

PRIVACY AS A RIGHT: IS SRI LANKA THERE YET?

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Invasion of personal privacy became a more frequently and widely discussed topic in Sri Lanka, in the aftermath of the Easter Sunday attacks in 2019, as well as during the curfew lockdown and quarantine process that took place during the outbreak of the CoVid 19 pandemic in 2020. Officials and media entering into private premises, video recording the premises and the inhabitants and their private lives, and video recording persons in public, at times disregarding their protest, was harshly criticized by the general public as well as responsible professionals, claiming such acts to be unacceptable invasions of privacy. In this matter, legal professionals were consulted by the citizens with regard to the legal ramifications of acts of this nature, that are undoubtedly indicate *prima facie* notion of breach of privacy. Hence, it is worthwhile to investigate how the breach of a person's privacy can be brought within the purview of the existing legal framework in Sri Lanka. This paper intends to review as well as discuss on the legal background in Sri Lanka regarding the privacy of an individual from the citizen's perspective, making necessary comparisons and references to the foreign and international jurisdictions in terms of privacy, proposing necessary reforms to the legal system in Sri Lanka.

What is privacy? Why is it important to the citizen?

Privacy, regardless of the difficulty to define specifically, is defined in terms of its lexical meaning as "the state of being alone and not watched or interrupted by other people" and "the state of being free from the attention of the public"². This meaning has also been agreed by the American Attorney Samuel D. Warren and Justice Louis D. Brandeis, in their famous Harvard Law Review article, "The Right to Privacy" in 1891; right to privacy is "the right to be let alone"³. Nevertheless, later, more pragmatic and broader definitions of privacy have been given by certain American academics. Professor Alan Westin, offering a wider definition, states that privacy is "the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behaviour to others", which Westin simplifies in his later work as "the claim of an individual to determine what information about himself or herself should be known to others"⁴. Professor Charles Fried defines privacy as "the control we have over information about ourselves"⁵, whereas Professor Tom Gerety interprets privacy as the "control over or the autonomy of the intimacies of personal

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²Lea and Bradbery, 2020

³Warren, S. D. and Brandeis, L.D., 1890

⁴Westin, A.F., 1967; Westin A.F., 2003

⁵Fried, C., 1968

identity”⁶. A collective reading of the above definitions substantiate, although not perfect and holistic, a comprehensive and a workable definition as to what privacy is; an individual’s liberty to decide and select as to whom, as to what and as to what extent that particular individual’s personal information – which may include but not limited to views, ideas, opinions, feelings, behavior, practices, beliefs, attitudes, knowledge, likes and dislikes – should be made available to or accessible to another individual or many individuals.

The right to privacy is, in many ways, incontestably linked with personal freedom and liberty. Professor Edward Bloustein emphasizes that “intrusion into privacy has a close connection with personhood, individuality and human dignity”⁷. Hence, breach of a person’s right to privacy undeniably deprives the person of enjoying his liberty; for instance, tapping a person’s telephone or video recording a person’s behavior without the consent of the person may, in term of the fundamental rights, breach the person’s right to movement as well as his freedom of speech and expression, association as well as the freedom of thought or consciousness and many of his other rights as a human. Therefore, it is essential that an individual’s private information, such as beliefs, views, knowledge and feelings remain draped by the veil of privacy in order for an individual to maintain his dignity, reputation and conscience which constitutes essentials of individual freedom.

Privacy has been subdivide into seven types⁸ by Rachel L. Finn, Michael Friedewald, David Wright; i.e. a) privacy of the person, which is the right to keep body-functions and body characteristics private and disclosed, b) privacy of behaviour and action, which includes the right to sexual inclinations, beliefs, habits, religious and political views etc. disclosed, c) privacy of communication which covers the right to communications such as conversations, telephone conversations, mails and the like communications without being intercepted, d) privacy of data and image, which focuses on the right to control accessibility and availability of to an individual’s data and information e) privacy of thoughts and feelings, which covers an individual’s right to keep his/her thoughts and feelings private, confidential and disclosed, f) privacy of location and space, which represents the right to move and stay in a public, semi-public or private space without being identified, tracked or monitored and g) privacy of association (including group privacy), which is the right to associate whoever a particular individual prefers without being monitored or tracked⁹. The types discussed in these subdivisions spotlights different stages and aspects of an individual’s life, emphasizing the fact that the right to all types of privacy is essential for a person to live a life with freedom and dignity. Hence, the importance of privacy being recognized as a right has been stressed in many instances.

⁶Gerety, T., 1977

⁷Bloustein, E. J., 1964

⁸ Rachel L. Finn, Michael Friedewald, David Wright extends the four types of privacy suggested by Roger Clarke,

which are Privacy of the person, privacy of personal behaviour, privacy of personal communications and privacy of personal data.

⁹Finn, R., Friedewald, M. and Wright, D., 2013

Recognition of privacy as a legal right in different jurisdictions

Accepting privacy as an individual's right, the *Universal Declaration of Human Rights* (UDHR) 1948, in Article 12 recognizes privacy, stating that;

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”¹⁰. Many legal systems in the world have made necessary legislative advancements to recognize privacy as a right and legislatively buttress that right. In additions, judicial decisions have also made a significant contribution to establish fundamental rights,

and recognized the right of privacy in the international arena.

In the United States, although the constitution does not explicitly and expressly establish the right to privacy, several legislations, judicial decisions and constitutional interpretations have firmly established privacy as a right. In several matters, including *National Association for the Advancement of Colored People v. Alabama*¹¹, *Griswold v. Connecticut*¹² and *Katz v. United States*¹³, the Supreme Court

of the United States has recognized that Amendment I, Amendment III and Amendment IV to the United States Constitution, respectively, have implicitly recognized the right to privacy. In addition, legislation such as *US Privacy Act of 1974*, *Children's Online Privacy Protection Act 1988* and the *Federal Wiretap Act of 1968*¹⁴, inter alia, recognizes and safeguards the privacy of personal information, information relating to children and communications.

In terms of delictual actions, William Prosser identifies that under the invasion of privacy a) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, b) public disclosure of embarrassing private facts about the plaintiff, c) publicity which places the plaintiff in a false light in the public eye and d) appropriation, for the defendant's advantage, of the plaintiff's name or likeness are the most common causes of action that can be maintained under the modern US tort law¹⁵. In *Cason v. Baskin*¹⁶, the Supreme Court of Florida recognized that an action can be maintained for the invasion of privacy (invasion of privacy of solitude and seclusion) as a result of the personal life of the plaintiff being portrayed in a book published by an author.

In the United Kingdom, *The Human Rights Act of 1998* incorporates the privacy rights set out in the Article 8(1) and 8 (2) of the

¹⁰Universal Declaration of Human Rights, Article 12, 1948

¹¹ 357 U.S. 449 (1958)

¹² 381 U.S. 479 (1965)

¹³ 389 U.S. 347 (1967)

¹⁴Originally passed as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, of which the capacity

and jurisdiction was later extended by The Electronic Communications Privacy Act of 1986

¹⁵Prosser, W., 1960

¹⁶ 20 So. 2d 243 (Fla. 1944)

European Convention on Human Rights, which recognizes everybody's right to private and family life, home and correspondence, and that such right cannot be interfered by any a public authority, except in accordance with the law. Provisions of this Act has been recognized in *Campbell v. Mirror Group Newspapers Ltd*¹⁷ and *Venables and Thompson v. News Group Newspapers*¹⁸ by the House of Lords and Queen's Bench Division, respectively, as safeguards to the rights of privacy.

As an Asian country, India has recently made significant advancements in the legal position of privacy. The Supreme Court of India, in 2017 in the matter of *Justice K.S. Puttaswamy (Retd) v. Union of India*¹⁹, through a unanimous decision of a nine-judge bench, recognized that "the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21²⁰ and as a part of the freedoms guaranteed by Part III of the Constitution". This decision overruled the holdings of the previous case *Kharak Singh v The State of Uttar Pradesh*²¹, which held that that the right to privacy is not protected by the Constitution of India. The holding of *Justice K.S. Puttaswamy (Retd) v. Union of India* was immediately applied in *Navtej Singh Johar & Ors. v. Union of India*²² (2018) in terms of preserving the privacy rights in terms of sexual preferences; a five-judge bench of the

Supreme Court of India delivered a unanimous judgment and pronounced that criminalizing consensual private sexual conduct between adults of the same sex is unconstitutional. In the same year, in *Joseph Shine v. Union of India*²³ a five-judge-bench a five-judge bench of the Supreme Court of India unanimously decided that Section 497 of the Penal Code of India, which pronounces adultery as an offense, is unconstitutional and a violation of the right to privacy recognized by the Constitution, as pronounced in *Justice K.S. Puttaswamy* case.

Moreover, *The Information Technology Act* of 2000 (India) amended by *The Information Technology (Amendment) Act* of 2008 ensures that reasonable security practices and measures are taken in terms of sensitive personal data or information²⁴, and an imprisonment of three years and/or a fine not more than Rs. 500,000 is imposed for 'wrongful loss or wrongful gain', by disclosing personal information of an individual during the services performed under the terms of lawful contract²⁵. In addition, the proposed *Personal Data Protection Bill of 2019*, as the preamble suggests, intends "to provide for the protection of the privacy of individuals relating to their personal data....protect the rights of individuals whose personal data are processed....lay down norms for social media intermediary..., [provide] remedies for unauthorized and harmful processing, and establish a Data Protection Authority of

¹⁷ (2002) EWCA Civ 1373

¹⁸ [2001] 1 All ER 908

¹⁹ Writ petition (Civil) No. 494 of 2012

²⁰ Article 21 of the Constitution of India: "Protection of life and personal liberty No person shall be deprived of his

life or personal liberty except according to procedure established by law"

²¹ AIR 1963 (SC) 1295

²² W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

²³ W.P(Criminal) No. 194 of 2017

²⁴ Section 43A of the Information Technology (Amendment) Act of 2008

²⁵ Section 72A of the Information Technology (Amendment) Act of 2008

India for the said purposes”²⁶. The most noticeable feature in privacy-related laws in India is the fact that, just as same as in the United States, the Supreme Court has played a decisive and pivotal role in being judicious, foresighted and innovative, without exceeding, disregarding or neglecting the limits of the Constitution.

Recognition of privacy as a legal right in Sri Lanka

The Right to Information Act No. 12 of 2016 provides some form of safeguard against the information of an individual being disclosed under the Act. Section 5 (1) (a) of the Act states that where;

the information relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure,

access to such information under the Act can be denied. Furthermore, Section 5 (1) (e) enunciate that if;

the information could lead to the disclosure of any medical records relating to any person unless such person has consented in writing to such disclosure,

the request made under the provisions of the Act for such information can be denied. Moreover, Section 5 (1) (g) states that information related to a fiduciary

relationship can be denied. Compared to the pre-2016 legal position on the privacy of information, *the Right to Information Act No. 12 of 2016* is unquestionably a positive advancement towards recognizing the right of privacy, regardless of the fact that it applies to information related matters of public authorities²⁷.

The same version of the right to information, introduced to the Constitution of Sri Lanka by the 19th Amendment to the Constitution in March 2015²⁸, inserting Article 14A to the Constitution, recognizes that access to information can be denied in the light of, *inter alia*, “the reputation or the rights of others [and] privacy”, which read collectively with the *Right to Information Act* amounts to a safeguard to the right to privacy, as well as an instance, or probably the first instance, of recognizing privacy as a legally enforceable, even though within a limited capacity.

Furthermore, Article 13 of the Constitution, in a very limited capacity, safe-guards personal liberty but it is applicable only in the matters of attest. However, the Constitution of Sri Lanka does not contain any provisions that expressly recognize privacy as a right, except in the above-mentioned instances. Nevertheless, the Court of Appeal of Sri Lanka, in *Sinha Ratnatunga v. The State*²⁹, has recognized that freedom of expression, provided for by Article 14 (1) (a) of the Constitution, is not a license to violate the individual privacy. In this matter, the accused-appellant, the Editor of the SundayTimes Newspaper was indicted before the High Court of Colombo,

²⁶ Personal Data Protection Bill of 2019

²⁷Section 3 of the Right to information Act No. 12 of 2016

²⁸Section 2 of the 19th Amendment to the Constitution

²⁹ (2001) 2 SLR 172

under two counts, namely, violation of Section 479 and 480 of the *Penal Code*, i.e. defamation, read with Section 15 of the *Sri Lanka Press Council Law No 5 of 1973*, i.e. criminal publications, by publishing an article that defamed Her Excellency the President of Sri Lanka at that time. The accused-appellant, who was found guilty on both counts by the High Court of Colombo appealed against the particular decision. In this matter, dismissing the appeal, Hector Yapa J stressed on the fact that;

to invade his privacy is to assail [a person's] integrity as a human being and thereby deny him his right to remain in society as a human being with human dignity.

and stated that;

what the press must do is to make us wiser, fuller, surer, and sweeter than we are. The press should not think they are free to invade the privacy of individuals in the exercise of the constitutional right to freedom of speech and expression merely because the right to privacy is not declared a fundamental right of the individual

emphasizing the fact that;

The press should not seek under the cover of exercising its freedom of speech and expression make unwarranted incursions into the private domain of individuals and thereby destroy his right to privacy. Public figures are no exception.

Even a public figure is entitled to a reasonable measure of privacy

This decision of the Court of Appeal of Sri Lanka is significant, as the holding of this matter once again affirms that the right to privacy should be positioned as a right that is equivalent to fundamental rights. However, in the light of the Supreme Court's final appellate jurisdiction³⁰, sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution³¹ and constitutional matters³², and fundamental rights jurisdiction³³, whether the decision in *Sinha Ratnatunga case* will have a lasting and landmark effect on recognizing privacy as a right is questionable. Similarly, as the *Penal Code (Amendment) Act No 12 of 2002* and the *Press Council (Amendment) Act No 13 of 2002* repealed the provisions that made defamation a criminal offense, currently, only civil actions are available as a remedy for defamation. Nevertheless, the rationale and the argument of the judges of the Court of Appeal cannot be neglected, and they possess the potential for future decisions in furthering the rights of privacy.

In criminal law, trespass, as laid down in Section 427 states, inter alia, that

whoever enters into or upon property in the occupation of another with intent ... to intimidate, insult, or any person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent

³⁰ Article 118 (c) of the Constitution of Sri Lanka

³¹ Article 125 of the Constitution of Sri Lanka

³² Article 118 (a) of the Constitution of Sri Lanka

³³ Article 118 (a), Article 126 (1) and Article 17 of the Constitution of Sri Lanka

thereby to intimidate, insult, or annoy any such person, ...is said to commit “criminal trespass”.

It should be noted that the intention of insulting, annoying by entering premises, which clearly constitute a breach or invasion of privacy, has been recognized as an offense by the Penal Code of Sri Lanka; another potential legal provision that can be creatively and innovatively interpreted to broaden the recognition given to the right of privacy in Sri Lanka.

Moreover, in terms of civil law, defamation influenced by the Roman-Dutch Law concept of *actio injuriarum*, is also a remedy for the losses or damages to an individual's dignity and reputation. In a matter of defamation, the statement being defamatory, the statement being referred to the plaintiff, the statement being published and the *animus injuriandi* or the wrongful intent of the defendant are essential elements that constitute defamation, as well as to build a strong and successful case of defamation. A remedy against a defamatory statement too can be regarded as a protection against the breach of privacy, since revealing personal information, views, beliefs, sexual orientations and much other private information can cause considerable harm to the image, profession, character, dignity, reputation and several other aspects of an individual's private life; an action against such a defamatory revelation or publication of such information to injure an individual's character may, at least to a certain extent, safeguard the right of privacy.

Discussion

In terms of recognizing privacy as a legally enforceable right, Sri Lanka is undoubtedly

lagging far behind many of the other contemporary jurisdictions, particularly those of the United States, United Kingdom and India, in which privacy is recognized, enforced and preserved both constitutionally and through numerous legislations. In comparison, the reach of Sri Lanka in safeguarding privacy rights has reached not beyond the *Right to Information Act* and the introduction of right to information as a fundamental right by the *19th Amendment to the Constitution*, (Article 14A of the Constitution) in terms of non-disclosure of information. Both the Act and the Article applies to public officials and therefore its applicability is limited. Moreover, in terms of collection, processing, storing and utilizing such information, both the above provisions are silent. Hence, although the Act and the Article serve their best in terms of the right to information and transparency of information, concerning the privacy, these two provisions do not make a significant impact.

Defamation, irrespective of it being reduced to a delictual offense from the pre-2002 state of criminal offense, is also a ‘long shot arrow’ to the right to privacy, as an action on defamation required, *inter alia*, the particular defamation being published and proving the *animus injuriandi* or the wrongful intent of the defendant; somewhat similar to *mens rea* in criminal law. If particular information is collected but not published or, even when such information is published cloaked by the concept of ‘public interest’ or ‘social responsibility’ – which are regarded as exceptions in Section 5 (1) (a) of the *Right to Information Act* – it is very likely that the component of *animus injuriandi* not being proved. Hence, the matter would have no substantial

grounds to continue under defamation. Similarly, as the need of the particular defamatory statement to be in published form hinders most of the defamation matter; if a statement is transmitted as ‘gossip’ or in any other verbal form, or even when the document is published and the publisher is unknown, in such scenarios, even if the victim of defamation identifies who was privy to such information or who held such information, maintaining a defamatory action is practically impossible. Moreover, defamation cannot be constituted against collecting or storing such personal data in a private and unpublished capacity; no action is available for collecting personal data using electronic devices such as audio and video recorders, CCTV cameras and social media with the intent of defaming the particular person in future or simply to annoy the person by invading privacy. Criminal trespass covers only a limited range of scenarios in which the offender is within the limits of the premises of the occupant. In terms of invading the privacy of an individual by a person or a non-state body, in or from a public place, the existing Sri Lankan legal provisions are insufficient to control or remedy such invasion of privacy, and to safeguard the individuals’ right to privacy.

Another critical invasion of privacy that is indirectly provided for by law, ironically, is the Sections 18 (1) (i), (ii) of the *Computer Crimes Act No 24 of 2007*, which allows an expert or a police officer to obtain any information in the possession of any service provider and intercept any wire or electronic communication including subscriber information and traffic data, at

any stage of such communication, for an investigation under the Act, under the authority of a warrant issued in that behalf by a Magistrate. On the contrary, Section 18 (2) provides that police officer may exercise all or any of the powers referred to in Sections 18 (1) (i) and (ii) without a warrant if the investigation needs to be conducted urgently³⁴, and in case of a likelihood of the evidence being lost, destroyed, modified or rendered inaccessible³⁵, and when there is a need to maintain confidentiality regarding the investigation. What is questionable about Section 18(2) of the Act is “who decides “urgency” and the need for a warrant, and under what circumstance should it take place?”, on which the Act is silent. In a matter under the Act, if the police obtain a warrant after the interruption of the communication, the individual whose privacy was invaded has no remedy or relief whatsoever regarding the invasion of privacy of communications. Hence, in a time and setting in which the right to privacy should actually be safeguarded and strengthened these sections of the Act, doing the contrary, tacitly provides for the invasion of privacy,

The intervention of the Courts in the matter of privacy is understood to be shackled and hindered by the gaps in the law with regard to the right to privacy. Although the Supreme Court of Sri Lanka has been thorough and farsighted in numerous instances in terms of innovatively interpreting and safeguarding the fundamental rights to preserve the sole purpose of the fundamental rights chapter, without being limited by linguistic and

³⁴Section 18 (2) (a) of the *Computer Crimes Act No 24 of 2007*

³⁵Section 18 (2) (b) of the *Computer Crimes Act No 24 of 2007*

legislative barriers, the lack of a constitutional provision equivalent to Article 21 of the Constitution of India³⁶ has been strongly felt in enforcing the right to privacy. Conversely, a victim taking a high risk of filing a fundamental rights action or civil action against the invasion of privacy, in the light of this considerable lack of legislations that recognizes the right to privacy, is highly unlikely. This in return will provide almost no opportunity for the Courts to interpret fundamental rights and/or legislations to substantiate, support and recognize the right to privacy, which will ultimately leave the individuals' right to privacy at stake.

Recommendations and conclusion

In the information age, with outstandingly advanced and complex technology in use, the most obvious strongly felt and highly recommended step to be taken in terms of enforcing and safeguarding the citizen's right to privacy is the legal recognition of fundamental rights. In this regard, constitutional protection, as well as legislations that specifically address the matters of privacy, is essential. In the light of legal provisions that safeguard privacy, although the right to privacy will not be completely and perfectly established in the country overnight, in the long run, the society will be adjusted to recognize and respect every individual's privacy, and this literacy on privacy will be helpful to fine-tune the rights of privacy and information.

Courts in the country also share an immensely crucial and decisive role in recognizing privacy, in terms of interpreting legislation and the Constitution; particularly the fundamental rights chapter. Innovative decisions of Courts, such as the Court of Appeal decision in *Sinha Ratnatunga v. The State*³⁷ in regarding privacy in the light of criminal defamation, may help fill gaps in legislations and interpret them. Furthermore, since the aggrieved persons always turn to courts for relief, Courts being actively involved in establishing the rights of privacy may increase the public trust in courts, resulting in more cases on privacy matters being filed, giving Courts the opportunity to broadly interpret the laws and the Constitution in order to support and recognize the right to privacy.

In addition, appointing a body as “a watchdog”³⁸ of information and communication that takes place through modern technology, and to identify the gaps and shortcomings in the systems as well as in law is also essential to safeguard the right to privacy. Media, social media, private persons and public and private bodies frequently collect, store, use and process information of the individuals and publish or share them for their purposes. Circulation of individuals' information should be monitored by a body, with necessary legal and technical capacity provided and delegated, so that the private information of the persons is preserved and not misused. The Sri Lanka Computer Emergency Readiness Team (CERT), Sri

³⁶ Article 21 of the Constitution of India: “Protection of life and personal liberty No person shall be deprived of his

life or personal liberty except according to procedure established by law”

³⁷ (2001) 2 SLR 172

³⁸ Marsoof, A., 2008

Lanka Police Cyber Crimes Division and Telecommunications Regulations Commission of Sri Lanka (TRCSL) are some of the potential institutions that can be, with the required legal authority and technical expertise provided, developed to become such “watchdog” institutions that preserve information privacy

In summation, it should be noted that the right to privacy is as important as any other fundamental right to the citizen for the purpose of establishing individual liberty so that a person may live with dignity, reputation and freedom. The shortcomings and gaps in the legal framework have been clearly an impediment in recognizing privacy as a right. As a developing country that is treading its way through the information age, with technology rapidly and swiftly developing to be more complex and complicated, the right to privacy is important not only to the dignity and freedom of an individual but also for the security, peace and harmony of the country as well. In every aspect and under all circumstances, it is about time that the legislators make necessary decisions for recognizing the right to privacy, to stand resolute with other economies and jurisdictions in the world.

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