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THE RIGHT TO PRIVACY AND NATIONAL SECURITY: A JURISPRUDENTIAL EXAMINATION

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I. ABSTRACT

The evolution of privacy rights and their intersection with national security is a critical area of contemporary legal and philosophical discourse. This paper examines diverse theoretical perspectives on privacy, surveillance, and the balance between individual autonomy and state intervention. It explores landmark judicial interpretations, including the recognition of privacy as a fundamental right in *K.S. Puttaswamy v. Union of India*, and critiques from legal philosophers such as Judith Thomson, Kenneth Himma, and Adam Moore. The paper argues for a nuanced approach that balances security and privacy while highlighting the significance of transparency, responsibility, and public discussion in the formulation of public policy.

II. INTRODUCTION

In the landmark case of *K.S. Puttaswamy v. Union of India*, the Supreme Court recognized the right to privacy as a fundamental right, marking a significant moment in Indian jurisprudence.¹ Modern society imposes far greater restrictions on privacy than it did in the past, where individuals are constantly confronted by forces of institutional control, from the "organization man" to the surveillance state. Yet, while the evolution of social and political structures has led to increased oversight, this shift is not inherently negative.

The tension between national security and the right to privacy has emerged as a critical issue in contemporary jurisprudence with different discussions among legal experts, decision-makers, and the public. However, the discourse surrounding this tension is not new and has been deeply explored by various legal philosophers and

¹ *K S Puttaswamy v Union of India* (2017) 10 SCC 1, AIR 2017 SC 4161

jurists, laying the groundwork for understanding the interplay of rights between state power, privacy rights and morality.

Few philosophers consider privacy a "natural" right or believe its intrinsic nature justifies it as a legal right. On the other hand, some argue that security is essential and should be prioritized above all else, while others advocate for a balanced approach between privacy and security. This paper will explore diverse perspectives among jurists on privacy, surveillance, paternalism, and related moral concerns, examining how these theories remain highly relevant to today's social and political landscape.

III. PHILOSOPHICAL PERSPECTIVES ON PRIVACY

Judith Thomson posits that the right to privacy is a cluster of rights, comprising both irreducible "grand rights," like property rights, and reducible "ungrand rights," which include more specific entitlements such as the right not to be subjected to eavesdropping. Kenneth Himma, on the other hand, contends that security should come before privacy since he sees the latter as a tool for protecting other rights rather than a fundamental one.

According to him, maintaining security is a basic obligation that is essential to living.² This viewpoint has become more pertinent in contemporary times, particularly when global challenges and technological breakthroughs continuously challenge the fragile balance between security and privacy. For example, the Indian government's push for mass surveillance through projects like the CCTV camera installations in urban areas is often justified in the name of public safety and security.

Conversely, Adam Moore disagrees with Himma's viewpoint, highlighting the need for privacy in preventing the possible tyranny of an unbridled security apparatus. While it is crucial for privacy and security to coexist, this relationship must be governed by checks and balances to prevent the potential overreach of security powers.

² Roessler B and DeCew J, 'Privacy' (Stanford.edu14 May 2002) <<https://plato.stanford.edu/entries/privacy/#ThomRedu>> accessed 1 November 2024

North Korea serves as an extreme illustration of the perils of putting security above individual privacy, as the state's harsh policies violate fundamental rights in the name of national security. Nonetheless, security measures can be acceptable if they are put in place with the proper supervision and are intended to shield citizens from outside threats. According to John Stuart Mill, there are situations in which restricting personal freedom is necessary to achieve the larger objective of safeguarding the country and its citizens.

IV. THE ROLE OF SURVEILLANCE

"The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others," John Stuart Mill famously argued in his essay 'On Liberty'.³ This quote lays up Mill's "harm principle," which emphasizes a minimal level of government interference and maintains that personal freedom should only be curtailed when it is necessary to protect others.

This notion raises an important challenge in the context of national security that may an invasion of privacy be justified if it shields society from possible harm. According to Mill, if collective security measures are truly intended to avoid harm, they may, under certain circumstances, justify restricting individual liberties. Second, Gerold Dworkin's paternalism contends that the government should act as the nation's "father," protecting and guiding its citizens. Like Mill's harm principle, paternalism assumes that populations must be protected, but it also goes so far as to say that population control requires management by the government.

Lastly Moralism, a dominant 19th-century American viewpoint, argues that governments exist to uphold shared societal values. The saying, "If you haven't done anything wrong, you have nothing to fear," is often used to justify state surveillance and may appear reasonable to law-abiding residents yet the invasiveness remains debatable.

Durkheim noted how crime and its punishment reinforce social norms and unity, while Lenin similarly contended in Imperialism that governments sway public

³ J S Mill, *On Liberty* (J W Parker and Son 1859)

opinion to legitimize systems such as global capitalism.⁴ Legal penalties coupled with surveillance run the risk of fostering an environment where people conform on the outside, but at the expense of true liberty and the extent of personal freedom.

V. THE PRIMACY OF PRIVACY RIGHTS

“If privacy is defined as an essential requirement for the achievement of morality, then privacy is a right that the law must protect and provide.”⁵

According to Dworkin, rights are basic ethical means that enable people to claim their self-respect and dignity, which are necessary for their equality in society. A sense of pride and self-worth is fostered by acknowledging oneself as a holder of rights, which empowers people to demand that they be treated as ends in and of themselves rather than mere means.⁶

Therefore, in examining the relationship between national security and individual rights, Ronald Dworkin’s analysis provides a strong perspective on understanding moral basis for privacy rights. He argues that citizens have inherent rights against the government, based on the ideas of political equality and human dignity.

In the *Puttaswamy v. Union of India* decision, the court determined that privacy is fundamental to the entire constitutional framework and is a necessary component of individual liberty and dignity.⁷ In this light, Dworkin maintains that individuals must ultimately determine whether their rights have been violated.

Accordingly, private rights are paramount, and any infringement must be supported by strong evidence, particularly when it comes to national security. Responsible governments should be able to justify any actions by them that limit the liberty of individuals.

⁴ M Liao, 'A Survey of Surveillance: Origins and Implications of Surveillance and Surveillance Technologies' (2023) The Macksey Journal <https://mackseyjournal.scholasticahq.com/api/v1/articles/46658-a-survey-of-surveillance-origins-and-implications-of-surveillance-and-surveillance-technologies.pdf> accessed 1st November 2024

⁵ Negley G, 'Philosophical Views on the Value of Privacy' (1966) 31 *Law and Contemporary Problems* 319 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3111&context=lcp>> accessed 1 November 2024

⁶ R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977)

⁷ *K S Puttaswamy v Union of India* (2017) 10 SCC 1, AIR 2017 SC 4161

Dworkin and George's conceptions of collective interests are essentially different. George sees collective interest in the traditional sense of the common good, which is entirely consistent with respecting individual rights and necessarily involves care for each person's well-being. Dworkin, on the other hand, views communal interest from an aggregative or utilitarian standpoint, where individual rights may clash with the needs of the many. The incommensurability of human goods is a challenge raised by this utilitarian approach since it is difficult to prioritize or quantify them without sacrificing personal dignity.

Robert George offers a perfectionist view and categorizes privacy into three categories, namely decisional privacy, spatial privacy, and informational privacy. Although perfectionists acknowledge the importance of individual interiority such as the thoughts, feelings, and wants that people may choose to express, he contends that this interiority ought to be communicated willingly. Invading someone's privacy not only compromises their autonomy but also reduces the possibility of obtaining some collective benefits that result from sincere, voluntary communication between people.⁸

George posits that both the right to privacy and the right to free speech are instrumental goods, meaning their value is derived from their utility in promoting human flourishing and the common good rather than being intrinsically valuable. As a result, perfectionists believe that the right to privacy can only be legitimately violated in extreme circumstances where it serves a higher moral goal, such as preserving justice or shielding the community from impending damage, and thus supports a cautious approach to invasions of privacy.

He contends that legislation aimed at protecting public morality does not inherently violate any norms of justice or political morality, even though there are instances where toleration of moral wrongdoing may be justified on prudential grounds. Encroachments on privacy may be justified in this situation if the values of life and knowledge are being protected to maintain public safety and efficient crime control.

⁸ 'Legislating Morality? A Review of Making Men Moral by Robert P. George (*Allkirk Network* 13 January 2020) <<https://allkirk.net/2020/01/13/legislating-morality-a-review-of-making-men-moral-by-robert-p-george/>> accessed 1 November 2024

George identifies these exchanges as essential to the realization of basic human goods, which form the foundation for a morally coherent society.⁹ However, for such justifications to hold, it is imperative to foster an open dialogue that encourages the exchange of ideas and knowledge, as well as a shared understanding of what constitutes a good life.

VI. PATERNALISM

Paternalism is the act of a state or an individual interfering against the will of another person based on the justification or motivation that the person being interfered with would benefit or be safe. To examine government actions affecting individual rights under the guise of national security, we can draw on Thaler and Sunstein's concept of libertarian paternalism.

According to this view, "nudges" like subtly crafted policy instruments can affect behaviour without taking away personal autonomy.¹⁰ Governments may employ such strategies to enhance public safety, such as gently changing the way that national security requirements are seen to persuade citizens to accept privacy trade-offs. For example, by portraying monitoring as advantageous rather than invasive, people may be more willing to agree to data sharing because they think it safeguards the general welfare. Nevertheless, government-driven nudges here entail potential hazards as they may subtly normalize widespread oversight, undermining individual liberty and privacy rights.

Several moral concerns surface while assessing the justification of paternalism considering privacy invasion. The government frequently bears the burden of proving that the invasion of citizens' privacy is both required and advantageous. According to a consequentialist perspective, paternalism could be acceptable if the monitoring does noticeably more benefit than harm, like stopping crime or terrorism. However, from a Kantian standpoint, respect for rational agency would suggest that the state should refrain from taking paternalistic actions that violate autonomy without explicit

⁹ B Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2012)

¹⁰ Dworkin G, 'Paternalism' (*Stanford.edu* 6 November 2002)
<<https://plato.stanford.edu/entries/paternalism/#HardVsSoftPate>> accessed 1 November 2024

knowledge or permission. Regardless of the apparent security advantages, citizens who are viewed as ends in themselves should have access to information and be able to make educated decisions about their privacy. Supporting Mill's theory of inherent autonomy, this perspective stresses that the benefits of monitoring must be balanced against the ethical costs of limiting personal freedom.

Thus, the extraordinary use of communications monitoring technologies may be justified by concerns about criminal activity and national security. For example, in response to allegations about violating privacy, NSO, the creator of Pegasus, argued that the software was sold solely for tracking serious threats, such as terrorists and criminals.¹¹ However, this justification leaves significant room for abuse because governments may use these techniques to keep tabs on not just real dangers but also political rivals, journalists, activists, and other dissident groups.

VII. UTILITARIANISM AND PRIVACY

A framework for assessing government acts that affect individual freedoms is established by Bentham's philosophy, which is centered on maximizing the greatest happiness, particularly in governance. He promoted the idea that the government should use what he called "security against misrule" to ensure that the interests of the governed and those in authority align.¹²

He recommended administrative changes such as universal suffrage, transparency, and public accountability, emphasizing the value of the "Public Opinion Tribunal" as a venue for public discussion and open examination to stop power abuses. He believed that the government could only remain legitimate and align its operations with the public interest by implementing such checks.¹³

Bentham's utilitarian theory, for example, can provide a framework for assessing the privacy issues related to biometric data gathering under India's newly passed Telecom

¹¹ Kaldani T and Prokopets Z, 'PEGASUS SPYWARE and Its Impacts on Human Rights' (2022) <<https://rm.coe.int/pegasus-spyware-report-en/1680a6f5d8>>

¹² Crimmins JE, 'Jeremy Bentham' (*Stanford.edu* 17 March 2015) <<https://plato.stanford.edu/entries/bentham/#AdmGovConLaw>> accessed 1 November 2024

¹³ 'An Introduction to the Principles of Morals and Legislation - Econlib' (*Econlib* 9 July 2018) <https://www.econlib.org/library/Bentham/bnthPML.html?chapter_num=8#book-reader> accessed 1 November 2024

Act, which went into effect in June 2024.¹⁴ Although the act requires telecom service providers (TSPs) to use biometric verification to identify their customers, it does not explain why this is necessary or comply with the data protection standards set forth in the Digital Personal Data Protection Act (DPDPA), which will regulate data handling after it goes into effect.

Bentham's core tenet of utilitarianism is that laws and regulations should maximize collective happiness and, in this context, will require the advantages of biometric data collection to outweigh its privacy costs. It is imperative to make sure that these regulations genuinely serve the public interest and prevent needless intrusion, given that TSPs have access to private data.

VIII. ETHICAL CONFRONTATION

John Stuart Mill's another infamous concept of ethical confrontation, like Bentham's idea of transparency, argues that moral progress is fostered through the open discussion of diverse views on morality, politics, and lifestyle.¹⁵ While state restrictions on individual privacy may sometimes be necessary, these issues should remain subjects of public discourse. Encouraging open conversations about the justifications for privacy infringements allows both the state and individuals to better understand the reasoning behind such measures. Lastly, considering morality, it is vital for the public to be informed of their rights that fosters understanding and accountability.

James Fitz James Stephen argues in his critique of Mill that laws should serve as a proactive tool for fostering a morally sound society based on what lawmakers believe to be a "good moral system or standard," rather than just serving as a safeguard for individual liberties. His position represents a teleological view to law, in which advancing the moral wellbeing of the group is the goal, even if doing so means

¹⁴ Kaushik Moitra and Karnika Vallabh, 'Connected and Exposed? Privacy Risks under the Proposed Telecommunications Regime' (Lexology, 28 October 2024) <https://www.lexology.com/library/detail.aspx?g=b0d13222-8189-43b2-9ca8-f64c16e73da4> accessed 1 November 2024

¹⁵ Brink D, 'Mill's Moral and Political Philosophy' (Stanford.edu 9 October 2007) <<https://plato.stanford.edu/entries/mill-moral-political/>> accessed 1 November 2024

limiting some individual liberties, such the right to privacy.¹⁶ Within the framework of national security, this approach positions the state as a moral guardian tasked with protecting society's stability by mitigating potential threats. According to this viewpoint, national security is a manifestation of the state's moral duty, a mirror of the social contract aimed to protect the citizens of its country.

IX. THE NEED FOR A BALANCE

Joseph Raz argues that autonomy is integral to a fulfilling life, emphasizing that individuals should have the freedom to make personal choices regarding their activities and relationships. However, he also posits that governments hold a responsibility to ensure the well-being of citizens, which includes curating meaningful choices and minimizing those that lack value.¹⁷

Thus, this gives us a balanced perspective where autonomy is important but state intervention, especially when it comes to national security, may curtail it to safeguard the welfare of the citizens. Accordingly, privacy protections found in U.S. and EU national security regulations frequently represent national interests just as much as they do universal rights to privacy with the goal of preserving autonomy only to the degree that it serves the purposes of collective security.¹⁸

According to Raz's conclusion based on his principles, the government can legitimately influence the options accessible to its citizens, but liberty and autonomy restrict when it should use coercive measures like moral paternalism. When it comes to national security, one could argue that the government should only restrict individual freedoms to preserve the welfare of the whole.

Such interventions, nevertheless, ought to be modest and appropriate, guaranteeing that individual liberties are not unnecessarily jeopardized and that the main objective is the welfare of the populace rather than overbearing control.

¹⁶ M Golding, *The Limits of the Law* (OUP 1985)

¹⁷ B Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2012)

¹⁸ Bignami F and Resta G, 'Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance' (2018) https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2562&context=faculty_publications

An example of a law in India that illustrates Raz's reasoning is the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. This law mandates social media platforms to remove harmful or unlawful content, reflecting the state's role in making social media platforms safe, trusted, and accountable and shaping mindful online discourse for citizens. While some argue that this limits freedom of expression and personal autonomy, it ultimately serves the public welfare by protecting rights under Articles 14, 19, and 21 of the Indian Constitution.

X. CONCLUSION

In conclusion, while there have been diverse discussions from influential jurists like Thomson, Himma, and Mill, a recurring theme among them is the need for the essential balance between individual privacy rights and national security. Since Mill contends that people should be aware of their rights and the degree to which they may be violated, his focus on public knowledge is especially pertinent in this context.

This is very much in line with the K.S. Puttaswamy ruling, which aims to build confidence between the public and the government by ensuring that people are aware of their privacy rights. Various government measures, such as the Telecom Bill, the IT Act, and the use of surveillance cameras in public spaces, highlight ongoing tensions between privacy rights and national security interests.

The debate over these policies is essential, especially when viewed through a perfectionist lens, which suggests that uninformed privacy intrusions hinder open and authentic communication between institutions and citizens. Ultimately, effective governance must respect individual privacy while protecting public safety through controlled and justified surveillance methods, creating a balanced and ethically grounded society.