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PRIVACY ISSUES IN THE AGE OF PANDEMIC: A Critical Analysis

Lakhvinder Singh & Vibhuti Jaswal

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PRIVACY ISSUES IN THE AGE OF PANDEMIC: A Critical Analysis

Lakhwinder Singh & Vibhuti Jaswal***

[Abstract: Right to privacy has been guaranteed to Indians recently. However, the advent of the digital age poses threat to the right to privacy and legal protection of this right is inevitable. The pandemic that we are witnessing today is an unprecedented situation, and the vulnerability of the common man is exacerbated in this context. The vulnerability is not only related to the concerns of the health but brings with it the possibility of excessive surveillance by the State and the mandate by the Government on the use of Arogya Setu application is a step towards this end. Therefore, never in the history of surveillance by the State and protection of the right to privacy, the emphasis was more needful than it is today. In this context, the paper analyses the cross-roads at which the pandemic and right to privacy converge and the impact it may have in the future owing to the sweeping and widespread changes we are witnessing today.]

I

Introduction

The right to privacy includes informational, decisional privacy and mental privacy.¹ Privacy is an essential part of individual life. Privacy provides individuals the breathing space to evaluate their real being. Right to privacy has a social value and includes civil liberties that enable an individual to participate in the democratic processes of the country. In its larger ambit, right to privacy includes the fundamental freedoms such as right to speak freely, right to make associations, right to internet, right to social media, right to move freely, right to religion, etc. In the present paper, it has been argued that an individual's right to privacy is a strong saviour of his or her emotional release against the ubiquitous judgments created by the social media, governments and modern life.

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¹ Zoey Mayhew, Informational Privacy in the Modern Era: Expanding Constitutional Protections to the Mental Health Care of Minors (2017), available at: <http://digitalcommons.law.msu.edu/king/257>

The right to privacy begins from bodily privacy and protects the citizens from unsavoury usurpations.

The paper in its second part assesses four aspects of privacy – Right to bodily privacy, right to mental privacy, right to decisional privacy, and right to privacy as a social value. Thereafter, the paper shifts its focus to surveillance by the State and its effect on right to privacy. The paper then delineates the approach of courts across the globe in dealing with the issues emanating from surveillance by the State and the extent of its legality. In the fourth section, this paper discusses the regulations of State surveillance in India followed by a brief analysis of the impact of surveillance during and after the health crisis the country is facing today. The paper also makes a case for how the application developed by the Government to collect information about health of the patients may prove detrimental eventually, the need of legislative checks and balances to ensure that State surveillance is conducted in the most effective manner while also not falling prey to disproportionate measures to achieve the goal of limiting the spread of the virus.

II

Certain Aspects of Privacy

Right to Bodily Privacy

Privacy means control over personal information and bodily privacy means individual autonomy over his or her bodily decisions. As a corollary, every individual has an inherent right to feel content not only in the way they find befitting but also to outward representation of their contentedness. This right prevails irrespective of social or political attitudes of the nation and whether it is in conformity with the prevalent external expressions acceptable in the society. These externalities would not impinge in any way upon the right to privacy conferred upon the individual. A body of an individual being cannot be forced to be conformist. The individual is free to take care of his or her own body; free to take bodily decisions.² Bodily autonomy protects an individual in a society, *especially* where the physical display of the bodies' contribution is inevitably expected. Bodily privacy demands that the health of body cannot be constructed based on the so-called perfect race,³ for diversity is inherent in nature.

² Michel Foucault argues that each individual is being fabricated in order to normalize the functions of the society. And the fabrication is being done by installing the *governmentality* and ubiquitous *surveillance* at all levels of the fragmented lives. Effective techniques of *Biopower* subjugate bodies and control the whole population. See Michel Foucault, *DISCIPLINE AND PUNISH*, 24 (1977); Michel Foucault, *THE HISTORY OF SEXUALITY*, Vol. 1, 140 (1976).

³ Constructing a perfect society is unconstitutional. For it would intend to create a single patterned society. And, everybody would be expected to live on the same patterns of living. Since nobody knows that who would decide the fixed patterns for the utopian society, the

Perfect race or pure race is dystopian ideal.⁴ It was the use of this dystopian ideal and the idea of a perfect race that led to the holocaust⁵.

Since bodily integrity encourages an individual to live his or her life freely, the recognition of bodily autonomy passes the test of constitutional morality, and is protected by the principles of constitutionalism.⁶ Therefore, the right to treat one's body without any intervention on part of the society or the State writ large is innate to human existence. Unreasonable interference with the right to self-treatment violates the individual's bodily integrity.

In *Aruna Ramchandra Shanbaug v. Union of India*,⁷ the Supreme Court recognized passive euthanasia as a part of right to personal autonomy. Similarly, the Supreme Court of India in *Common Cause (A Regd. Society) v. Union of India*,⁸ acknowledged the fact that bodily autonomy includes right to refuse medical treatment, and an individual has right to die without undergoing into any kind of suffering.

Right to Mental Privacy

Today mental information covers thoughts, feelings, emotions, dreams, nightmares, fears, anxiety etc., and the enjoyment of having control over such psychological processes is the *end* of the inborn right of mental privacy.⁹ Control over one's own psychological information gives room to the individual to evaluate their thought, and

human prejudices and stereotypes could happen to become the part of them. The pursuit of utopia can itself lead to a form of dystopia. See Thomas P. Crocker, *Dystopian Constitutionalism*, JOUR. CONS. L. 603 (Dec. 2015).

⁴ Isaiah Berlin concludes, "Immanuel Kant . . . once observed that 'Out of the crooked timber of humanity no straight thing was ever made.' And for that reason no perfect solution is, not merely in practice, but in principle, possible in human affairs, and any determined attempt to produce it is likely to lead to suffering, disillusionment and failure." Isaiah Berlin, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS*, 48 (Henry Hardy ed., 1991). Quoted in Thomas P. Crocker, "Dystopian Constitutionalism," *Journal of Constitutional Law*, Vol. 18:2, (Dec. 2015), 593-655, at 605, available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1588&context=jcl> (last visited on May 14, 2019).

⁵ During Nazi Regime (under the rule of Adolf Hitler), Jews and other minorities were ostracised and exterminated from the main stream of society. Privacy and dignity of their bodies, families, homes, properties, literature, etc, were degraded by the Nazis. See Kevin M. Keenan, *INVASION OF PRIVACY: A REFERENCE HANDBOOK CONTEMPORARY WORLD ISSUES*, 8-9 (2005).

⁶ In *Navtej Singh Johar v. Union of India*, (2018) 1 S.C.C. 791, the Supreme Court held that LGBTIQ (lesbian, gay, bisexual, transgender/transsexual, intersex and queer/questioning) people have human dignity to choose their sexual orientation and life partner. The Court said that Section 377 is against the spirit of the Indian Constitution. The Court held that the societal morality or majoritarian view or popular perception cannot override the Constitutional Morality.

⁷ A.I.R. 2011 S.C. 1290.

⁸ A.I.R. 2018 S.C. 1665.

⁹ Marcello Ienca & Roberto Anderno, *Towards new human rights in the age of neuroscience and neurotechnology*, LIFE SCI SOC POLICY. (2017).

to participate in the social, political and legal institutions of the society. Therefore, any attempt to penetrate one's mental process with an intention to decrypt the thought process can have dire consequences on the privacy. Although the nature sufficiently provides the innate veil to an individual in order to protect his or her thoughts and feelings, the prejudicial norms of a society and the powers always try to remove the natural veil through various ways since times immemorial. The traditional ways would include torture, coercion, hypnosis, etc., and the modern ways include the ubiquitous monitoring through the new media tools, with increased reliance on technologically advanced techniques.¹⁰

The existence of social prejudices and discriminatory practices in the contemporary context demands transparency in the society which may otherwise destroy the social order. Furthermore, extensive interference with the mental privacy could affect individuals negatively. Erving Goffman noted that although an individual has to play different roles, and to wear different masks while interacting in a society, he or she cannot play those roles or wear masks for an indefinite period of time.¹¹ That is why, as Goffman said, the individual needs 'off stage' moments where he or she removes the mask and acts naturally. In those moments, the individual may be angry, lustful or irritable- with himself or herself only. In the absence of such moments, the individual would be stressful and anxious at home and workplace (during interactions with the society).

Right to Personal Decisions

Personal decisions and the freedoms associated therewith include freedom of religion, freedom of speech and expression, freedom to choose friends and associations, freedom to eat, freedom to marry any partner of choice, freedom to procreate etc. In this context, it is apposite to refer to the developments around the world in respect of autonomy of decisions and freedom to take decisions as a part of right to privacy. In *Griswold v. Connecticut*¹², the Court invalidated the Connecticut law that prohibited the use of contraceptives, and held that such kind of law violates the 'zones of privacy' which are beyond the scope of any legitimate search.

Similarly, in *Eisenstadt v. Baird*¹³, the court extended the use of contraceptives within the realm of exercise of the right to privacy. The court found no basis on which the

¹⁰ Alan F. Westin classified surveillance in three parts i.e. physical surveillance, psychological surveillance, and data surveillance. The traditional means for extracting information include eavesdropping, paid surveillance agents, torture, sex, alcohol, opium, hypnotism, primitive "lie" tests, registers in which residences, movements, and transactions of individuals were recorded, etc. Modern ways include electronic eavesdropping, wiretapping, television-eye monitoring, etc. The new technology is serving the purposes of classic surveillance methods. Alan F. Westin, *PRIVACY AND FREEDOM*, 72 (1970).

¹¹ See Erving Goffman, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, (1959).

¹² 381 U.S. 47 (1965).

¹³ 405 U.S. 438 (1972).

unmarried couples were barred from using the contraceptives, and held that both married and unmarried individuals have right to decide whether to bear or beget a child. It was said that such personal decisions that are protected under the Constitution are enforceable against the unwanted governmental intrusion.

In *Roe v. Wade*¹⁴ the court held that absolute ban on an individual's right to abortion is a violation of the right to decisional privacy. The right to decisional autonomy has been extended to the choice of partner, with special reference to marriage. In *Obergefell v. Hodges*,¹⁵ the U.S. Supreme Court held same-sex couples have right to marry each other. The Court announced that all individuals have right to define their life and to express their identities within the lawful realm, and the State cannot prohibit them from exercising their personal choices.

The Supreme Court of India in *Lata Singh v. State of Uttar Pradesh*,¹⁶ held that everyone has personal autonomy to choose his or her life partner. The Court directed the State to perform its positive duty to protect the marriage rights of the individuals against the barbaric practices, such as the so-called honour-killings. The apex court in *Arumugam Servai v. State of Tamil Nadu*,¹⁷ banned all those institutions that encourage honour killings in the society. The Supreme Court in *Bhagwan Dass v. State (NCT of Delhi)*,¹⁸ held that the so-called honour crimes do fall under the rarest of rare category, and its perpetrators deserve death sentence. Similarly, sexual orientation is one's personal decision, and has nothing to do with the society. In *Navtej Singh Johar v. Union of India*,¹⁹ the Supreme Court held that an individual has *human dignity* to enjoy any kind of sexual orientation, and the majority's view against the sexual minorities should be overridden by the *Constitutional Morality*.

The Right to Privacy: As a Social Value

Right to privacy is also important to strengthen the interpersonal relationship and every society needs strong interpersonal relationships. Self-respect, reputation and honour are the core values of a developed society. Recognition of the privacy norms enable an individual to participate in the society as an active agent. The being of any person is acknowledged in the respect for the privacy of the person, which when absent might make the person feel an outcast from the mainstream society.²⁰ According to Alan F.

¹⁴ 410 U.S. 113 (1973).

¹⁵ 576 U.S. (2015).

¹⁶ A.I.R. 2006 S.C. 2522 at para 17.

¹⁷ (2011) 6 S.C.C. 405.

¹⁸ *Id.*, at para 396.

¹⁹ (2018) 1 S.C.C. 791, at para 610.

²⁰ The moral basis for human rights, as I reconstruct it, is the respect for the human person as an autonomous agent who possesses a right to justification, i.e. a right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon him or her. Human rights secure the equal standing of persons in the political and social world, based on a fundamental

Westin, personal autonomy, emotional release, self-evaluation, and limited and protected communication are the functions of privacy in democratic societies.²¹ Privacy protects us from being defined in unwanted or confirmatory manner. The social aspect of privacy helps us in building stronger relationships based on mutual trust and revelation over time. It is this right that ultimately culminates into a concrete manifestation whereby two persons become closely associated within the bounds of their relationship at the mental and bodily level. Therefore, right to privacy has social value. Privacy is shared commonly by all the members of the society.²² Right to privacy includes civil liberties that allow an individual to participate in the democracy. Right to privacy protects an individual from any kind of threat or coercion. Daniel J Solove said that without privacy, the society is suffocating.²³

III

Surveillance by the State – International Practices

For this part of the paper, 'state includes all those entities that perform public functions²⁴ and have the potential to affect the individuals' privacy rights. Indubitably, the State can

moral demand of respect. R. Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach* in PHILOSOPHICAL DIMENSIONS OF HUMAN RIGHTS: SOME CONTEMPORARY VIEWS 81–106 (C. Corradetti ed., 2012).

²¹ Alan F. Westin, PRIVACY AND FREEDOM 35 (1967).

²² Priscilla Regan said: I argue that privacy is not only of value to the individual, but also to society in general... Privacy is a common value in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a public value in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. Privacy is rapidly becoming a collective value in that technology and market forces are making it hard for any one person to have privacy without all persons having a similar minimum level of privacy'. Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, 213 (1995).

²³ Daniel J. Solove classifies the different conceptions of privacy into six general types: (i) the right to be let alone; (ii) limited access to the self—the ability to shield oneself from unwanted access by others; (iii) secrecy—the concealment of certain matters from others; (iv) control over personal information—the ability to exercise control over information about oneself; (v) personhood—the protection of one's personality, individuality, and dignity; and (vi) intimacy—control over, or limited access to, one's intimate relationships or aspects of life. Right to privacy ensures one's freedom of speech and expression, freedom of carrying any kind of idea, freedom of having dissent, freedom of association, freedom to remain anonymous, etc. For him, privacy enhances social interaction on a variety of levels. A society without privacy, according to Solove, is a suffocating society. Daniel J. Solove, UNDERSTANDING PRIVACY 13 (2008).

²⁴ *Ajay Hasia v. Khalid Mujib Sehravardi* (1981) 1 S.C.C. 722, at para 12.

impose reasonable restrictions on an individual's freedom, and especially the right to privacy. However, for doing that, the State must ensure that its restrictive measures are proportionate, just, fair, and reasonable vis.-a-vis. the goal, the State is striving to achieve by imposing such restrictions. Both substantive as well as procedural due process should be followed before taking any action.²⁵ Mass surveillance programs, by their nature, have the attribute of denting the right to privacy and thereby destroying the underlying principles of a democratic State. Unchecked and unregulated power of the State to access various details about the individuals' life using new media tools and surveillance techniques cannot be proportionate or reasonable.

Position of the European Courts

In *Malone v. The United Kingdom*,²⁶ the European Court held that communications surveillance is permissible only when it is 'in accordance with the law', and is 'necessary in a democratic society' in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Court also said that the phrase 'in accordance with the law' means that the law should be compatible with the *rule of law*, and mere presence of domestic law is not sufficient. The restrictive measures should be in accordance with Article 8 of the European Convention on Human Rights that protects right to respect for his private and family life, his home and his correspondence.

Moreover, surveillance powers of the State should be subject to the independent review mechanism. This is because the precept of constitutionalism requires the presence of checks and balances to inhibit the possibility of any vices on part of the State or its agencies. It helps build the trust relationship between the individuals and the State. The technological advancement comes with its own share of ramifications and they can act as two-edged sword. On the one hand they facilitate and support human existence and life, on the other hand they can have deleterious impact on the right to privacy and exercise of other rights, when the same technology is used for surveillance measures to breach privacy of an individual.

The European Court of Human Rights in *Klass and Others v. Germany*,²⁷ was of the opinion that the surveillance should be made subject to the judicial control. However, the court accepted the fact that if the surveillance had been supervised by the *independent authorities* who were 'vested with sufficient powers and competence to exercise an effective and continuous control' and had a 'democratic character', then, the requirement of having prior judicial control can be avoided. The Court said:

²⁵ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 S.C.C. 353, at para 158.

²⁶ (1984) ECHR 10.

²⁷ (1978) 2 EHRR 214.

'[N]evertheless, having regard to the nature of the supervisory and other safeguards provided for by the G 10, the Court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society. *The Parliamentary Board and the G 10 Commission are independent of the authorities carrying out the surveillance, and are vested with sufficient powers and competence to exercise an effective and continuous control.*'²⁸

The European Court of Human Rights in the *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*²⁹ observed that the independent review must be available at all of three stages: *when it is first ordered, while it is being carried out, or after it has been terminated*. Increasingly, without jeopardizing the purpose of secret surveillance, the monitored individual should be notified about it. The notification would enable him to redress the privacy violations occurred due to the secret surveillance. The European Court of Justice ruled in *Weber and Saravia v. Germany*³⁰ that *as soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should, however, be provided to the persons concerned.*³¹

The European Court of Human Rights (ECHR) in *Big Brother Watch and others v. United Kingdom*,³² held that the mass surveillance violates privacy rights and freedom of expression. The court said that bulk interception of the electronic communications inevitably violates the right to privacy in the 'absence of robust independent oversight of the selectors and search criteria used to filter intercepted communications'.³³

The above decisions clearly bring forth the position in the EU with respect to surveillance by the State, in that the same should be permitted by the law of the land, a mechanism for grievance redressal must be in place where any unauthorised surveillance takes place, surveillance by State can be subjected to judicial review, and independent review of surveillance techniques is not only essential as also democratic.

Position of the American Courts

In the United States, the first voice against the electronic surveillance was raised by Justice Louis Brandeis. In 1890, when the future judge was a lawyer, Louis Brandeis along with his friend Samuel Warren wrote an article entitled 'Right to Privacy' published in the Harvard Law Review. In this article, the lawyers argued for the protection of "right to be let alone" against the technological advancements.³⁴ They said

²⁸ *Id.*

²⁹ (Application no. 62540/00), Jun., 28, 2007, available at: http://hrlibrary.umn.edu/research/bulgaria/AEiHR_M_Ekimdjiev_en1.pdf (last visited on May 16, 2019).

³⁰ Dec. No. 54934/00, ECHR 2006-XI

³¹ *Id.* para 135.

³² (Applications nos. 58170/13, 62322/14 and 24960/15) [2018] ECHR 722.

³³ *Id.* para 347.

³⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4(5) HARV. L. REV. 193-220 (1890).

that the modern enterprises and inventions that violate privacy subject an individual to mental pain and distress, far greater than could be inflicted by mere bodily injury.³⁵

In *Olmstead v. U.S.*,³⁶ the majority of the Court held that wiretapping was not a search within the meaning of the Fourth Amendment to the United States Constitution as no physical trespass was done by the law enforcement agencies. But Justice Louis Brandeis gave his dissenting opinion, and said that wiretapping is a violation of right to be let alone, which has been conferred upon an individual against the government by the framers of the United States Constitution. Justice Brandeis said that the Framers of the Constitution 'conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.'³⁷

Later, *Olmstead* was overruled, and the dissenting opinion of Justice Louis Brandeis was accepted by the U.S Supreme Court in the landmark decision of *Katz v. United States*.³⁸ In this case, the court held that electronic listening of the phone is a search within the meaning of the Fourth Amendment that prohibits illegal search and seizure, and even when an individual uses public phone booth, he has reasonable expectation of privacy in his private conversation.³⁹

In the post-9/11 era, the law enforcement agencies in the United States acquired unprecedented powers to conduct any number of arbitrary surveillances within the country and outside the country. USA PATRIOT Act 2000 allowed the government agencies to intercept anyone's electronic communication without showing any probable cause to the court of law. Such powers totally negated the protection given under the Fourth Amendment to the United States Constitution, which requires police to obtain the search warrant from the *Constitutional Court of Law*⁴⁰ before conducting any search of house, papers, etc. But the United States Supreme Court in *Kyllo v. United States*⁴¹ held that the use of thermal imager to detect heat differentials inside a home without any warrant based on probable cause is unconstitutional. The Court said:

[W]here, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search', and is presumptively unreasonable without a warrant.⁴²

³⁵ *Id.* at 196.

³⁶ 277 U.S. 438, 478 (1928).

³⁷ *Id.* at 478.

³⁸ 389 U.S. 347 (1967).

³⁹ *Id.* at 350-353.

⁴⁰ Fake courts or secret courts are not constitutional courts within the meaning of the Fourth Amendment to the United States Constitution. Fake courts act under the influence of the executive.

⁴¹ 533 U.S. 27 (2001).

⁴² *Id.* at 31-41.

In *United States v. Jones*,⁴³ the Supreme Court held that physical installation of the Global Positioning System (GPS) device on a vehicle is a 'search' within the meaning of Fourth Amendment of the United States Constitution.⁴⁴ But this approach would not protect the locational privacy of an individual where the government obtains the information from the Global Positioning System (GPS) service providers or other telecom service providers. This information stored on the databases of the service providers would be considered as third-party information for which court's warrant is not required.

The American courts have used a more substantial approach in the context of search conducted by State agencies in course of investigation and the transgression of the right to privacy thereof. The courts have granted wider rights to the citizens, and have read down any untoward intrusion in the name of search.

IV

Surveillance by the State: Position in India

In India, right to privacy can easily be found in the liberal interpretations of the constitutional provisions by the courts. Although in its earlier judgments the Supreme Court of India refused to interpret the constitutional provisions liberally and to read right to privacy in the constitutional scheme, now it is clear that right to privacy is a fundamental right under the Constitution of India.

In *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi*,⁴⁵ the Supreme Court (Eight Judges Bench) said that right to privacy is not a fundamental right, and refused to accept the Fourth Amendment jurisprudence of the United States Constitution. *M.P. Sharma's case* was based on *AK Gopalan's literal rule*, which declared that each provision relating to the fundamental rights should be read in isolation. The same interpretation was followed in *Kharak Singh v. State of U.P.*⁴⁶ (Six Judges Bench), and the Court held that right to privacy is not a fundamental right under Part III of the Indian Constitution. However, the Supreme Court in *Kharak Singh case* protected an individual's right to private home and its sanctity against the arbitrary search power that permitted police to make domiciliary visits at night.

In *Govind v. State of M.P.*,⁴⁷ the Supreme Court said that every law that infringes privacy-dignity claim should satisfy the compelling State interest test.⁴⁸ In *Malak Singh v. State of*

⁴³ 565 US (2012).

⁴⁴ *Id.* at 3.

⁴⁵ 1950 S.C.R. 1077

⁴⁶ *Kharak Singh v. State of U.P.*, 1964 S.C.R. (1) 332.

⁴⁷ 1975 S.C.R. (3) 946.

⁴⁸ *Id.* at 953.

*Punjab*⁴⁹, that the police should respect right to privacy while exercising its surveillance powers.⁵⁰

In *Kharak Singh case*, the Supreme Court did not read personal liberty guaranteed under Article 21 of the Indian Constitution along with the fundamental freedoms protected under Article 19(1) of the Indian Constitution. The Court said that these two provisions of Part III should be read separately and opined that the fundamental freedoms enshrined under Article 19(1) has been carved out from personal liberty guaranteed under Article 21 of the Indian Constitution. However, the Supreme Court in *Maneka Gandhi v. Union of India*⁵¹ said that Article 19(1) is a part of Article 21. The decision of *Maneka Gandhi v. Union of India*⁵² liberally construed the words 'procedure established by law' as due process of law, and, therefore, corrected the literal rule of *A.K. Gopalan* case.

In *People's Union for Civil Liberties v. Union of India*,⁵³ the Supreme Court held that wiretapping is a serious invasion of an individual's right of privacy. In *District Registrar and Collector v. Canara Bank*,⁵⁴ the Court held that the right to privacy dealt with persons and not places. In *Ram Jethmalani v. Union of India*,⁵⁵ the Supreme Court held that without any prima facie case the disclosure of an individual's bank accounts violates his or her right to privacy.

In *Selvi v. State of Karnataka*⁵⁶, the Supreme Court held that compulsory administration of any of the techniques like narcoanalysis, polygraph examination and brain Electrical Activation Profile (BEAP) test, is an unjustified intrusion into the mental privacy of an individual.⁵⁷ It was also recognized that forcible intrusion into a person's mental processes is an affront to human dignity and liberty, often with grave and long-lasting consequences.⁵⁸ According to the developed criminal jurisprudence, an individual cannot be punished for his or her thoughts. Any society guided by the principle of the rule of law must denounce the idea of crimes committed by way of transgressing the thought process as it affects the freedom of speech and expression. Journalists, political opponents, political dissidents, and whistle-blowers need free environment to participate in a democracy. Persecution by venturing into their thoughts deters creative ideas that enables growth of the society.

⁴⁹ A.I.R. 1981 S.C. 760.

⁵⁰ *Id.* at 323.

⁵¹ A.I.R. 1978 S.C. 597.

⁵² A.I.R. 1978 S.C. 597.

⁵³ A.I.R. 1997 S.C. 568.

⁵⁴ A.I.R. 2005 S.C. 186.

⁵⁵ (2011) 8 S.C.C. 1.

⁵⁶ 2010 (4) S.C.A.L.E. 690.

⁵⁷ *Id.* at 783.

⁵⁸ *Id.* at 778.

In *Re: Ramlila Maidan Incident v. Home Secretary, Union of India and others*,⁵⁹ the Supreme Court noted that even if an assembly was illegal, the action of police under Section 144 of Code of Criminal Procedure (CrPC) without being preceded by an announcement to the sleeping individuals was not reasonable. The court observed that 'sleep' is a basic requirement for the survival of every human life. Furthermore, to disturb someone's sleep is a violation of his or her human right as it amounts to torture. Therefore, the court declared that right of privacy of sleeping individuals was immodestly and brutally outraged by the State police action.⁶⁰

Finally, 9 Judges Bench of Supreme Court of India in *K.S. Puttaswami v. Union of India*⁶¹ declared that right to privacy is a part of the right to life and personal liberty under Article 21, and the freedoms guaranteed by Part III of the Constitution. The Court overruled *M. P. Sharma* decision and *Kharak Singh's decision* to the extent it did not recognize the right to privacy under the Indian Constitution. The court finally clarified that the decisions that recognized right to privacy as a fundamental right (which were decided in post-*Kharak Singh* time) are the present position of law.

V

India: Privacy and Pandemic

Since *Coronavirus* has compelled everyone to stay at home, the only means of communication for the people is the use of information and communication technology. Governmental agencies, organisations, businesses, and private individuals have no choice but to share their expressions over audio and video-conferencing applications that are installed on various devices including smart phones, computers, and tablets. Currently, *Zoom*, *Google Duo*, *Facebook Messenger*, *Skype*, *Cisco Webex*, etc. are the most widely used video-conferencing applications, and are being used to conduct personal and professional online meetings. Video-chatting applications manage the interpersonal relationships. The number of users of these applications for maintaining their interpersonal relationships is surging across the world with each passing day. The smart applications allow users to share their personal messages, photos and videos with the relatives, friends, or selected group of people. Educational institutions have started imparting education among their students using these online platforms. Online meetings replaced the officials' travelling that is an essential part of the business transactions. However, it has been reported by many news agencies that the hackers

⁵⁹ (2012) 5 S.C.C. 1.

⁶⁰ *Id.* at 248.

⁶¹ (2017) 10 S.C.C. 1.

easily hacked many of these platforms and uploaded the obscene material over the ongoing video-conferencing.⁶²

In the wake of COVID-19, use of information and communication technology and surveillance by the State has met at cross-roads and has given much leeway for the State to cause mass-surveillance. In the name of locating, contacting, screening, flagging, monitoring, and isolating those affected by the virus. The application is used for mass surveillance and also for accessing user information.⁶³ Also, it cannot be denied that the totalitarian regimes would use the absolute access to restrict the individuals' civil liberties arbitrarily. Excessive monitoring creates a surveillance State, where everyone's body, mind and soul are under continuous supervision.⁶⁴

The pandemic provides an opportunity to all forms of governments, irrespective of the fact whether the government is liberal, communist or authoritarian, to use the artificial technology in order to see through the processes of the human body. The mandatory imposition of use of the application developed by the Governmental agencies is indirectly a license to monitor human behaviour and can give unprecedented access to the government into the confines of the citizenry. In times of peace, the autocratic governments were conducting forms of surveillance, but only in a surreptitious manner. But now, it is no more hidden or clandestine. There is high possibility that the Government will resort to such mass surveillance without hesitation, in the name of public security. Many philosophers have argued that the existing means of communications construct the behaviour of an individual to serve others' end. In the new normal, the manufacturing and construction of one's behaviour could be done to undermine the functions of the individuals' civil liberties.

Principles of checks and balances demand the constitution of independent review mechanism to monitor the surveillance powers of the government. It means that the use of artificial intelligence technology to read humans' body, mind and soul should be subject to the legislative and judicial oversight.⁶⁵

Increasingly, the pandemic undermines the principles of democracy. In all democracies, the Executive has got the absolute powers to take any decision in order to control the *Coronaavirus*. Judiciary has come to a slight halt, and the virus has stopped them from entertaining any *habeas* petition against the wrongful detentions. Executive is taking

⁶² Kate O'Flaherty, *Zoom Security Tip: Avoid The App and Do This Instead, Here's Why*, (FORBES (Apr. 29, 2020). Available at: <https://www.forbes.com/sites/kateoflahertyuk/2020/04/29/zoom-security-tip-avoid-the-app-and-do-this-instead-heres-why/#1febc0c448d9>.

⁶³ Yuthika Bhargava, *Hacker sees security flaws in Arogya Setu*, (THE HINDU May 06, 2020). Available at: <https://www.thehindu.com/news/national/ethical-hacker-robert-baptiste-elliott-alderson-sees-security-flaws-in-aarogya-setu/article31515292.ece>.

⁶⁴ Gautam Bhatia, *The Mandatory Imposition of the Arogya Setu App Has No Legal or Constitutional Basis*, (THE WIRE May 04, 2020). Available at: <https://thewire.in/law/the-mandatory-imposition-of-the-aarogya-setu-app-has-no-legal-or-constitutional-basis>.

⁶⁵ *Ghulam Nabi Azad v. Union of India*, (2020) S.C.C. Online S.C. 25, at para 163.

decisions without consulting them with the legislature.⁶⁶ Such situation gravely affects in those democracies where even in the peace time the executive managed to pass the stringent laws without having any deliberative discourse. At present, therefore, any bill to hack the human bodies for exterminating the *Coronavirus* can easily be passed without any debate or discussion. Now is the perfect stage for any government not to discuss privacy standards while enacting legislations. Right to privacy cannot be enforced in the age of *Coronavirus*.

Coronavirus has pushed the human race into a sordid situation. Fear, anxiety and lack of due process of law would lead to the violation of human dignity. Right to privacy, including respect, reputation and dignity, becomes meaningless when an individual patient is being placed under the unhygienic conditions; gets food and other basic necessities in an inhumane manner. Under the impulse of fear and disgust, the attendants and people are unable to realize the human dignity.

Earlier it was thought that the virus is non-discriminatory because it can infect anyone irrespective of race, colour, caste, and religion. However, the existing prejudices and discriminatory practices of the society soon found pandemic's race, colour and religion. Stereotypes gave colour, race, caste and religion to the *Coronavirus*. For example, in Europe, Chinese people were subjected to hate crimes; and in United States, African-Americans are more vulnerable to the virus because of their undeveloped socio-economic conditions, and mortality rate among them is more than other American individuals. A stereotypical notion claimed that a religious minority's prayers and worships spread more virus than the majority's sacred places. Due to the ongoing migration crisis in Europe, the migrants have to face rigorous isolations and quarantines. Nobody wants to take care of their privacy rights. They are not provided with any fundamental right to privacy.

In the outbreak of the dangerous virus, an infected human body has become a non-living thing or commodity for the state and non-state actors. Once it is suspected that an individual is infected with virus, the body is subject to the complete subjugation, especially in the developing nations where the infected person does not have right to self-quarantine.⁶⁷ It has been reported that the governments have failed to provide safe and hygienic places for the infected persons. The unhygienic conditions of the quarantine centres unreasonably and disproportionately deny the individual patients from exercising their right to refuse medical treatment.⁶⁸ Right to refuse medical treatment, which is a part of right to privacy, can be restricted in the interest of general public, and the individual patient can be treated by the State health department. But if

⁶⁶ Neera Chandhoke, *Democracy should not permit a trade off*, (THE HINDU Apr. 07, 2020 Delhi). Available at: <https://www.thehindu.com/opinion/lead/democracy-should-not-permit-a-trade-off/article31274449.ece>

⁶⁷ Ashok Kumar, *I regret coming to quarantine centre, say Delhi patient*, (THE HINDU May 17, 2020). Available at: <https://www.thehindu.com/news/cities/Delhi/covid-19-i-regret-coming-to-quarantine-centre-says-delhi-patient/article31610257.ece>

⁶⁸ *Id.*

the State fails to respect *dignity, honour, reputation and reasonable expectation of privacy* of the individual patient, it amounts to the serious violation of the individual's inherent right to be self-treated.⁶⁹

Lack of infrastructure, protective equipment, and insufficient staff jeopardize the private lives of the health professionals. The landlords have ordered their tenants who are doctors to vacate their houses. The health professionals are facing colossal challenges while meeting their families and friends. Doctors are being punished for commenting on the insufficient resources. Health professionals and police have to work continuously without rest because of the insufficient staff members. At many places, they were beaten up by the people when they went for testing and tracing. The absence of social cohesion affects their privacy rights. But they do not have any option but to perform their public functions. The continuous working at hospitals and other public places do not provide the health professionals and police reasonable privacy environment. Their reasonable expectation of privacy at public places is under threat, and its violation would cause them serious psychological problems.

VI

Conclusion

Social distancing rules intend to contain the *Coronavirus* within the prescribed perimeter. Social distancing demands the respect for each other's privacy. Failing to do so would defeat the whole purpose of lockdown. In the densely populated areas, where privacy hardly gets any acknowledgment from the society, the strict observance of social distancing is not feasible. Unplanned urban areas, unapproved colonies, slums, ghettos, etc, are the architectural failures, and are against the constitutional objectives, which promise to bring social, economic and political justice in the whole society. Such architectural failures cannot remove the inequalities that still exist in the society. Poverty, unemployment, and inaccessibility to the natural resources bind people to live in the closed spaces, which is the story of every developed and underdeveloped nation. Large families who are bound to live in the small houses cannot afford private rooms to each individual. But it does not mean they do not have minimum standards of privacy. However, in the outbreak of *Coronavirus*, even those minimum standards have been compromised. Increase in the incidents of domestic violence further proved this fact.

The ongoing privacy violations, which seem inevitable in the age of *Coronavirus*, teach the world civilizations to be united, and to reform the existing structures. Democratic societies need to accept the fact that privacy violations occurred in pandemic because they could not invest timely in the primary institutions including education, health and freedom of media. Respect for privacy strengthens the interpersonal and societal

⁶⁹ Omprakash V. Nandimath, *Consent and medical treatment: The legal paradigm in India*, 25(3) INDIAN J UROL. 343–347 (2009).

relationships. Even the strict adherence to the hygiene actions involves the respect of each other's privacy. Privacy standards about self, isolation and intimacy need to be realized in the new normal conditions. In these contexts, privacy is not anti-social. Privacy has social utility. The sense of valuing privacy proves to be the saviour against the fake news, domestic violence, distrust, disgust, hatred feelings, anger, fear, anxiety, hoarding, cybercrimes, anarchy, chaos, autocracy, dictatorship, authoritarianism, opaque bureaucracy, mob-lynching, and so on and so forth.

The pandemic could bring with itself, an increased mass surveillance coupled with the use of new technology. In this context, it becomes imperative to relook at the ways in which the decisions are made and the right to privacy of individuals upheld after the pandemic has subsided. The extremity of surveillance must not become the new normal transgressing not only the constitutional mandate but the rights that constitute the fundamental human element.