opined that further development shall take place case by case.[35] Court has also specifically pointed out that no form of privacy claims could be absolute.[36] The Court has cautioned that no public authority shall do anything detrimental to the right of privacy except situations in which there were highly competing state interests on the other side like national security, public safety, prevention of disorder or crime, protection of health or morals or for the protection of the rights and freedoms of others. Court held that the petitioner's privacy claim in consequence of domiciliary visit could not overcome the state's compelling interest embedded in regulation 856 of the Madhya Pradesh Police Regulations which in turn was legitimate according to Section 46(2) (c) of the Police Act, 1961.

Thus *Gobind* has become the promising jurisprudential development in India so far as privacy claims in terms of constitutional rights are concerned. The judges in *Gobind* had conducted a forensic analysis to determine the scope and limits of the right of privacy. A drastic change has occurred in the Indian constitutional law after the delivery of two significant decisions viz., *R.C. Cooper v. Union of India*[37] *and Maneka Gandhi v. Union of India*[38]. In *Cooper*, the court had extensively discussed the restrictive interpretation made in *Gopalan's* case and propounded the "effect test" for deciding the state intrusion on liberty and freedom of people. Court observed:

> ...in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.[39]

Thus in *Cooper*, court has totally negated the proposition in *Gopalan's* case that each article contains in part three of the Constitution are distinct entities which may overlap in different situations. According to the court the whole articles under part three are all parts of an integrated scheme in the constitution.

In *Maneka Gandhi* case, the court overruled the *Gopalan's* 'exclusiveness' proposition of fundamental rights and laid down the "golden triangle" among articles 14, 19 and 21. Court was of the view that the "Constitution must be read as an integral whole, with possible

[35] *Id* at 157.
[36] *Id*.
[37] 1970 (1) SCC 248.
[38] 1978 (1) SCC 248.
[39] 1970 (1) SCC 248, 288.

overlappings of the subject matter of what is sought to be protected by its various provisions particularly by articles relating to fundamental rights."[40]

In *R. Rajagopal v. State of T.N.*,[41] the court tried to express the rationale in inferring the privacy right from article 21 of the Constitution. Court after discussing various U.S. and Indian decisions, observed that the right to privacy may emanate from any of the existing fundamental rights like personal liberty, freedom of speech or right to move freely and mould as a fundamental right which is not absolute.[42] In this case the court had logically balanced the claim based on the freedom of press on the one side and the right to privacy on the other relying on the landmark U.S. decision *New York Times v. Sullivan*.[43] Court also referred the English cases like *Attorney General v. Guardian Newspapers Ltd.*[44] and *Leonard Hector v. Attorney General of Antigua and Barbuda*[45] and reached certain broad principles which can be reduced as follows:

1. In India, the right to privacy flows from article 21 of the constitution which has bearing on one's own, his family, marriage, procreation, motherhood, child-bearing and education etc. and no one can publish anything on those things without consent. The person who violates this would be liable except in situation where the claimant voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy;[46]
2. If a subject matter of controversy is based on a public record including court record, the claim of privacy no longer subsists except in the case of the publication of anything that would indignity the name of a victim of a sexual assault;[47]
3. Similarly, if the subject matter of controversy is something connected with the actions of a public officer while discharge of his public duty, no action for damages would lie against the wrongdoer even though the publication is based upon facts and statements which are not true unless the official establishes that the publication was made with

[40] 1978 (1) SCC 248, 393.
[41] 1994 SCC (6) 632.
[42] *Id* at 641.
[43] 376 US 254 (1964).
[44] [1988] 3 All ER 545.
[45] [1990] UKPC 3.
[46] 1994 SCC (6) 632, 649-50.
[47] *Id* at 650.

reckless disregard[48] for truth. Even in that case, it is not the burden of the defendant to prove that the thing which was written by him is true;[49]

4. No governmental or any institutions exercising governmental power could maintain a suit for damages for defaming them; however, it should be subjected to the provisions of the Official Secrets Act, 1923.[50]

After framing the aforesaid principles, court had mentioned that they are broad in nature and neither exhaustive nor all-comprehending. The court has also enthusiastically stated that the development of varying facets of privacy would take place case by case.

In another landmark case *People's Union for Civil Liberties v. Union of India,*[51] Supreme Court got another opportunity to reinforce the principles of the right to privacy laid down in former decisions. The case came before the court challenging the constitutionality of Section 5(2) of the Indian Telegraph Act, 1885. It was contented that the concerned section has no procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping.[52] It was further argued that the central government had also failed to make rules in pursuance of section 7 (2) (b) of the Act as a precaution to prevent the improper interception or disclosure of messages. The petitioner had argued that privacy protection could be possible only if there were sufficient safeguards, especially the ex-parte judicial sanction to eliminate the element of arbitrariness and unreasonableness.[53] After having a thorough discussion on the concept of privacy in the light of various judicial decisions, the court concluded that telephone tapping would definitely affect the privacy of a person and attract article 21 of the constitution unless it is permitted by the procedure established by law. The Court observed that though section 5 (2) of the Telegraph Act contains proper substantive law to be fulfilled by the authority who was authorised to intercept the communication, there was lack of procedural safeguards to be followed in such situations, which may make the decision arbitrary, freakish or bizarre.[54] Realising the huge lapse on the side of the central government in framing proper rules, court had issued various directions and guidelines to the government in connection with telephone tapping.

[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] (1997) 1 SCC 301.
[52] *Id* at 304.
[53] *Id* at 316.
[54] *Id* at 314.

In another landmark case *National Legal Services Authority v. Union of India*,[55] court has extended the right to privacy to the transgender people accepting them as a third gender holding that the basic rights coming under article 19 and 21 like right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, exploitation and right against discrimination shall also be available to the transgender.

K.S. Puttaswamy Jurisprudence on right to privacy

Puttaswamy v. Union of India (hereinafter *Puttaswamy* 2) [56] was penned down by the Supreme Court in the year 2017 to resolve the uncertainty in India's constitutional jurisprudence. A nine judges bench was constituted to revisit and resolve the anomalies that existed in the conceptual analysis of privacy as a fundamental right and with regard to its convolutions linked with one's liberty. The nicety of the judgment is so apparent on the face of the record, especially in its synopsis which is comparable with a well-written law review article. Though a lot of judicial time has been spent for hewing the judgment to solve the privacy issues connected with the central government's *Aadhar* card scheme (Personal Unique Identification using Demographic Biometric Data), it was delivered with proper foresight to create everlasting judicial precedent bearing on various aspects linked with privacy. The significance of the judgment lies in two things viz. (1) the court had laid down a three-prong test to determine the constitutionality of state action under article 21 of the constitution; (2) the decisions in *M.P. Sharma* and *Kharak Singh* were overruled to the extent that the right to privacy was not protected by the constitution. At the outset of the decision itself, the court mentioned its task in imparting constitutional meaning to individual liberty particularly in the light of the invasion of information technology into various facets of human life.

Court had addressed various aspects of privacy including its existence, its source in part three, doctrinal foundation, content and its vigour in controlling the state power. While discussing the precedential force of *M.P. Sharma* and *Kharak Singh's* (Majority) decisions, the court was of the view that since those decisions were rendered in the aftermath of *A.K.Gopalan's* case, they were directly influenced by the *Gopalan's* stature of short interpretation of the fundamental rights. Court vehemently held that the strange type of relationship which was established by *Gopalan* between Article 19 and 21 was abrogated in *Maneka Gandhis*' case

[55] 2014 (5) SCC 438.
[56] (2017) 10 SCC 1.

with a very broad observation that the state action shall be tested not on the basis of the 'object' of the law but the 'effect' it would make on one's fundamental right.[57] Moreover, the court has stated that the state action shall not be arbitrary and must fulfil the requirement of reasonableness under article 14, which is common for all fundamental rights. The court started its discussion after drawing a dividing line between the public and private spheres and came to the conclusion that an individual is sovereign in his own private sphere like privacy.[58] Court tried to discern the seeds of the development of privacy from the American jurisprudence, especially from the well-known legal literature contributed by James Madison, Warren and Brandeis and Thomas Cooley. The Court opined that privacy being a part and parcel of one's personality is basically a natural right which is also inalienable.[59] However, the court stated that though some inalienable rights give autonomy, they cannot be considered absolute.[60] After completing the roving inquiry through the precedents on privacy, the court went on to scrutinise the Indian constitutional edifice as a whole starting from the preamble. Court then went on to have a comparative jurisdictional analysis of various nations including the U.S., U.K., South Africa and Canada and observed that there is certain human values including the dignity of the individual which are common to all nations. The observation of the Court highlighting the constructive interpretation of the constitution in the changing social setup is pertinent to mention here:

> The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past. Hence as Judges interpreting the Constitution today, the Court must leave open the path for succeeding generations to meet the challenges to privacy that may be unknown today.[61]

As a reply to the query regarding the requirement to include privacy under Part III of the constitution, the court has strongly stated that the inclusion would increase the possibility of

[57] *Id* at 478.
[58] *Id* at 599 citing John Stuart Mill, *On Liberty* (Batoche Books, 1859).
[59] *Id* at 537.
[60] *Id* at 367.
[61] *Id* at 477 – 78.

judicial review of legislative action from the side of the majoritarian government.[62] According to the court privacy postulates the right of an individual 'to be let alone', which has a direct nexus with his autonomy. The development of the human personality also lies in preserving his/her private sphere. Court has also held that privacy attaches to the person and not to the place where it is associated. After having a detailed discussion of the conceptual aspects of privacy including the need to protect it from state interference, the court went on to explain three prongs to be satisfied by the state before any attempt of such intrusion:

1. There must be a law in existence to justify an encroachment on privacy;
2. The legitimate need of such intrusion shall be satisfied as reasonable against any form of arbitrariness that would attract article 14;
3. The means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law.[63]

Recently in *Manohar Lal Sharma v. Union of India*,[64] (Pegasus Case) court had a roving inquiry on an allegation against the central government for using spyware known as "Pegasus" for deciphering the secrets from the citizen's gadgets. It was contended that the spyware could be installed onto a person's device without his knowledge or consent and could access all the data including emails, phone calls and audio clips. One of the features of this spyware is to give remote access of the device to its operator. On its website, the manufacturing company of Pegasus has stated that its customers are primarily government intelligence and law enforcement authorities. It was soon declared that there were multiple victims in India. In this case, the court had considered a batch of writ petitions which were clubbed together due to the similarity of the cause of action. One of the major contentions from the side of the petitioners was that since the Union government was alleged to be one of the customers of Pegasus, it was prayed to initiate an independent investigation on the matter.

The case being entangled with the privacy of the citizens, the court went on to examine the intricacies of the matter in connection with privacy rights. The Union government at the outset had cleared their stand through a "limited affidavit" stating that the foundation of the whole case was centred on mere conjectures and surmises; hence, was not an appropriate matter to be considered under article 32 of the constitution. When the court insisted the government to file

[62] *Id* at 485.
[63] *Id* at 504.
[64] 2021 SCC OnLine SC 985.

a detailed affidavit, it was contented by the government that disclosure of certain facts would have a chilling effect on national security and defense.

The court, after having a brief discussion about the historical development of the right to privacy, observed that the right has the utmost significance in a technology-driven world. The court had quoted and underscored the observations made in *Puttaswamy*, especially the three-prong test to be satisfied by the state for curtailing the liberty of an individual. After considering the three prongs, the court held that the state can invade the right to privacy of an individual only if it is justified on constitutional grounds. Court further argued that the state can put an individual under surveillance only if there is a need and when it is absolutely necessary for protecting the national security or interest and that should be proportional. Finally, the court constituted a committee to study and report on the allegation.

Conclusion

An exploration of the origin and development of 'privacy' as a common law right and constitutional right takes one to the legal landscape in which the human liberty and dignity of individuals triumphed through judicial decisions.

Privacy as a claim originated from a mere property interest and later acquired the status of an inherent constitutional right available in any political society ruled by law. It is evident from the legal history that the refinement of the privacy claim from the level of property to a constitutional right took a very long time with the help of judges and jurists. The foundation is well settled and more and more research is necessitated to erect divergent leeway of privacy.

The right to privacy as a dynamic concept cannot be confined within the unbending legal bars except in the case of extreme legitimate state interest. The legitimate expectations of privacy situations are beyond the level of predictability of any prudent man if it is unsettled through judicial decisions. Due to this lacuna, some jurists had rightly stated that the expectations are in fact expectations of judges and not the common man. In future, the judiciary has to take more pain in demarcating the boundaries of privacy claims, where the state could be able to intrude into one's private affairs on varying national interests. However, after the establishment of privacy as a constitutional right, such intrusion into the liberty of individuals may not be an easy task since the state is responsible to justify the same with the principle of reasonableness and proportionality. Further research is needed to understand the intention of the state in blatant violations of the well-founded right of privacy particularly on issues like Pegasus. While India

has several laws that touch upon privacy, there is no comprehensive privacy law that provides a comprehensive framework for protecting privacy rights. The current laws on privacy in India have a limited scope and apply only to specific areas such as sensitive personal information and data protection, and electronic surveillance. Although there are laws in place to protect privacy in India, there is a lack of effective enforcement mechanisms to hold violators accountable since there is an absence of a regulator.

The Judiciary as the watchdog of the constitution is also duty-bound to segregate the illegitimate use of state power with some vexatious political motive and thereby disrupt the well-settled human dignity and autonomy as the laws of privacy in India provide several exemptions for government agencies, which allow them to collect and use personal information without obtaining prior consent from individuals. Hence timely judicial interference is always warranted in situations where the citizens have to compromise with the actions of the state