

# The Pegasus Snooping Case: A Legal Analysis of the National Security VS Individual Privacy Paradigm

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**Running Title:** Pegasus Snooping Case is a Matter of National Security or Individual Right to Privacy: A Study

**Abstract:** *In the Technology Era, conflict between the individual's identity and legislative regulation is inevitable. Snooping case is one of the glaring examples to defy the citizenry inalienable rights. The Pegasus snooping case has raised several difficult questions in the field of spyware and individual privacy. This is the first and foremost matter of the surveillance at large scale involves a large number of veteran journalists, lawyers, government officials, opposition leaders, social and human rights activists pose a serious threat to their life and security which is guaranteed as the fundamental rights under the Indian Constitution. The petitioner stated before the Supreme court of India that using military grade spyware for targeted surveillance is a direct violation of fundamental right to privacy as held in K.S. Puttaswamy v. Union of India (2017). This Article deals with the set of policy questions highlighted under the purview of relationship between the privacy and security distinction that deserve further research. Also, it is an attempt to examine the interpretation of the term national security and privacy and with the help of textual and judicial interpretation.*

**Keywords:** Privacy, Personal life and Liberty, Security, Supreme Court, fundamental Right, The Constitution of India

## 1. Introduction

In mid-July 2021, the Forbidden Stories a Paris-based media nonprofit with a collaboration of 80 journalists from the 17 media organization and Amnesty International further research and analysis, published a report of potentially hacking and illegal surveillance of a number of peoples across more than 50 countries mostly belonging to the authoritarian regimes. The Amnesty Security Lab did the detailed forensic analysis of the smartphones and produced technical report for the same.

This international collaborative investigation titled as "The Pegasus Projects" analysed the suspected attacks through interviews and forensic analysis of the phones. Amnesty security Lab examined 67 suspected smartphones<sup>1</sup>, out of those 23 were infected and 14 showed signs of attempted penetration. For the remaining 30, the tests were inconclusive due to phones had been replaced. Fifteen of the phones were Android devices, none of which showed evidence of successful infection. However, unlike iPhones, Androids do not log the kinds of information required for Amnesty research work. But 3 of them showed targeting signs through the Pegasus Linked SMS messages.<sup>2</sup>

Amnesty shared copied data of iPhones<sup>3</sup> with the Citizen Lab which is a research group at the University of Toronto that specializes in studying the Pegasus. The Citizen lab after conducted the peer review as per the Amnesty Forensic

method<sup>4</sup> and further concluded with the signs of Pegasus Infection.

However in the Indian Perspective, The Wire<sup>5</sup> an independent media organization, assisted this Pegasus Projects reported that more than 1,000 phone numbers from India are also part of this list involved high profile name Shri Rahul Gandhi, Wayanad Lok Sabha Constituency Representative, Shri Ashwini Vaishnav India Minister of Railways, Communication And Electronics and Information Technology, Shri Prahlad Singh Patel Minister of State for Jal Shakti (the Water Ministry).<sup>6</sup>

## What is Pegasus?

A proprietary spyware owned and developed by the NSO Group Technologies<sup>7</sup> covertly installed on phones running on almost every version of the iOS and Android. It is capable of zero click surveillance of smartphones and able to read text messages, tracking calls, collecting passwords, location tracking, accessing the target devices microphone and camera and harvesting information from apps.

The Pegasus name borrowed from the ancient Greek mythology. A mythical winged divine flying horse one of the most recognized creatures as the same also called as the "Spirit Flight".<sup>8</sup> The same can be relate with the Trojan Horse<sup>9</sup> computer virus that can be sent "flying through the air" to infect cell phones.

<sup>1</sup> <https://www.amnesty.org/en/latest/research/2021/07/forensic-methodology-report-how-to-catch-nsa-groups-pegasus/>

<sup>2</sup> <https://www.washingtonpost.com/investigations/interactive/2021/nso-spyware-pegasus-cellphones/>

<sup>3</sup> <https://www.washingtonpost.com/technology/2021/07/19/apple-iphone-nsa/>

<sup>4</sup> <https://citizenlab.ca/2021/07/amnesty-peer-review/>

<sup>5</sup> <https://thewire.in/media/pegasus-project-spyware-indian-journalists>

<sup>6</sup> <https://thewire.in/government/pegasus-project-rahul-gandhi-prashant-kishor-ashok-lavasa-ashwini-vaishnav-prahlad-patel>

<sup>7</sup> An Israeli cyber-arms technology firm Founded in 2010 and the company name NSO standing with names of the Company Founder i.e., Niv, Shalev and Omri.

<sup>8</sup> Pegasus, the Most Terrifying Spyware with an Ancient Greek Name (greekreporter.com)

<sup>9</sup> Metaphorically this term used to invite a targetted foe to a secure place by deceiving appearance. Historical Importance, The Greeks created a giant hollow horse in which to hide themselves so as to gain entrance into Troy city.

The question is how the Pegasus different from the other spyware. Two reasons would be possibly for this question, first one is this spyware is developed by the veterans of Israeli intelligence agencies marketed through own company group NSO, the world leading cyber intelligence and the second one is, according to the Pegasus brochure brags it as the NSO uniqueness significantly differentiate with the other spyware available in the market.

### Previous feud with the Pegasus Software

The Citizen Lab, an interdisciplinary research laboratory of the University of Toronto, in August 2016, first time reported the existence of Pegasus into Apple devices, alerted the cyber security firm for lookout. In later year, April 2017 the Lookout and Google published a detail reports<sup>10</sup> on android version Pegasus and found that the Android devices can sophistically become the Pegasus target. Google named this threat Chrysaor, brother of Pegasus.<sup>11</sup>

In October 2019, WhatsApp directly attack the NSO group and alleged that exploring vulnerability in video call feature of WhatsApp. A user received what appeared to be a video call but that was not the case as it appears. WhatsApp Chief Will Cathcart also alleged that the person sitting-in -chair of NSO group did not even have time to answer a call.<sup>12</sup>

In December 2020, the Citizen Lab Report suggested the involvement of government operatives while using Pegasus spyware to hack phones belonging to the journalist, producers, anchors and executives at Al Jazeera and London Based Al Araby TV during the period of July- August 2020. The attack happened at very miniscule fraction against the iOS version 13.5.1 the then latest iPhone 11, but the same attack did not very effective against iOS 14 and above which apparently the Apple company planning to be roll out within span of time.

### Pegasus Snooping Case in India

“The Pegasus Project” investigation revealed that the said spyware has been used on minister, opposition leaders, political strategist and tactician, journalists, activities, minority leader, Supreme Court Judges, religious leaders, administrator like Election Commissioners and head of Central Bureau of Investigation (CBI).<sup>13</sup> Some of these phones were forensically and digitally examined by the Amnesty International Security Lab and the report showed signs of attempted hack.<sup>14</sup> Hue and cry has been carried across the India, Media houses, journalist, politician, opposition leader of the House and social activists blamed the government in an attempt to suppress the fundamental right of Speech and Expression as well as Life and personal Liberty Guaranteed under Article 19 (1) (a) and Article 21

respectively of the Constitution of India. A writ petition has been lodged before the Apex Court in the light of the alleged use of spyware on the private individuals in India.<sup>15</sup> It has been claimed as per the petition about 300 mobile numbers belonging to the Indian were allegedly under surveillance using Pegasus including those of senior journalists, doctors, political persons and court staff. The NSO Group who developed Pegasus software reportedly sold only to the vetted governments. And thus, by using this software violated the Petitioner’s right to privacy and free speech and further demanded an independent investigation in regard of Pegasus deployment by the foreign governments or agencies of the Indian Government against the citizens of India. The Supreme Court of India<sup>16</sup> examined the allegation relating to the potential violation of the right to privacy of Indian citizens through the use of spyware technology. The Court vide its order dated 27-10-2021 ordered for the constitution of committee to probe into the allegation of the governments using Israeli software.

In the Next part we will discuss the textual, legislative and juridical development with respect to the surveillance, telephone tapping and right of privacy in India – its facets and importance.

### Right to Privacy- Facet & Nuances

At the outset, certain nuances of the right to privacy in India- its factes and importance to be discussed. Historically, privacy rights have been ‘property centric’ rather than people centric. This approach was seen in both the United States of America as well as in England. In 1604, in the historical **Semayne’s case**<sup>17</sup> it was famously held that “every man’s house is his castle”. This marked the beginning of the development of the law protecting people against unlawful warrants and searches.<sup>18</sup>

As **William Pitt, the Eral of Chatham** stated in March 1763<sup>19</sup>:

“The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail- its roof may shake- the wind may blow through it- the storm may enter- but the King of England cannot enter- all his force dares not cross the threshold of the ruined tenement.”

As long back as in 1890, Samuel Warren and Louis Brandeis observed in their celebrated article “**The Right to Privacy**”<sup>20</sup>: “Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what judge Cooley calls the right “**to be let alone**”.... numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”

<sup>10</sup> <https://info.lookout.com/rs/051-ESQ-475/images/lookout-pegasus-android-technical-analysis.pdf>

<sup>11</sup> <https://blog.lookout.com/pegasus-android>

<sup>12</sup> <https://www.dailymail.co.uk/news/article-7026177/WhatsApp-rolls-security-fix-amid-spyware-fears.html>

<sup>13</sup> Pegasus spyware used to ‘snoop’ on Indian journalists, activists - The Hindu

Phones of 2 Ministers, 3 Opp leaders among many targeted for surveillance: report | India News - The Indian Express

<sup>14</sup> Snoop List Has 40 Indian Journalists, Forensic Tests Confirm Presence of Pegasus Spyware on Some (thewire.in)

<sup>15</sup> Manohar Lal Sharma versus Union of India (2021 SC) Decided by the Hon’ble Mr. N.V. Ramanna CJI, Surya Kant J., Hima Kohli J. 16884\_2021\_1\_1501\_30827\_Judgement\_27-Oct-2021.pdf (sci.gov.in)

<sup>16</sup> Hereinafter referred to as “The Court”.

<sup>17</sup> 77 ER 194 Kings Bench.

<sup>18</sup> Manohar Lal Sharma versus Union of India (2021 SC).

<sup>19</sup> Lord Brougham, Historical Sketches of Statesmen Who Flourished in the Time of George III First Series Volume 1 (1845).

<sup>20</sup> Samuel Warren and Louis Brandeis, **The Right to Privacy**, Harvard Law Review, Volume 4 (December 15, 1890).

The direct threat to one's privacy occurs whenever there is surveillance or spying on an individual, either by the state or by any external agency. Ellen Alderman and Caroline Kennedy, in 'Right to Privacy'<sup>21</sup> foresaw this threat to privacy in 1995, while referring to governmental eavesdropping in the United State of America, in the following words:

"Perhaps the scariest threat to privacy comes in the area known as "Informational Privacy". Information about all of us is now collected not only by the old standbys, the IRS AND FBI, but also by the MTB, MIB, NCOA and NCIC, as well as credit bureau, credit unions and credit card companies. We now have cellular phones which are different from cordless phones, which are different from cordless phones, which are different from what we used to think of as phones. We worry about email, voice mail, and junk mail. And something with the perky name Clipper Chip- developed specifically to allow governmental eavesdropping on coded electronic communications- is apparently the threat of all."<sup>22</sup>

Of course, if done by the State, the same must be justified constitutional grounds. This court is cognizant of the State's interest to ensure that life and liberty is preserved and must balance the same. For instance, in today's world, information gathered by intelligence agencies through surveillance is essential for the fight against violence and terror. To access this information, a need may arise to interfere with the right to privacy of an individual, provided it is carried out only when it is absolutely necessary for protecting national security/interest and is proportional. The considerations for usage of such alleged technology, ought to be evidence based. In a democratic country governed by the rule of law, indiscriminate spying on individuals cannot be allowed except with sufficient statutory safeguards, by following the procedure established by law under the Constitution.

The trade-off between the right to privacy of an individual and the security interests of the State, has been recognised world over with the renowned scholar Daniel Solove<sup>23</sup> discussed as follows:

"The debate between privacy and security has been framed incorrectly, with the trade-off between these values understood as an all or nothing proposition. But protecting privacy need not be fatal to security measures, it merely demands oversight and regulation. We cannot progress in the debate between privacy and security because the debate itself is flawed. The law suffers from related problems. It seeks to balance privacy and security, but systematic problems plague the way the balancing takes place...

Privacy often can be protected without undue cost to security. In instances when adequate compromises cannot be achieved the trade-off can be made in a manner that is fair to both sides. We can reach a better

balance between privacy and security. We must there is too much at stake to fail."

(emphasis supplied)

However, unlike the 'property centric' origin of privacy rights in England and under the Fourth Amendment in the Constitution of the United States of America, in India, Privacy rights may be traced to the 'right of life' enshrined under Article 21 of the Constitution. When this Court expounded on the meaning of "life" under Article 21, it did not restrict the same in a pedantic manner. An expanded meaning has been given to the right to life in India, which accepts that "life" does not refer to mere animal existence but encapsulates a certain assured quality.<sup>24</sup>

Members of a civilized democratic society have a reasonable expectation of privacy. Privacy is not the singular concern of journalists or social activists. Every citizen of India ought to be protected against violations of privacy. It is this expectation which enables us to exercise our choices, liberties and freedom. The Supreme Court of India in Privacy Case<sup>25</sup> has recognized that the right to privacy is a sacrosanct as human existence and is inalienable to human dignity and autonomy. This Court held that:

**"Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognized and Guaranteed by the fundamental rights contained in Part III.**

Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21. Privacy is not an absolute right. **A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of Life or Personal Liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them."**<sup>26</sup> (emphasis supplied)

Although declared to be inalienable, the right to privacy of course cannot be said to be an absolute, as the Indian Constitution does not provide for such a right without reasonable restrictions. As with all other fundamental rights, this Court therefore must recognize that certain limitations

<sup>21</sup> Ellen Alderman and Carolin Kennedy, the Right to Privacy 223 (Knopf Publication, 1995).

<sup>22</sup> Ibid.

<sup>23</sup> Daniel J. Solove, Nothing to Hide: The false Trade-off Between Privacy and Security (2011).

<sup>24</sup> *Supra* 18.

<sup>25</sup> K. S. Puttaswamy versus Union of India (2017) 10 SCC 1.

<sup>26</sup> *Supra* 22 at Para 320, 325.

exist when it comes to the right to privacy as well. However, any restrictions imposed must necessarily pass constitutional scrutiny.<sup>27</sup>

### Privacy- Various Issues & Fundamental Development

The issue has been raised time and again whether right to privacy is a fundamental right guaranteed under the Constitution of India and if the answer is in affirmative, what is the source and what are the contours of such a right, in view of the fact that no provision in Constitution expressly provides for a right to privacy. Under this part we will examine the various scope of the privacy right with respect to different scenario.

### Person, Surveillance & Privacy Issue

The debate over wiretapping for Criminal Investigation nowadays has been increasing ever since the evolution of the Constitution of India. The communication devices like telephones and telegraphs have been mentioned in Entry 31 of the Union List<sup>28</sup>. Both the Central and the State Governments reserved the privilege to intercept telephones under the provisions of the Telegraph Act, 1885<sup>29</sup>. Besides this, under Section 25 of the Act it is provided that action should be taken in case of illegal phone tapping and extracting information<sup>30</sup>. Punishment for such acts is provided under the Act for upto 3 years.<sup>31</sup> At sometimes the need exists wherein the inspecting authority wishes to record the telephone discussions being held by the individual that is under doubt. The specialist should look for consent from the Home Ministry prior to proceeding along with such a demonstration. In the request explicit details and motives must be put forward. Also, the requirement for phone tapping should be presented. At that point the Ministry considers the request and awards consent after assessing the basis and urgency of the request. Every agency provides an approval slip prior to setting a telephone under investigation.<sup>32</sup> With regard to States, the State Home Secretary is the Delegated Authority to provide sanctions. The phones of Lawmakers cannot be tapped formally. It must be clearly provided on the slip that the reviewed individual is not a politician.<sup>33</sup>

Other than the Telegraph Act, the other statute that relates to telephone tapping is the Information Technology Rules, 2009<sup>34</sup>. It defines the term “interception”:

“Interception means the acquisition of the contents of any information through the use of means, including an interception device to misuse such information and includes-

- a) Monitoring of information by means of a monitoring device;
- b) Viewing the contents of any direct or indirect information; and
- c) Diversion of any direct or indirect information from its intended destination to any other destination.”

If the information retrieved or recorded from a call stays with either the sender or receiver then this will not be considered as an act of interception since interception should involve the dissemination of such information to some other person.

By the 1990s a great many feud came up in the country and a number of these were related to what people perceived to be illegal tapping of the telephones. The opposite parties did assert that their telephones has been wiretapped by Government based on the request of the ruling party. Subsequently, this was brought before the Supreme Court of India requesting to explain the legislation in regard to the tapping activities in India. The main issue adequate technical protections to contain the discretionary control exercised under the provisions given ought to be included in section 5(2). In this way, despite the fact that Section 7(2)(b) of the Act engages the government to come up with guidelines accommodating “the precautions to be taken for preventing the improper interception or disclosure of messages”<sup>35</sup> till that time the government did not provide any standards or rules. Further, it is alleged Section 5(2) of the Act was not appropriate because it allowed telephone tapping not only for public safety and integrity of India.

The Apex Court laid down the guidelines were<sup>36</sup>

- 1) The conditions under which telephone tapping can be done under Section 5(2) were specified-
  - a) Sovereignty and Integrity of India;
  - b) The security of the State;
  - c) Friendly relations with foreign States;
  - d) Public order; or
  - e) For preventing incitement to the commission of an offence,
- 2) The Union Home Secretary or State Home Secretary are the only ones to issue a request for tapping.
- 3) A copy of such an authorized tapping will be forwarded to the Review Committee.
- 4) The validity of the command sanctioning the telephone tapping will be 2 months.
- 5) Further, the Government is additionally needed to show that the data looked for is not available via some alternatives methods.
- 6) Additionally, the Court commanded an advancement of a special committee which can survey the legitimacy and legal validity of every tapping activity.
- 7) Though the choice to make an evaluation framework has been seriously criticized. Legal fraternity excused it to be empowering the individuals that approve tapping activity to survey the personal requests with an assembly of partners acting arbitrarily and secretly so as to abuse the privacy and related rights.

As per the procedural protections defined by the Supreme Court in PUCL case Government at the Centre initiated a

<sup>27</sup> *Supra* 18 at Para 33.

<sup>28</sup> Schedule 7, Union List - Entry 31, The Constitution of India.

<sup>29</sup> Section 5 Telegraph Act, 1885.

<sup>30</sup> Section 25, Telegraph Act, 1885.

<sup>31</sup> Section 26, Telegraph Act, 1885.

<sup>32</sup> Zubin Dash, Do Our Wiretapping Laws Adequately Protect the Right to Privacy, Economic and Political Weekly, Volume 53 Issue 6 (2018).

<sup>33</sup> *Ibid*.

<sup>34</sup> Information technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Act.

<sup>35</sup> Section 7(2)(B) The Telegraph Act, 1885

<sup>36</sup> People's Union for Civil Liberties versus Union of India (1997) 1 SCC 301.



modification to the Telegraph Rules, 1951 by introducing a new provision.<sup>37</sup> These guidelines had a far-reaching impact and now the Information Technology Act, 2000 gives extensive power to intercept devices in the field of digital communication without the 2 conditions as provided under the Telegraph Act thus making it easier to intercept and tap data.

The Supreme Court has held in PUCL Case that wiretapping constitutes as a grave invasion to one's privacy. To establish the base of the existence of right to privacy and infringement of the same by authorities, the court mentioned in Kharak Singh Case that Article 21 encompassed the "right of an individual to be free from restrictions or encroachments on his person". This case however dealt with the physical invasion of privacy of a person but in PUCL the scope was expanded to include telephonic conversations. It was further stated that "the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'".

### Person, Protection & Privacy Rights

In **M. P. Sharma versus Satish Chandra**<sup>38</sup> an eight-judge Bench of the Supreme Court denied the existence of such a right while dealing with the case of search and seizure observing:

".... A power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security and that power is necessarily regulated by law. When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction."

Similarly, In **Kharak Singh versus State of Uttar Pradesh**<sup>39</sup> A Six-Judges Bench reiterated a similar view observing:

"... Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by the learned counsel for the petitioner....., the right of privacy is not a guaranteed under our Constitution and, therefore, the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a Fundamental Right guaranteed by the Part III of the Constitution of India."

Though the majority judgment in the Kharak Singh case held that right to privacy do not exist under the Constitution. The foundation for right to privacy as Fundamental Right was laid down by the minority judgment given by the **Hon'ble Mr. K. Subba Rao J., and K. C. Shah J.** recognized the right to privacy as a fundamental right under Article 21 and Article 19(1)(d) of the Constitution of India.

In **Govind versus State of Madhya Pradesh**<sup>40</sup> the right to privacy was declared by the supreme court to encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing, but can restrict fundamental right under the subjection of "compelling public interest". But the court, on the other hand, protected the right of privacy of a prostitute observing the fact that even a woman of easy virtues is entitled to her privacy.<sup>41</sup>

In **Malak Singh versus State of Punjab and Haryana**<sup>42</sup> it was held that the police can have surveillance on a person only in accordance with the rules framed for that purpose. The right of privacy is not absolute. It was reaffirmed and held that surveillance per se under the Statute may not violate rights of privacy.<sup>43</sup> And, in another stint, the Apex court held that the credible recording of evidence and safeguarding Human Rights inside police station is a part of Article 21.<sup>44</sup>

However, in the subsequent cases right to privacy has been held to be a fundamental right of the citizen being an integral part of article 21 of the Constitution of India by Supreme Court. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. However, right of privacy may not be absolute and in exceptional circumstances particularly surveillance in consonance with the statutory provisions may not violate such a right.<sup>45</sup>

### Right to Life, Personal Liberty & Privacy

Article 21 being the sole repository of one's right to life or personal liberty, is provided under the caption "Right to Freedom" of Part III of the Constitution of India read as follows:

**"No Person shall be deprived of his life or personal liberty except according to procedure established by law."**

## 2. Background

It may be necessary to give the background and the history of Article 21. In the original draft of the Indian Constitution, the words used were "in accordance with due process of law" instead of the words "according to procedure established by law". The concept expression "due process of law" or its equivalent "law of the land" traces its lineage for back into the beginning of the 13<sup>th</sup> Century A.D. The famous **39<sup>th</sup> chapter of the Magna Carta** provides that "no free man shall be taken or imprisoned or disseized, or outlawed or exiled or in any way destroyed; nor shall we go upon him nor send upon him but by the lawful judgment of his peers and by the law of the Land." Magna Carta as a Charter of English Liberty was confirmed by the successive English monarchs. It was included in "**Statue of Westminster of the Liberties of London**"<sup>46</sup> that the expression 'due process of law' or 'laws of the land' was explained or defined in any of the documents, but on the authority of **Sir Edward Coke** it may be said that

<sup>37</sup> Section 419-A, the Telegraph Rules, 1951.

<sup>38</sup> AIR 1954 SC 300.

<sup>39</sup> AIR 1963 SC 1295

<sup>40</sup> (1975) 2 SCC 148.

<sup>41</sup> State of Maharashtra versus Madhukar Narayan Mardikar AIR 1991 SC 207.

<sup>42</sup> AIR 1981 SC 760.

<sup>43</sup> Bhavesh Jayanti Lakhani versus State of Maharashtra (2009) 9 SCC 551.

<sup>44</sup> Paramvir Singh Saini versus Baljeet Singh (2020) 7 SCC 397.

<sup>45</sup> Supra 32.

<sup>46</sup> 28 Ed. III, Chapter 3.

both the expressions have the same meaning. In substance, they guaranteed that persons should not be imprisoned without proper indictment and trial by peers, and that property should not be seized except in proceedings conducted in due form in which the owner or the person in possession should have an opportunity to show cause why seizure should not be made. The expression “due process of law” came to be a part of the US Constitution by the **Fifth Amendment** which was adopted in 1791 and which provided that “**no person shall be deprived of life, liberty or property without due process of law.**” A similar expression was used in the Fourteenth Amendment in 1868. It has been said that few phrases in the law are so elusive of exact apprehension as “due process of law”. The United States Supreme Court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decision as they arise. The expression “Due Process of Law” as used in the US Constitution, has been taken to impose a limitation upon the powers of the government, Legislative as well as executive and judicial. Applied in England as protection against executive usurpation and royal tyranny, **in America it became a bulwark against arbitrary legislation.** “Due Process of Law”, according to Cooley, “means in each particular case such as exercise of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.”<sup>47</sup>

Till about the middle of the 19<sup>th</sup> Century, due process clause was interpreted as a restriction upon procedure, and particularly the judicial procedure by which the Government exercises its power. Principally it related to the procedure by which persons were tried for crimes and guaranteed to accused persons the right to have a fair trial in Compliance with well-established criminal proceedings. The same principle applied to the machinery or proceedings by which property rights were adjudicated and by which the powers of eminent domain and taxation were exercised. During this period, it was not considered to have any bearing on substantive law at all. Subsequently view came to be accepted that the concept due process of law protected rights of life, liberty and property. This change in judicial thinking was influenced in a great measure by the industrial development leading to accumulation of large capital in the hands of industrialists and the emergence of a definite labouring class. What constituted legitimate exercise of the powers of legislation now come to be a judicial question and no statute was valid unless it was reasonable in the opinion of the court. The US Supreme Court laid stress upon the word “due” which occurs before and qualifies the expression “process of law”. ‘Due’ means ‘what is just and proper’ according to the circumstances of a particular case. The word introduces a variable element in the application of the doctrine, for what is reasonable in one set of circumstances may not be so in another set of circumstances. The requirement of due process clause as a substantial restriction on government control is

also now becoming a thing of the past and the rule is being restricted more and more of its original procedural aspect.<sup>48</sup> The right to life and personal liberty is the most precious right of human beings in civilized societies it is, often, governed by the rule of law. Many modern constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The **American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty and the pursuit of happiness.** The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment to the US Constitution prohibits inter alia deprivation of life and liberty without due process of law. The Different Declaration of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be deprived of his life or liberty without the authority of Law. The **International Commission of Jurists** has been attempting with considerable success to give material content to the “Rule of Law”, an expression used in the Universal Declaration of Human rights. One of its most notable achievements was the **Declaration of Delhi, 1959.** This resulted from a congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. “**Respect for the Supreme value of a Human Personality**” was stated to be the basis of All law.<sup>49</sup>

One of the popular notion is that the Freedom under law is not an absolute freedom. It has its own limitation in its own interest, and can properly be described as regulated freedom. In the words of Ernest Barker, (1) the truth that every man ought to be free has for its other side the complementary and consequential truth that no man can be absolutely free (2) that the need of liberty for each is necessarily qualified and conditioned by the need of liberty for all, (3) that liberty in the State or Legal Liberty is never the absolute liberty of all, (4) That liberty within the state is thus a relative and regulated liberty, and (5) That liberty a relative and regulated actually operative and enjoyed.

### Constituent Framer Consideration

Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a fact of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of his life and liberty without the authority of law was not the gift of the Constitution. It was a necessary corollary of the concept relating to the sanctity of life and liberty, it existed and was in force before the coming into the force of the Constitution. The idea about the sanctity of life and liberty as well as the principle that no one shall be deprived of his life and liberty without the authority of law are essentially two facets of the same concept. This concept grew and acquired dimensions in

<sup>47</sup> Thomas M. Cooley, A Treatise on The Constitutional Limitations 741 (M.P.P. House Bangalore).

<sup>48</sup> Hon’ble Mr. B. N. Mukherjea J. observation in A. K. Gopalan versus State of Madras (1950 SC).

<sup>49</sup> O. Hood Phillips and Paul Jackson, Constitutional and Administrative Law 21 (Sweet and Maxwell Publication, 3<sup>rd</sup> Edition).

response to the inner urges and nobler impulses with the march of civilization. Great writers and teachers, philosophers and political thinkers nourished and helped in the efflorescence of the concept by rousing the conscience of mankind and by making it conscious of the necessity of the concept as necessary social discipline in self-interest and for orderly existence. According even to the theory of social compact many aspects of which have now been discredited, individuals have surrendered a part of their theoretically unlimited freedom in return or blessings of the government. Those blessings include governance in accordance with certain norms in the matter of life and liberty of the citizens. Such norms take the shape of the rule of law. Respect for law, we must bear in mind, has a mutual relationship with respect for government. Erosion of the respect for law, it has accordingly been said, affects the respect for government. As per the **Macdonald**, Government under the law means that the power to govern shall be exercised only under conditions laid down in constitutions and laws approved by either the people or their representatives. Law thus emerges as a norm limiting the application of power by the government over the citizen or by citizens over their fellows. Theoretically all men are equal before the law and are equally bound by it regardless of their status, class, office or authority. At the same time that the law enforces duties it also protects rights, even against the sovereign. Government under law thus seeks the establishment of an ordered community in which the individual, aware of his rights and duties, comprehends the area of activity within which, as a responsible and intelligent person, he may freely order his life, secure from interference from either the government or other individual. In the words of

**Professor Macdonald:**

“It is clear enough that High echelon administrator are understandably impatient with the restraints imposed upon them by the traditional concept of the rule of law as developed by Dicey.”<sup>50</sup>

Speaking of Rule of Law, Rule of Law is considered to be the antithesis of arbitrariness. Plato believed that if philosophers were kings or kings philosophers’ government by will would be intrinsically superior to government by law, and he so proclaimed in his republic. Experience eventually taught him that his ideal was not obtainable and that if ordinary men were allowed to rule by will alone the interests of community would be sacrificed to those of the ruler. Accordingly, in the laws he modified his position and urged the acceptance of the “second best”, namely government under law. Since then the question of the relative merits of rule by law as against rule by will has been often debated. In the aggregate the decision has been in favor of rule by law. On occasions however, we have slipped back into government by will only to return again,

demonstrated the essential egotism of men and the truth of the dictu that all power corrupts and absolute power corrupts absolutely. Bracton’s dicta that if the king has no bridle one ought to be put upon him, and that although the king is under no man he is under God and the law Fortescue’s insistence that the realm of England is a regimen **politicium et regale** and hence limited by law. Coke’s Observation that “**Magna Carta is such a fellow that he will have no sovereign**” these are but a few of the beacons lighting the way to the triumph of the rule of law.<sup>51</sup> Rule of Law is now the accepted norm of all civilized societies. Even if there have been deviations from the rule of law, such deviations have been covert and disguised for no government in a civilized country is prepared to accept the ignominy of governing without the rule of law. As observed by Wade and Phillips<sup>52</sup> the rule of law has come to be regarded as the mark of a free societies. Admittedly its content is different in different countries, nor is it to be secured exclusively through the ordinary courts. But everywhere it is identified with the liberty of the individua. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state the problem arises of reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and state and compel Governments to conform to the law.<sup>53</sup>

This is the essential postulate and basic assumption of the rule of law and not of men in all civilized nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principles and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It odes not, however, follow from the above that if article 21 had not been drafted a person of his life or liberty without the authority of law. NO case has been cited before us to show that before the coming into force of the Constitution or in countries under rule where there is no provision corresponding to article 21, a claim was ever sustained by the courts that the State can deprive a person of his life or liberty without the authority of law. In fact, any suggestion to such a claim was unequivocally repelled. In the case **James Somerset versus Stewart**<sup>54</sup>, Lord Mansfield<sup>55</sup> dealt with a case of a negro named Sommersett, who was being taken in a ship to Jamaica for a sale in a slave market. When the ship anchored at London port, a Habeas

<sup>50</sup> ADM Jabalpur versus Shivkant Shukla (1976 SC).

<sup>51</sup> Malcolm Macdonald, Rule of Law 3-6 (Southern Methodist University Press, 1961).

<sup>52</sup> Wade and Phillips et. al., Constitutional and Administrative Law 77 (Longman, 8<sup>th</sup> Edition, 1970).

<sup>53</sup> Supra at 39.

<sup>54</sup> (1772) 98 ER 499. the issue was right of an enslaved person on English soil to be protected from unlawful detention under Habeas Corpus,

<sup>55</sup> Lord Mansfield reported Version in Somerset Case:

“The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.”



Corpus petition was presented by some Englishmen who were moved by the yelling and cries of Sommersett. In opposition to the petition the slave trader took the plea that there was no law which prohibited slavery. Lord rejected the contention and cited as one of the worst case of deprivation of personal freedom. In another case **Fabrigas versus Mostyn**<sup>56</sup> Lord Mansfield observed:

“To lay down in an English Court of Justice that a Governor acting by virtue of Letters Patent. Under the Great Seal, is accountable only to God and his own conscience, that he is absolutely despotic and can spoil, plunder and affect His Majesty’s subjects, both in their liberty and property with impunity is a doctrine that cannot be maintained.”

Lord Atkin in the **Eshugbavi Eleko versus Officer Administering the Government of Nigeria**<sup>57</sup> it was held that “In accordance with British Jurisprudence, no member of the executive can interfere with the liberty or property of British subject except on the condition that he can support the legality of his action before a Court of Justice and it is the tradition of British Justice that Judges should not shrink from deciding such issues in the face of the executive.”<sup>58</sup> Ameer Khan<sup>59</sup> case relied upon the above mentioned observation

At the Time the Constitution was being drafted, the Constitutional Advisor Mr. B.N. Rau had had discussions with US Constitutional experts some of whom expressed the opinion that power of review implied in due process clause was not only undemocratic because it gave the power of vetoing legislation to the judges, but also threw an unfair burden on the judiciary. This view was communicated by Mr. Rau to the Drafting Committee which thereupon substituted the word “except according to the procedure established by law” for words “due process of law”. In dropping the words “due process of law”, the framers of our constitution prevented the introduction of elements of vagueness, uncertainty and changeability which had grown round the due process doctrine in the United States. The words ‘**except according to procedure established by law**’ were taken from article 31 of the Japanese Constitution, according to which “no person shall be deprived of life or liberty nor shall any criminal liability be imposed, except according to procedure established by law. The article is also somewhat similar to **Article 40(4)(1) of the Irish Constitution**, according to which no person shall be deprived of his personal liberty save in accordance with law.” It was laid down in Gopalan Case by the majority that the word “law” has been used in article 21 in the sense of State-Made-Law and not as an equivalent of law in the abstract or general sense embodying the principles of natural

justice. The “Procedure established by Law” was held to mean the procedure established by law made by the state, that is to say, the Union Parliament or the Legislature of States, **Law** was, as per Hon’ble Mukherjea J., meant a **valid and binding law under the provisions of the Constitution and not one infringing Fundamental rights.**

### Contemporary Laws

Under the Constitution of the United States of America the corresponding provision is found in the 5<sup>th</sup> and 14<sup>th</sup> Amendment where the provision, inter-alia, is “that no person shall be deprived of his life or liberty or property except by due process of law.” The Indian Constitution gives the same protection to every person in India. The only difference is the United State Constitution “Due Process of Law” cover both substantive and procedural law, while in India only the protection against procedural law is established. It is also argued that the word “Law” ought to be understood in line of the principles of Natural Justice<sup>60</sup> as in Jurisprudence describe law in the abstract sense of the principles of Natural Justice and not as “Lex” i.e., enacted Law.

There is following distinction between the American Constitution and Article 21 of the Constitution of India, the first is that in U.S.A. Constitution the word “liberty” is used simpliciter while in India it is restricted to personal liberty, Secondly In USA Constitution the same protection is given to property, while in India the fundamental right in respect of property is contained in Article 31, Thirdly the word ‘due’ is omitted altogether and the expression “due process of law” is not used deliberately, and Lastly the word “established” is used and is limited to “Procedure” in Article 21 of the Constitution of India. The discussion of the meaning of “due process of law” found in **Willis on Constitutional Law** and in **Cooley’s work Constitutional Limitation** shows the diverse meanings given to that expression at different times and under different circumstances by the Supreme Court of Supreme Court of U.S.A., so much that the conclusion reached by the these is that the expression means reasonable law according to the view of the majority of the judges of the Supreme Court at a particular time holding office.

### Aspects and Scope of Article 21 of The Constitution of India

The question arises hereby is, what is the right given by the Article 21?, this has been answered by the Apex Court is that the only right is that no person shall be deprived of his life or liberty except according to procedure established by Law. one may like that right to cover a large area, but to give such a right is not the function of the Court.<sup>61</sup> The Court erred in observing the fact that it is function of the constitution to what extent right will be applicable, the

<sup>56</sup> 1 Cowp., 161.

<sup>57</sup> AIR 1931 PC 248.

<sup>58</sup> The said rule was followed by the Constitution Bench after coming force of the Constitution in the cases of Bidi Supply Co. versus the Union Of India and Basheswar Nath versus the Commissioner of Income Tax, Delhi.

<sup>59</sup> 6 Bengal Law Reports 392.

<sup>60</sup> The following principles of Natural Justice can be covered under the word “Law”, they are-

1. An Objective Test That is to say., a certain, definite and ascertainable rule of human conduct for the violation of,
2. Notice,
3. An Impartial Tribunal, administrative, judicial,
4. Orderly course of procedure, including an opportunity with a right to lead evidence and call witness.

<sup>61</sup> A. K. Gopalan versus State of Madras (1950 SC). Judgment delivered by the Hon’ble Mr Kania C.J. <https://indiankanoon.org/doc/1857950/>



constitution *sub silentio* would not be anyhow ground to exclude the inalienable aspects attached to one's life and liberty. The constitution cannot be read down under the vague standard impression. The next question will be whether the term 'law' to be understood as 'jus' we have to look at phrase "procedure established by law" seems to be borrowed from Article 31 of the Japanese Constitution. The said article of the Japanese Constitution is different as used in the Constitution of India. In the Japanese Constitution these rights claimed under the rules of natural justice are not given under the Indian Constitution. According to the Supreme Court of the U.S.A. The word "due" in the expression "due process of law", as per the American Constitution, interpreted to mean "just". That word imparts jurisdiction to the courts to pronounce what is "due" from otherwise, according to law. The deliberate omission of the word "due" from article 21 lends strength to the contention that the justiciable aspect of "law" i.e., to consider what is reasonable or not by the Court, does not form part of the Indian Constitution. The omission of the word "due", the limitation imposed by the word "procedure" and the insertion of the word "established" thus brings out more clearly the idea of legislative prescription in the expression used in article 21. By adopting the phrase "procedure established by Law" the Constitution gave the legislature the final word to determine the law.<sup>62</sup>

The next question will be whether there is inter-relation between Article 14 and 21? Does Article 21 merely require that there Must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable ? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin<sup>63</sup>, "they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India". They were indelibly written in the sub-conscious memory of the race which fought for well-nigh thirty years for securing freedom from British rule and they found expression in the form of fundamental rights when the Constitution was enacted. These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a "**pattern of guarantees on the basic-structure of human rights**" and impose negative obligations on the State not to encroach on individual liberty in its various dimensions. It is apparent from the enunciation of these rights that the, respect for the individual and his capacity for individual volition which finds expression there is not a self-fulfilling prophecy. Its purpose is to help the individual to find his own liability, to give expression to his creativity and to prevent governmental and other forces from 'alienating' the individual from his creative impulses. These

rights are wide ranging and comprehensive and they fall under seven heads, namely, right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to property and right to constitutional remedies. Articles 14 to 18 occur under the heading 'Right to, Equality', and of them, by far the most important is Article 14 which confers a fundamental right by injuncting the State not to "deny to any person equality before the law or the equal protection of the laws within the territory of India". Articles 19 to 22, which find place under the heading "Right to freedom provide for different aspects of freedom."<sup>64</sup>

Lastly, the relation between the right to privacy and Article 21, The right to privacy is one of the rights most widely demanded today. Privacy has not always so been demanded. The reasons for the present concern for privacy are complex and obscure. They obviously relate both to the possibilities for very considerable enjoyment of privacy by the bulk of people living in affluent societies brought about by twentieth-century affluence, and to the development of very efficient methods of thoroughly and systematically invading this newly found privacy. However, interesting and important as it is as a socio-philosophical inquiry, the concern of this paper is not with why privacy has come to be so highly prized, but rather with whether it is rightly prized, and if so, when and why. This means that my concern will be with what privacy is, what is its domain, whether there is a right to privacy, and, if so, whether it is an ultimate, basic, albeit, prima facie right, or simply a conditional right.

The right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner... the solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values...the notion of fundamental rights such as a right to privacy as part of right to life, is not merely that the state is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.<sup>65</sup>

The privacy is a personal right distinct from a right to property. Intrusions in it by the legislature, to be tested on the touchstone of reasonableness and for that purpose the court can into proportionality of the intrusion vis-à-vis the purpose, sought to be achieved "right to privacy" is part of the life enshrined in Article 21 of the Constitution of India.<sup>66</sup>

### 3. Conclusion

The theme of legal and ethical debate with respect to the privacy and Pegasus like security issue is the extent of control, safeguard of personal life and liberty of an individual. In any Democratic Nation, the citizenry right

<sup>62</sup> *Ibid.*

<sup>63</sup> Granville Austin, *The Indian Constitution-Cornerstone of a Nation* (Oxford University Press, 1999).

<sup>64</sup> *Maneka Gandhi versus Union of India*, page 668 (1978 SC).

<sup>65</sup> *Ram Jethmalani versus Union Of India* (2011) 8 SCC 1.

<sup>66</sup> *District Registrar and Collector, Hyderabad versus Canara Bank* AIR 2005 SC 186.

comes under the subjection of the security of state, integrity and unity, public order, or in some cases morality and thus strongly suggest as a matter of fact the no right is an absolute right. Therefore, reasonable restriction upon the fundamental right guaranteed under the Constitution and makes it compulsorily to maintain the regime.

Individual Interest can often appear in conflict with the Societal Interest. In such circumstances, societal value with the majoritarian impact, able to maintain the societal cause, greater influence upon the lives of the citizenry for a prolonging time required to be maintain, reflect in the enactment of the legislative policies.

From the evolution of Industrial to Information Communication technology, the people live in term of social level and economic progressively changed in various perspective and all those techniques either directly or indirectly influences the lives of the people and leaving a trail for the future development is somehow now connected with the Individual Life and Liberty. Therefore, it is essential to protect ones by placing these inalienable rights guaranteed like any constitution under the caption "Fundamental Right".

So far as concerned with the Privacy issue, legal scholarship tends to conflate privacy and security. However, security and privacy should be treated as distinct concerns. Privacy discourse involves difficult normative decisions about competing claims to legitimate access to, use of and alteration of information. It is about selecting among different philosophies and choosing how various rights and entitlements ought to be ordered. Security implements those choices - it mediates between information and privacy selections. This argues that separating privacy from security has important practical consequences. Security failings should be penalized more readily and more heavily than privacy ones, both because there are no competing moral claims to resolve and because security flaws make all parties worse off. Currently, security flaws are penalized too rarely, and privacy ones too readily.

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