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THE USE OF AMERICAN DUE PROCESS AND PRIVACY FRAMEWORKS BY THE INDIAN SUPREME COURT IN PRIVACY CASES DURING THE PRE-DUE PROCESS ERA

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ABSTRACT

This Article seeks to analyze the use of American due process and privacy frameworks by the Indian Supreme Court in conceptualizing the right to privacy as an un-enumerated right in Chapter III (Fundamental Rights) of the Indian Constitution. The Article principally examines judicial developments in three seminal cases on privacy decided before the incorporation of substantive and procedural due process in the toolkit of the Indian judiciary. In doing so, it seeks to make a contribution towards understanding how Indian courts partake of transplantation, translation and migration of foreign jurisprudence from a comparative perspective. A few conclusions reached through the analysis are as follows: ***a)*** *the three seminal Indian cases tasked with finding a right to privacy in the Indian Constitution selectively deployed American due process and privacy jurisprudence to push against the narrow conception of fundamental rights prevalent at the time; as a corollary;* ***b)*** *in attempting to develop privacy jurisprudence with the assistance of American cases, these cases contributed to the expansion of judicial review and total incorporation of substantive and procedural due process in India, subverting the original intent of the framers of the Indian Constitution;* ***c)*** *even after due process came to be accepted as a pillar of judicial review in India, the evolution of the right to privacy continued to draw on developments in American cases on privacy, and more qualitatively; and* ***d)*** *the use of American jurisprudence by the Indian Supreme Court to inform and develop its own jurisprudence suffered from methodological inconsistencies and broader incoherence, adversely affecting the doctrinal development of a right to privacy.*

Introduction

Privacy is a catch-all concept that takes within its sweep different iterations. Couched in notions of liberty and dignity—the famed placeholders of a liberal constitutional democracy—it is amorphous and all pervasive: its absence is intuitively felt across a range of human experiences. It is so keenly implied in the basic guarantees provided to citizens of liberal constitutional democracies that one can be forgiven to wonder why the existence of a related right must even be the subject of inquiry. Nevertheless, such legal systems have toiled to build a solid doctrinal foundation upon which a right to privacy has come to rest. Some legal systems, like Germany, have built this right upon notions of dignity,[1]

[1] James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160 (2004).

whereas others, like the United States, have principally relied on the framework of liberty.[2] Subsequently, the right to privacy has undergone a case-by-case substantiation.[3]

In the American experience, the right to privacy went from being a common law right[4] to being conceived[5] euphemistically in aspects of liberty,[6] and then directly implied at various points (1870–1950) in the protections of the 4th Amendment against illegal searches and seizures.[7] Gradually, U.S. courts would deploy the power of judicial review drawn from the due process clause and certain other interpretive techniques[8] to expand the normative[9] and descriptive[10] scope of privacy implied in the Bill of Rights.[11] The 1960s would witness a heightened period of case-by-case expansion of the right to privacy beyond the 4th Amendment, coinciding and reflecting social values that underscored the civil rights movement.[12] During this period, the right to privacy would expand around issues like marriage,[13] use of contraceptives both in[14] and outside[15] of marriage, and abortion.[16] This trend ebbed and flowed, coming to the fore again at the turn of the millennium, when in rapid succession the

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[2] *Id.* at 1161.

[3] *See generally* Bert-Japp Koops et al., *A Typology of Privacy*, 38 U. PA. J. INT'L L. 483, 484, 500–02 (2017) (spatial privacy, bodily privacy, communicational privacy, proprietary privacy, intellectual privacy).

[4] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

[5] *See* Prince v. Massachusetts, 321 United States 158, 163–64 (1944) (dealing with parental rights infringed by a state statute); Skinner v. Oklahoma, 316 U.S. 535, 537–38 (1942) (dealing with forced sterilization of criminally convicted).

[6] Liberty in fact lies at the base of the doctrinal foundation of the right to privacy in America. Berger v. New York, 388 U.S. 41, 53 (1967); Katz v. United States, 389 U.S. 347, 351 (1967).

[7] *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949); Olmstead v. United States, 277 U.S. 438, 466 (1928); Boyd v. United States, 116 U.S. 616, 634–35 (1886).

[8] *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (discussing the penumbral right to privacy underlying the constitutional guarantee).

[9] When privacy sub-serves values upon which other basic guarantees (like liberty and freedom) are founded. *See* Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691, 699–700 (2015).

[10] When privacy itself postulates a bundle of entitlements and interests. *See id.* at 701–02.

[11] This was partly due to the fact that the protection of fundamental rights, including liberty, is ensured in the U.S. via the constitutional guarantee of due process. *See* U.S. CONST. amend. XIV, § 1.

[12] *See Griswold*, 381 U.S. at 484–85.

[13] *Id.* at 485–86.

[14] *Id.*

[15] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[16] Roe v. Wade, 410 U.S. 113, 153 (1973).

Supreme Court moved to decriminalize homosexuality[17] and assure marriage equality.[18] Therefore, the doctrinal foundation and development of the right to privacy has been more or less grounded in solid domestic jurisprudence in the U.S. experience.[19]

In contrast, the very existence and doctrinal basis for a fundamental right to privacy in India remained the subject of much uncertainty until recently.[20] After independence, between 1954 and 1975, three constitution benches[21] of the Indian Supreme Court were tasked with finding a fundamental right to privacy.[22] In each instance, the court was unwilling to conclude that the Indian Constitution envisaged a fundamental right to privacy;[23] but in two of those cases, the court hedged against this finding, carving out limited protections under the guise of protecting *personal* liberty guaranteed under Article 21 of the Indian Constitution.[24] Three factors primarily guided these outcomes: **1)** An originalist interpretation of the Indian Constitution did not readily allow the judiciary to conclude that its drafters intended to include a fundamental right to privacy analogous to the 4th amendment in the Bill of Rights;[25] **2)** The Indian judiciary did not have expansive powers of judicial review available to U.S. Supreme Court under the American due process doctrine, so it was hard pressed to 'discover' un-enumerated rights, and;[26] **3)** These cases pitted privacy concerns against wide surveillance, and search and seizure powers of the State, which were perceived as unimpeachable in the initial years that followed independence.[27]

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[17] Lawrence v. Texas, 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 633–35 (1996).

[18] Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015); United States v. Windsor, 570 U.S. 744, 775 (2013).

[19] *See Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (critiquing reliance on foreign developments by the majority as a source of decriminalization of homosexuality).

[20] Puttaswamy v. India, AIR 2017 SC 4161, ¶ 96.

[21] Rarely constituted benches of five or more judges authorized to adjudicate issues involving interpretation of the Indian Constitution. INDIA CONST. art. 145, § 3.

[22] Govind v. Madhya Pradesh, AIR 1975 SC 1378, ¶ 31–35 (India); Singh v. Uttar Pradesh, AIR 1963 SC 1295, ¶¶ 40–41 (India); Sharma v. Satish Chandra, AIR 1954 SC 300, ¶ 4 (Del.) (India) (seminal cases).

[23] *See Singh*, AIR 1963 ¶¶ 40–42.

[24] *See Singh*, AIR 1963 ¶¶ 40–42; *Govind*, AIR 1975 ¶¶ 34–35.

[25] *See Govind*, AIR 1975 ¶¶ 34–35. Indeed, one would be hard pressed to find a provision which implies a right to privacy, say, as obviously as the American 4th Amendment.

[26] *See* Marguerite J. Fisher, *The Supreme Court of India and Judicial Review*, 9 SYRACUSE L. REV. 30, 35 (1957).

[27] *See generally* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216, 236 (2010) [hereinafter Mate]. The political climate was dominated by fear and State

Drafters of the Indian Constitution considered and rejected the incorporation of the due process clause[28] in Article 21[29] similar to that in U.S. Constitution's 5th and 14th amendments.[30] Instead, they chose the less inscrutable phrase "procedure established by law."[31] Further, unlike the American Bill of Rights, Article 21 qualified liberty as "personal liberty."[32] The Constituent Assembly was persuaded in part by the American experience with economic due process of the *Lochner* era, wherein courts had repeatedly stalled legislation and policies aimed at social welfare while signaling the primacy of individual economic rights of property and contract.[33] Writings documenting the interactions between B.N. Rau, the Indian jurist who chaired the Constituent Assembly's sub-committee on fundamental rights and played an instrumental role in the drafting of the Indian Constitution,[34] and Justice Felix Frankfurter of the American Supreme Court bear this out.[35] Granting extensive powers of judicial review to the Indian Supreme Court, the Constituent Assembly feared, might result in an judicial wing that considered itself co-equal to the legislature and the executive, and reproduce the American experience which would hamper the social-welfarist model of State that they were intent on shaping.[36]

Both these views was reiterated and confirmed by a constitution bench[37] of the Supreme Court in *A.K. Gopalan*,[38] which engaged in a

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paternalism stemming from Gandhi's assassination, fear of national disintegration, and proliferation of communal riots and/or secessionist movements. *See id.* at 220.

[28] *See generally* Sujit Choudhry, *Living Originalism in India: Our Law and Comparative Constitutional Law*, 25 YALE J.L. & HUM. 1, 8 (2013) (Constituent Assembly's debates on the incorporation of the due process clause).

[29] The right to life and personal liberty. INDIA CONST. art 21.

[30] Mate, *supra* note 27, at 219.

[31] *Id.* at 222 (quoting INDIA CONST. art. 21). Ironically, also an American invention included in the Japanese Constitution after the Second World War. Nobushige Ukai & Nathaniel L. Nathanson, *Protection of Property Rights and Due Process of Law in the Japanese Constitution*, 43 WASH. L. REV. 1129, 1129 (1968).

[32] INDIA CONST. art. 21.

[33] *See generally* Mate, *supra* note 27, at 221–22 (detailing the historical-contextualist and constitutional perspectives that motivated the Constituent Assembly and the Supreme Court of India).

[34] *Id.* at 222.

[35] Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 232 (1955).

[36] *See* A.K. Gopalan v. Madras, AIR 1950 SC 27, ¶¶ 13–16 (India).

[37] A bench comprised of five or more sitting judges has the authority to decide cases "involving a substantial question of law as to the interpretation of [the Indian] Constitution." INDIA CONST. art. 145, § 3.

[38] *Id.* ¶ 11 (concerning the issue before the court relating to the detention of communist leader, A.K. Goplan, touching on aspects of liberty and privacy: whether a person's detention may be justified on the ground that it had been carried out "according to procedure

comparative analysis of the original intent of the drafters of the American and Indian constitutions.[39] The bench took a narrow textual view of not just the phrase "procedure established by law" to disallow substantive due process and all attendant frameworks, but also the term "personal liberty" in Article 21, as distinct from the broader conception of unqualified "liberty" in the U.S. Constitution.[40] Effectively, it consigned each fundamental right to an isolated *silo* and proscribed judicial synthesis of different fundamental rights or the constitutional scheme to find unenumerated rights.[41] These two aspects of the holding would stymie any judicial endeavor to envisage an unenumerated right to privacy at the time.[42] Thus, the first notable instance of judicial borrowing from American jurisprudence for comparative purposes was undertaken to point out stark differences between Indian and American jurisprudence, with the aim of limiting the role of the judicial review and narrowing the scope of fundamental rights.[43]

I. THREE SEMINAL CASES ON PRIVACY IN THE POST-GOPALAN ERA

Shortly after *AK Gopalan*, American jurisprudence would become central again in cases considering privacy issues. In 1954, a constitution bench of the Supreme Court would issue its first holding on a fundamental right to privacy in the case of *MP Sharma*.[44] The case impugned the constitutionality of general search warrants as being *ultra vires* Article 20(3)[45] of the Constitution (right against self-incrimination) insofar as they amounted to "compelled production".[46] The Petitioner substantiated this argument by making an analogy to the 4th and 5th Amendments of the U.S. Constitution, which contained protections against illegal search and seizure and the right against self-incrimination, respectively.[47] The court, for its part, also conducted a very thorough comparative analysis of the controlling provisions in India and the U.S.[48] It held that while the 4th and 5th Amendments expressly protected against illegal search and seizure and empowered courts to test the reasonableness of such

established by law," as stipulated in Article 21 of the Indian Constitution, even when that procedure did not adhere to principles of natural justice).

[39] *Id.* ¶¶ 3, 15.

[40] *Id.* ¶¶ 15, 18, 21.

[41] *See generally id.* ¶ 6.

[42] *See id.* ¶¶ 250–51.

[43] *See id.* ¶ 207.

[44] Sharma v. Chandra, AIR 1954 SC 300, ¶¶ 24–25 (India).

[45] "No person accused of any offence shall be compelled to be a witness against himself." INDIA CONST. art. 20 § 3.

[46] *See Sharma*, AIR 1954 ¶¶ 23–24.

[47] *Id.* ¶¶ 15, 18.

[48] *See id.* ¶ 24.

measures, Article 20(3) of the Indian Constitution served a limited function of protecting citizens from compelled self-incriminating testimony and was subject to provisions of the Indian Criminal Procedure Code, which expressly authorized general searches.[49] This interpretation was read together with the limited power of judicial review available under the Indian Constitution to proscribe any substantive deliberation over search and seizure measures instituted by the Executive.[50] However, in rejecting the Petitioner's analogy, the court also held, "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 . . . ."[51]

This negative finding regarding the right to privacy was incidental to the issue and arguably unnecessary. In rejecting the argument from analogy, the court perhaps found it fit to refer to the doctrinal underpinnings of the 4th Amendment, which seeks to protect aspects of privacy.[52] This was not its error. The error lay in its implication that the 4th Amendment protected not merely aspects of privacy but was its sole repository in the Bill of Rights.[53] Therefore, in the absence of a provision in the Indian Constitution that was *pari materia* to the 4th Amendment, a right to privacy could not possibly be found elsewhere in the Indian Constitution.[54]

For all its impressive analysis of the 4th and 5th Amendments, this incorrect assumption was not traced to any judicial finding in America.[55] Indeed, a proper analysis of *Boyd*[56] (which the court did discuss, albeit in a different vein) or *Wolf*[57] would have benefitted the court.[58] To be sure, in *Wolf*, the U.S. Supreme Court did not confine the right to privacy to the 4th Amendment, but by using the substantive due process framework of

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[49] *See id.* ¶¶ 17–18.

[50] *See generally id.* ¶¶ 2–4.

[51] *Id.* ¶ 24 (emphasis added).

[52] *Id.* ¶¶ 15, 18.

[53] *See id.* ¶ 24.

[54] *Id.*

[55] *See generally id.* ¶¶ 13–15.

[56] Boyd v. U.S., 116 United States 616, 621–22, 633–35 (1886).

[57] Wolf v. Colorado, 338 U.S. 25, 28–30, 33 (1949) (wherein the United States Supreme Court traced the right to privacy to the 4th Amendment).

[58] See generally *Boyd*, 116 U.S. at 621–22. Arguably, this analysis too may have led the court to conclude that in the absence of expansive judicial review steeped in American substantive due process, it would similarly not be able to find a right to privacy in India. However, it would allow the court to traverse beyond a textual comparison of the 4th Amendment and Article 20(3), and therefore, perhaps conclude that the American court did not limit the right to privacy to the 4th amendment.

ordered liberty–only found an aspect of it implied therein.[59] By doing so, it was able to extend the application of the 4th Amendment to the State of Colorado via the due process clause in the 14th Amendment.[60] In the author's opinion, the Indian Supreme Court's insistence on borrowing (or at least quoting) extensively from *Wolf,* while failing to engage with it rigorously, led to unwarranted narrow observations regarding the absence of a right to privacy in Chapter III of the Indian Constitution.

The second major case concerning privacy came up before a smaller three-judge bench of the Indian Supreme Court in *Kharak Singh*[61]. Here, the court considered the constitutionality of five provisions of a State regulation which outlined procedures for domiciliary visits by the police and other forms of surveillance of a suspect's home.[62] Among the principal arguments raised by the Appellant was that these regulations violated his fundamental right to privacy.[63]

Much like *MP Sharma*, the Indian Supreme Court refused to find a right to privacy implied within the chapter on fundamental rights, as it was implied in the U.S.' 4th Amendment; thus, upholding the regulations almost in their entirety.[64] However, the court did single out and strike down a provision concerning domiciliary visits which involved discretionary intrusions into a suspect's home.[65] In doing so, it fashioned a controversial workaround.

Despite *AK Gopalan's* proscriptions on due process, the court borrowed the American concept of ordered liberty which is essentially a due process framework used to determine rights considered so fundamental that they are presumed be protected by the 14th Amendment

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[59] In its analysis, the majority opinion borrowed heavily from both the majority and dissenting opinions in *Wolf*, which is not a case about surveillance, but about 1) determining whether the 4th amendment applied to the State of Colorado, through the due process clause of the 14th amendment; 2) if yes, whether evidence obtained illegally by State police in violation of the 4th amendment would be precluded in evidence. *See Wolf*, 338 U.S. at 27–28. The application of the 4th amendment was extended to the State of Colorado by holding that the right to privacy—which was at the core of the 4th amendment—was so basic to a free society that it was implicit in the concept of ordered liberty which the States were bound by. *Id.* Thus, States would be in violation of the 14th Amendment due process clause if they were to gather evidence through unreasonable searches and seizures. *Id.* at 28. However, the majority (J. Frankfurter) held that that such evidence need not be excluded from state criminal proceedings because the bar on evidence obtained in this manner was not a constitutional mandate but a rule created by the federal judiciary. *Id.* at 33. On the other hand, the concurring single judge stated that the evidence be excluded even in States, in keeping with the federal scheme. *Id.* at 40 (Black, J., concurring).

[60] *Id.* at 27–28.

[61] Singh v. Uttar Pradesh, AIR 1963 SC 1295, ¶ 21 (India).

[62] *Id.* ¶¶ 7, 10.

[63] *See id.* ¶¶ 1, 21.

[64] *Id.* ¶ 21.

[65] *Id.* ¶ 22.

(see detailed discussion below).[66] Then it drew on opinions in two more foreign cases: an English majority opinion[67] and an American dissent.[68] From these it plucked florid passages on the meaning of "life" and "liberty" and interlaced them with persuasive restatements on human dignity drawn from the Indian Constitution's Preamble along with the meaning of "personal liberty" in Article 21.[69] Finally, while emphasizing the importance of protecting certain sanctified spaces guaranteed by democracy to the citizenry, the court held the right against unauthorized intrusion into *one's home* was so basic that it was essentially a part of ordered liberty and therefore, deserved protection under Article 21's guarantee of personal liberty.[70]

Thus, under the rubric of personal liberty, the court essentially extended protection to aspects of spatial privacy violated through domiciliary visits.[71] However, it upheld other provisions concerning reporting requirements, travel restrictions, and shadowing of suspects by arguing that there was no overarching fundamental right to privacy that militated against the latter.[72]

Kharak Singh's synthesis of foreign jurisprudence has been critiqued by scholars.[73] The decision to borrow and transmute the conceptual framework of ordered liberty from an American substantive due process case was a curious choice in the teeth of *AK Gopalan's* proscriptions. The curiosity is compounded by the judgment's failure to elaborate on the origin, meaning and dimensions of ordered liberty, which is central to its reasoning and methodology. There is absolutely no effort here to engage in any sort of analysis or justification for the import. Indeed, one cannot find a single line outside of the borrowed passage which elaborates on ordered liberty. Furthermore, the opinion also demonstrates a peculiar tendency of Indian courts to afford equal weight to majority and dissenting opinions of foreign cases.[74] From a comparativists perspective, the irresistible conclusion is that there is no comparative method or accountability here, no dialogic interpretation, no contextual analysis, and

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[66] *Id.* ¶¶ 16–19.

[67] *Id.* ¶ 22.

[68] *Id.* ¶ 16. *See also* Munn v. Illinois, 94 U.S. 113, 142 (1877) (Field, J., dissenting).

[69] *See Singh,* AIR 1963 ¶¶ 16, 17, 19–20.

[70] *Id.* ¶ 38.

[71] *See id.* ¶ 22.

[72] *See id.* ¶ 21. *See also* Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment – I*: *Foundations*, INDIAN CONST. L. & PHIL., (Mar. 20, 2019, 9:34 AM), https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations/.

[73] *See* Mate, *supra* note 27, at 255–56; *see also* Raghavan Vikram, *Navigating the Noteworthy and Nebulous in Naz Foundation*, NUJS L. REV. 397, 403 (2009).

[74] *See Singh*, AIR 1963 SC 1295, ¶ 16. *See also* Wolf v. Colorado, 338 U.S. 25, 27–28 (1949); Munn v. Illinois, 94 U.S. 113, 136, 142 (1877).

no awareness of or willingness to deal with the universalist-particularist tensions that dominate academic literature on comparative methodologies.

It is also noteworthy to refer to Justice Subba Rao's dissenting opinion in *Kharak Singh* which is steeped in an unapologetically universalist conception of American substantive due process principles and insists on inferring a wholesome right to privacy premised on an expansive conception of personal liberty in Article 21.[75] Much like the majority opinion, Justice Subba Rao quoted extensively from the dissent in *Munn v. Illinois* and the opinions of all shades in *Wolf*.[76] He also quoted from *Bolling v. Sharpe* (a case about segregation in American schools).[77] Unlike the majority, however, Justice Subba Rao does not tinker with semantics and instead, goes the distance, discussing foreign jurisprudence at length and comprehensively engaging in a comparative study to effectively challenge the *AK Gopalan* doctrine *in toto*.[78] This universalist/activist approach would prove to be far more prescient and compelling to future benches which dwelt upon incorporating substantive process in India and in *Puttaswamy*,[79] which eventually laid the comprehensive doctrinal foundation of the fundamental right to privacy in India.[80] In some ways though, the dissent resembles the majority opinion. While the conclusions drawn on the basis of American jurisprudence by Justice Subba Rao may differ from the majority and be held up as a shining example of progressive thought, the use of foreign passages in dissents and majorities which were not even central to the holding in the original case present a similar pathology of deploying foreign jurisprudence wantonly.

Thirteen years after *Kharak Singh* came *Govind v. Madhya Pradesh*,[81] wherein a much smaller bench of the Supreme Court was tasked with determining the constitutionality of surveillance regulations very similar to those impugned in *Kharak Singh*.[82] The unanimous judgment in *Govind* upheld the Regulations—even provisions on domiciliary visits contained therein—and rejected arguments pertaining to the right to privacy.[83] It is nevertheless unique in its usage of a peculiar steel-manning technique. It created an entirely hypothetical

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[75] *See Singh*, AIR 1963 ¶ 38.

[76] *See Id.* ¶¶ 22, 35, 38. *See also Wolf*, 338 U.S. at 25, 27–28; *Munn*, 94 U.S. at 136, 142 (Field, J., dissenting).

[77] *See Singh*, AIR 1963 ¶ 36. *See also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[78] *See Singh*, AIR 1963 ¶ 38.

[79] *See* Puttaswamy v. India, AIR 2017 SC 4161, ¶ 16–18.

[80] *See* Mate, *supra* note 27, at 245–46.

[81] Govind v. Madhya Pradesh, AIR 1975 SC 1378, ¶¶ 13–14 (India).

[82] *Id.* ¶ 31.

[83] *Id.*

jurisprudence around a presumed fundamental right to privacy in India and tested the impugned Regulations under this hypothetical jurisprudence, demonstrating in the process that they would nonetheless remain valid. [84]

In building this hypothetical case for a fundamental right to privacy, however, the bench did not confine its comparison to the U.S. 4th Amendment, as was the case in *MP Sharma* and *Kharak Singh*. Instead it straddled the contemporary idea of penumbral rights advanced in a plurality opinion delivered by the American Supreme Court a few years earlier in *Griswold v. Connecticut*, whereby the right to privacy was implied in the radiations emanating from different guarantees in the Bill of Rights.[85] Under a similar approach, *Govind* presented the case for a hypothetical right to privacy that could similarly be located in Chapter III (Article 21, as well as Article 19).[86] The court also drew on American scholarly literature[87]—which American courts themselves avoid to this day—and other contemporaneous American decisions like *Roe v. Wade,* foregrounding them in the persuasive writings of Locke and Kant on natural rights and the passages in *Kharak Singh* that speak persuasively of human dignity.[88]

From this emerged a template for a novel—albeit hypothetical—doctrinal basis of a right to privacy tied to liberty, dignity and autonomy. The passages that speak of this doctrinal basis would later be reproduced in cases dealing with privacy,[89] and, along with the dissent of *Kharak Singh*, serve as the basis for a comprehensive *de jure* doctrinal foundation of privacy evolved in *Puttaswamy*.[90] Thus, yet again, we find the resilient thread of American jurisprudence weaved through the evolving tapestry of Indian jurisprudence on privacy.

However, in *Govind* too we find the cursory and opportunistic treatment of American jurisprudence. Firstly—to address the purely peculiar—much like *Kharak Singh*, *Govind* made a (conjectural) case for a right to privacy by essentially applying substantive due process principles (penumbral rights *and* ordered liberty).[91] Yet, unlike its American counterpart, *Govind* took a narrow view of procedural due process in stating that even if the regulations were to infringe the said right, they would be upheld either because they have the mere force of law

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[84] *See id.* ¶¶ 22–31.
[85] *See id.* ¶ 17.
[86] *See id.* ¶¶ 31, 34–35.
[87] *See id.* ¶ 20.
[88] *See id.* ¶¶ 14, 19, 21.
[89] *See* Naz Foundation v. NCT, 160 (2009) DLT 277 ¶ 40 (India).
[90] *See* Puttaswamy v. India, AIR 2017 SC 4161, ¶ 16–18.
[91] *See Govind*, AIR 1975 ¶¶ 24, 31.

(Article 21)[92] or because they amount to reasonable restrictions (Article 19).[93]

Further, *Govind* advocated using the standard of compelling state interest to test the constitutionality of laws impinging on the hypothetical right to privacy.[94] The standard is one part of the American strict scrutiny test, which is used to ascertain the validity of restrictions on fundamental rights via laws involving suspect classifications.[95] Therefore, it is steeped in a combined reading of the due process and equal protection clauses. But this was not made clear in *Govind*. The judgment did not dwell on the fact that unlike the Indian Constitution which explicitly outlines the criteria for restriction of different fundamental rights, the American judiciary created the test owed to little textual guidance that the American Constitution provides towards construing the equal protection and due process clauses.[96] Even if *Govind* may be given the benefit of the doubt owed to the fact that the test was presented as part of a liberal hypothesis that embraced American procedural and substantive due process jurisprudence, its failure to appropriately couch foreign conceptual frameworks in their legal and historical context, and then present persuasive reasons for borrowing the same *mutatis mutandis*, had incongruent consequences over 50 years later.[97]

In a similar vein, and as discussed above, in both *Kharak Singh* and *Govind*, the court resorts to the framework of ordered liberty without so much as entering a word by way of definition. Ordered liberty was the product of a long-drawn conversation surrounding the applicability of substantive due process principles to individual states in the U.S.[98] It gained some prominence in the aftermath of the 14th Amendment of the U.S. Constitution, which had serious implications for the federal structure

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[92] *Id.* ¶ 31.

[93] *Id.*

[94] *Id.* ¶ 22.

[95] Vikram, *supra* note 73, at 408–409

[96] *See generally Govind*, AIR 1975 ¶¶ 17–21.

[97] The compelling state interest standard was applied in 2009, with *Govind's* citation, by the Delhi High Court in affirming the unconstitutionality of a provision that had the effect of criminalizing homosexual acts. Thereafter, it was applied unfavorably in the context of balancing the privacy interests of a pregnant woman seeking the abortion of fetus, which was conceived through rape. In both these instances, the standard was used to supplant the more rigorous and widely accepted due process test of just, reasonable and fair (akin to rational basis review) set out in *Maneka Gandhi* (discussed below). Gandhi v. India, 1978 AIR SC 597, ¶ 40. More recently, the problematic history of variously applying the compelling state interest and just, fair and reasonable test, without any criteria to guide judicial discretion in the matter, was also discussed in the *Puttaswamy* judgment.

[98] *See* McDonald v. Chicago, 561 U.S. 742, 764–65 (2010).

of the United States.[99] The first eight Amendments of the U.S. Constitution that granted various procedural rights to citizens were originally only applicable *qua* the Federal government and not individual states.[100] The passing of the 14th Amendment after the Civil War, however, cast an obligation on states to adhere to the due process of law in the curtailment of life, liberty and property.[101] The central question, which arose and would divide the U.S. Supreme Court for decades,[102] could be reduced to the following: If and to what extent did the due process requirement in the 14th amendment require states to incorporate the guarantees in the U.S. Constitution's eight amendments?

The answer divided the court. The intractable emphasis on Federal-State relations in America, and according to one scholar, suspicions against judicial activism of the *Lochner-ian* era interventions in service of economic due process, produced two approaches, each claiming a greater affinity to judicial conservatism and restraint in interpreting the scope and applicability of the Bill of Rights.[103] Justice Black's camp leaned towards total incorporation of the Bill of Rights under the 14th Amendment[104] and insisted that the judiciary not attempt deploying the due process clause to traverse beyond those rights which were not textually explicit.[105] On the other hand, Justice Cardozo's (and later Justice Frankfurter's) camp leaned towards a framework of ordered liberty, which actively tasked it with selectively teasing out only those rights from the Amendments the abolishment of which would "violate a 'principle of justice so rooted in the traditions and conscience of [the American] people as to be ranked as fundamental.'"[106] It also anticipated a judicial assessment of how the constitutional scheme conceived individual liberty and balanced it against societal interest. This is reflected in the juxtaposition of the words ordered and liberty. By emphasizing that the rights in the Bill of Rights were not absolute, ordered liberty appealed to judicial self-restraint in approaching

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[99] *See* William D. Graves, *The Supreme Court's Subversion of the Constitution through Substantive Due Process of Law and 14th Amendment Judicial Incorporation of the Bill of Rights*, 6 REGENT J.L. & PUB. POL'Y 249, 250–51 (2014).

[100] *See McDonald*, 561 U.S. at 744.

[101] *See id.* Similar to the obligation cast by the 5th Amendment on the Federal Government. *See* Griswold v. Connecticut, 381 U.S. 479, 494–95 (1965).

[102] See Duncan v. Louisiana, 391 U.S. 145, 147–49 (1968); *Griswold*, 381 U.S. at 481–82; Palko v. Connecticut, 302 U.S. 319, 323 (1937); Gitlow v. New York, 268 U.S. 652, 664 (1925).

[103] Barnum G. David, *Article 21 and Policy Making Role of Courts in India: An American Perspective*, 30 J. INDIAN L. INST. 19, 23–24 (1998).

[104] *Id*. at 27–28.

[105] *Id*. at 28.

[106] *See id.*

substantive due process in the aftermath of the *Lochner* era.[107] Indeed, it was first deployed by Justice Cardozo to find against certain rights of prisoners in the state of Connecticut.[108]

However, the prevailing view in India rejected the American due process doctrine[109] and by implication, all manners of constructive frameworks and concepts implied therein. The *AK Gopalan* doctrine expressly prohibited any structural/intertextual analysis of fundamental rights, let alone conception of new rights based on a judicially discoverable value system and subjective rhetoric of ordered liberty'[110] Therefore, the use of ordered liberty by Indian courts in *Kharak Singh* and *Govind*, could be considered either brave or anomalous—depending on whether the framework is consequentialism or deontological. That being said, one must also wonder whether the lack of proper comparative analysis was a result of deliberate judicial omission or inadvertent judicial misconstruction. The treatment in *Govind* is instructive in this regard. A close reading of the judgment reveals that the bench may also have conflated the divergent judicial approaches of penumbral rights and ordered liberty taken by different judges in *Griswold* to arrive at the right to privacy.[111]

In building its hypothetical jurisprudence around a right to privacy, *Govind* variously quotes from isolated passages on penumbral rights and ordered liberty, finding them separately useful and mutually reinforcing.[112] However, the two concepts are wholly unconnected and represent two distinct methodologies for formulating rights. The concept of penumbral rights advanced in *Griswold* by the plurality proceeded: firstly, to recognize several penumbral zones of privacy radiating from various guarantees in the Bill of Rights;[113] secondly, to relating them with one another, to arrive at pervasive right to privacy that was found to be "older than the Bill of Rights,"[114] and; thirdly, apply a certain iteration of the right to privacy (the right to privacy in marriage) to the States, by implying it in the 14th Amendment's Due Process requirement.[115] On the other hand, Justice Harlan, in his concurring opinion, stated that the right

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[107] Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring in the judgement).

[108] *See* Palko v. Connecticut, 302 U.S. 319, 328 (1937).

[109] A.K. Gopalan v. Madras, (1950) AIR 1950 SCR 27, ¶ 16 (India).

[110] *Id.* ¶ 4.

[111] *See* Govind v. Madhya Pradesh, AIR 1975 SCR 1378, ¶ 24 (India).

[112] *See id.*

[113] Griswold v. Connecticut, 381 U.S. 479, 483–86 (1965).

[114] *Id.* at 486 (Douglas, J., writing for the plurality opinion).

[115] *See id.* at 481–83.

to privacy was implicit in the concept of ordered liberty[116] and therefore applied to the State of Connecticut via the 14th Amendment's Due Process requirement.[117] According to him, the ordered liberty approach to determining the scope of the 14th Amendment Due Process clause proceeded on a wholly different jurisprudential inquiry which may be informed by, but was not dependent on, the Bill of Rights or any of its radiations.[118]

Justice Harlan also rejected the use of penumbral rights for being conceptually similar to the total incorporation approach.[119] While advocates of total incorporation would claim that penumbral analysis was substantially different in its movement away from a strictly textual interpretation of the Bill of Rights,[120] Justice Harlan's saw and rejected both for their reliance on the Bill of Rights. He felt that both frameworks made the invocation of 14th Amendment Due Process requirement against States contingent on whether the impugned State enactment touched the Bill of Rights, radially or textually.[121] However, *Govind* is clearly oblivious to such distinctions.

II. INDIAN DEVELOPMENTS IN PRIVACY IN THE ERA OF SUBSTANTIVE DUE PROCESS

In the late 1970s, constitution benches of the Indian Supreme Court in *RC Cooper*[122] and *Maneka Gandhi*[123] fully admitted substantive and procedural due process within the framework of the Indian constitution, ushering in an era of judicial activism where courts were permitted to engage in a structural interpretation of fundamental rights, interweaving them to find constitutional themes and unenumerated rights.[124] Various reasons have been offered by scholars as informing the courts motivations

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[116] Therefore, while originally J. Harlan, in *Poe v. Ullman*, found the right to privacy under the 3d and 4th amendment, noting the Court's past precedent, he was able to extrapolate its scope beyond them and include the right to privacy in marriage. S*ee* Poe v. Ullman, 367 U.S. 497, 549 (1961); Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

[117] *Griswold*, 381 U.S. at 500 (Harlan, J., concurring.).

[118] *Id.*

[119] *Id.* at 499–500.

[120] *Id.*

[121] *Id.* at 500.

[122] Rustom Cavasjee Cooper v. India, AIR 1970 SC 564, ¶ 66.

[123] Maneka Gandhi v. India, AIR 1978 SC 597, ¶ 11.

[124] Some scholars argue, with good reason, that the first majority opinion to truly apply substantive due process principles was in *Satwant Singh Sawhney v. D. Ramarathnam* (*See* Sawhney v. D. Ramarathnam, (1967) 2 SCR 525 (India)). It was authored by J. Subba Rao (who wrote the momentous dissent in *Kharak Singh*). However, since the bench strength was 5 judges, as opposed to 8 judges in *AK Gopalan* and 6 judges in *Kharak Singh,* its salutary findings constituted persuasive and not binding precedent. (*See* Singh v. Uttar Pradesh, AIR 1963 SC 1295 (India); Gopalan v. Madras, AIR 1950 SC 27 (India).

to completely overhaul the due process jurisprudence. These range from changes in institutional thinking,[125] to broader changes in the political system that altered judicial power dynamics,[126] to the liberal-activist leanings of the judges involved.[127] Whatever be the case, the court finally overcame *AK Gopalan's* persuasive restatement of the Constituent Assembly's repudiation of the American due process doctrine.[128] While a detailed legal and political analysis of due process arguments considered the courts therein is beyond the scope of this Article, it is apt to take note of the central role played by American jurisprudence and the dissent in *Kharak Singh*.[129]

The flurry of liberal judicial opinions that followed in the wake of *Maneka Gandhi* and the accompanying development of Public Interest Litigation—referred to by some scholars as the advent of the age of judicial populism[130]—would lead to a judicial expansion of fundamental rights and finding of various unenumerated rights.[131] In this age of substantive due process, however, the uncertain ratios of *Kharak Singh* and *Govind* regarding the right to privacy divided judicial opinion among smaller benches which were subsequently called upon to adjudicate issues impugning aspects of privacy.[132] A number of cases proceeded on the basis that there was no fundamental right.[133] By contrast, another body of judicial opinion proceeded on the assumption that the right to privacy was recognized under Article 21 in *Govind* (and even *Kharak Singh).*[134] Such cases on privacy decidedly shifted focus to evaluating whether various forms of positive and negative expectations fell within the ambit of the

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[125] Mate, *supra* note 27, at 257.

[126] *Id.* at 259.

[127] *Id.* at 229, 255.

[128] *Id.* at 260.

[129] *See* Kharak Singh v. Uttar Pradesh, AIR 1963 SC 1295, ¶ 36, ¶ 38 (India) (Subba Rao, J., dissenting).

[130] Adam M. Smith, *Making Itself a Home – Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L., 218, 252 (2006).

[131] *Id.*

[132] *See* Jyoti Panday, *India's Supreme Court Upholds Right to Privacy as a Fundemental Right-and It's About Time*, ELECTRONIC FRONTIER FOUND. (Aug. 28, 2017), https://www.eff.org/deeplinks/2017/08/indias-supreme-court-upholds-right-privacy-fundamental-right-and-its-about-time.

[133] *See* Puttaswamy v. India, AIR 2017 SC 4161, ¶¶ 3–4.

[134] *See* R. Rajagopal v. Tamil Nadu AIR 1995 SC 264, ¶ 9 (India) (explaining that the right to privacy was implied in Article 21 and 19(1)(d), while construing *Kharak Singh* and *Govind* as having referenced a right to privacy, but basing their decisions on the content of life and personal liberty); *see also* District Registrar & Collector, Hyderabad v. Canara Bank, AIR 2005 SC 186, ¶¶ 35–39 (India).

right to privacy.[135] Again, they would again borrow heavily from American jurisprudence on privacy, factoring in new developments.

In 2005, in *Canara Bank*, the Indian Supreme Court would not only draw on *Kharak Singh* and *Govind* as precedent for a pre-existing fundamental right to privacy[136] but also on developments in American law on privacy since *Govind*.[137] It would—perhaps for the first time—comprehensively trace the evolution of the right to privacy in American courts: from *Boyd,* wherein trespass of private property in contravention of the 4th Amendment was considered an invasion of the sacred "privacies of life";[138] to Justice Brandeis' famous dissent in *Olmstead*, wherein he noted that the 4th Amendment included protection against wiretapping as this invaded the person of the citizen and destroyed his privacy (thereby, linking privacy to persons and not just places);[139] to *Wolf* wherein the court reprised the existence of a right to privacy in the 4th Amendment through the prism of ordered liberty;[140] to *Griswold* wherein the majority/plurality relied on the framework of penumbral rights to create zones of privacy expressly beyond the 4th amendment;[141] to *Katz*[142] where in the court reprised Justice Brandeis' dissent in *Olmstead* while holding that privacy did indeed inhabit persons not places and spoke of a "reasonable expectation of privacy."[143] *Canara Bank* went on to hold that since privacy attaches to persons not places, a person does not forsake an expectation of confidentiality by placing documents in the custody of a public official and such a person has a "reasonable expectation of privacy" that such documents will not be shared for the public purpose of investigating fraud without meeting a certain threshold of diligence (presumably, this judicial interpretation of the controlling legal provision drew on the just, fair and reasonable test laid down in *Maneka Gandhi*).[144]

Around this time, back in America, the Supreme Court had been going even further in creatively deploying the due process clause[145] in the 5th and 14th Amendments clause in order to address the criminalization

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[135] *See generally id.* ¶ 54.

[136] *See id.* ¶ 37–39.

[137] Vikram, *supra* note 73, at 404. This interpretation has been criticized, especially in stating that the majority in *Singh* had found in favor of a right to privacy.

[138] Boyd v. United States, 116 U.S. 616, 630 (1886).

[139] Olmstead v. United States, 277 U.S. 438, 474–78 (1928).

[140] Wolf v. Colorado, 338 U.S. 25, 27–28 (1948).

[141] *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965).

[142] *See Katz v. United States*, 389 U.S. 347 (1967).

[143] *Id.* at 351, 360–61 (Harlan, J., concurring).

[144] District Registrar & Collector, Hyderabad v. Canara Bank, AIR 2005 SC 186 (India).

[145] As well as the equal protection clause—but that discussion is beyond the scope of this Article. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 3603–03 (2015).

and discrimination faced by the LGBTQI+ community.[146] For instance, in *Lawrence,* the Supreme Court moved beyond interpretive frameworks like ordered liberty and penumbral rights (but relied on cases that had applied them) and instead framed homosexuality as a fundamental privacy-liberty-autonomy interest[147] that deserved protection against the democratic majority's subjective morality. It upended the conservative rule of judicial restraint in upending legislation which sanctioned on the basis of protecting majority morality and tradition (both cornerstones of ordered liberty) and replaced it with an uncertain jurisprudence—replete with reliance on foreign developments, as well as the liberal notion of changing circumstances[148] to bring homosexual conduct and relationships within the scope of fundamental privacy interests.

A few years later, in *Naz Foundation*—which was expected to be India's own *Lawrence*[149]—the Delhi High Court decriminalized homosexuality by reading down the provisions of Section 377 of the Indian Penal Code.[150] Among the myriad of reasons cited by the bench in support of its conclusion, was the argument that Section 377, in criminalizing private and intimate conduct, violated the homosexuals's fundamental right to privacy.[151] The court traced this fundamental right to *Govind* and cited *Canara* to support its interpretation.[152] Subsequently, in expanding the scope of the right to privacy to include homosexual conduct, it placed reliance on the universalist reasoning that underscored the due process analysis in *Lawrence*.[153]

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[146] *See generally* United States v. Windsor 570 U.S. 744, 775 (2013); Lawrence v. Texas 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 634 (1996); *Obergefell*, 135 S. Ct. at 2608.

[147] Conduct and relationships. *See Lawrence,* 539 U.S. at 567.

[148] *Id.* at 598 (Scalia, J., dissenting).

[149] Chanakya Sethi, *India's Shockingly Bad Gay-Rights Decision*, SLATE (Dec. 13, 2013) http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/kaushal_v_naz_foundation_the_supreme_court_of_india_s_shockingly_bad_gay.html (Though the relevant Indian statute (PEN. CODE § 377 (India)) was more analogous to the one impugned in Bowers than it to the one impugned in Lawrence. In that, it effectively criminalized sodomy and other carnal acts against the order of nature (the law was of colonial vestige and its text reflected Victorian morality), and did not explicitly and exclusively target homosexual conduct).

[150] On appeal, in *Suresh Koushal & Ors. v. India & Ors*, (2012), the Supreme Court would reverse the judgment and restore Section 377, citing, among other reasons, the High court's overt reliance on foreign sources. Subsequently, the Supreme Court has agreed to re-hear the appeal afresh.

[151] Naz Foundation v. Gov't. of NCT of Delhi 160 D.L.T. 277, ¶ 132 (2009) (Ind).

[152] *Id.* ¶¶ 39, 40, 47.

[153] *See id.* ¶ 57.

III. *PUTTASWAMY* – SHORING UP PRIVACY AND THE ROLE OF FOREIGN SOURCES

The case by case development of a right whose doctrinal basis and existence was in and of itself suspect, led a nine-judge constitutional bench of the Indian Supreme Court in *Puttaswamy* to finally revisit its nebulous rulings and the correctness of subsequent decisions.[154] The court largely followed a two-prong approach: 1) To analyze and recalibrate holdings in the three seminal cases which nebulously invoked the right to privacy by relying on American constitutional jurisprudence *before* substantive due process was readily available; and 2) To synthesize a doctrinal basis for the fundamental right to privacy from domestic jurisprudence on liberty, personal autonomy and dignity,[155] most of which evolved *after* substantive due process was realized as tool for judicial review.

In a 547–page long judgment that reads like a treatise on privacy, the court rejected, distinguished, and validated some of the findings in *MP Sharma*, *Kharak Singh* and *Govind,* respectively.[156] It unequivocally affirmed a fundamental right to privacy,[157] and by implication, validated decisions that expanded its scope on a case-by-case basis, irrespective of whether or not they proceeded on a misconstrued understanding of the ratios in *Kharak Singh* and *Govind*. Within the constitutional framework as it stands today, it set out a strong doctrinal basis for the right, variously describing privacy as lying at the core of basic values already protected in Chapter III, such as human dignity, liberty, freedom, personal autonomy and so on.[158] Beyond it, it located privacy in the notion of inalienable natural rights, commenting at one point that the constitution did not create them but merely recognized them.[159]

While drawing widely from domestic precedent, the judgment also quoted extensively from foreign sources to bolster its commentary on privacy.[160] It dedicated an entire section to the case by case development of the right to privacy in multiple common law jurisdiction, including the United States.[161] It drew not just on foreign caselaw but also extensively quoted scholars from antiquity, as well as present day; again dedicating

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[154] Puttaswamy v. India, AIR 2017 SC 4161, ¶¶ 1, 3.

[155] *See id.* ¶ 4, 5.

[156] *See id.* ¶¶ 4, 12, 13.

[157] *Id.* ¶ 18.

[158] The judgment contains one plurality opinion and five separate concurring opinions of single judges. *See id.* ¶¶ 18, 21.

[159] *Puttaswamy*, AIR 2017 ¶ 82.

[160] *See generally, id*. ¶¶ 40–41.

[161] *Id*. ¶ 48.

entire chapters to their work.[162] As a result, one is as likely to find John Locke alongside Dworkin, Pound and Patterson in the chapter on inalienable and natural rights, as they are likely to find references to blog-posts and articles in contemporary law journals that speak to informational privacy.

Primarily, the court engaged comparative material in two distinct dialogic modes:[163] 1) Primary dialogic mode, where it consciously analyzed the evolution of the right to privacy and attendant concepts in foreign jurisdictions, and used it to inform and embellish its own formulations;[164] and 2) Secondary dialogic mode, where it placed reliance on domestic judicial opinions in order to arrive at its formulations, while explicitly acknowledging that such cases themselves were guided by foreign materials. In many ways, *Puttaswamy* is a fine example of an Indian court engaging with comparative material, especially in a labyrinthine jurisprudential realm that is littered with references and reliance on foreign citations. However, it is not without flaws. Some scholars are already beginning to point out gaping holes in *Puttaswamy's* treatment of foreign sources and the impact it may have on its legacy.[165] For instance, it has been pointed out that the court has misconstrued the test of reasonable expectation of privacy, originally from *Olmstead* and evolved *Katz,* and then borrowed by the Indian Supreme Court in *Canara.*[166] *Katz* used the test only in the context of the 4th Amendment, using it to identify places where individuals can claim protection against unreasonable searches and seizures.[167] Per contra, *Puttaswamy* deploys test of reasonable expectation of privacy to subordinate the right to privacy to amorphous social interests (*Puttaswamy* uses the phrase "the rights of others").[168]

Yet, contrasted with its early attempts to grapple with the right to privacy, the effort of the court in *Puttaswamy* seems impressive. That

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[162] *See generally, id*. ¶ 40.

[163] The author has borrowed this concept from Sujit Choudhary's academic vocabulary. For a detailed analysis of the concept see: Sujit Choudhry, *How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights and Dialogical Interpretation*, *in* COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45 (Sunil Khilnani et al. eds., 2010).

[164] *Puttaswamy*, AIR 2017 ¶ 40–43 (This section of the plurality opinion is entirely dedicated to analysis of foreign law).

[165] *See* Karan Lahiri, *Guest Post: Cracks in the Foundation – Two Fundamental Issues in the Puttaswamy Decision that threaten its legacy*, INDIAN CONST. L. & PHIL. (Oct. 5, 2017), https://indconlawphil.wordpress.com/2017/10/05/guest-post-cracks-in-the-foundation-two-fundamental-issues-in-the-puttaswamy-decision-that-threaten-its-legacy/.

[166] The judgment may suffer from severe doctrinal and textual issues, which are again rooted in its treatment of foreign sources. *See generally Puttaswamy*, AIR 2017 ¶¶ 65, 73.

[167] *See* Katz v. United States, 389 U.S. 347, 359 (1967).

[168] *Puttaswamy*, AIR 2017 ¶ 28.

said, it is most likely an unfair comparison to begin with. As noted at various points in the judgment itself, it must be remembered that the early cases like *Kharak Singh* and *Govind* did not enjoy many of the advantages that *Puttaswamy* did. At any rate, they were not readily available. Institutional advantages like the general expansion of the court's power of judicial review as well as interpretive advantages that stem from the admittance of substantive due process doctrine, allowed the court to seamlessly synthesize an unenumerated right of privacy by interweaving the various protections in Chapter III. Additionally, the court had the benefit of borrowing from a large body of stable domestic precedent[169] and not having to rely directly or exclusively on foreign sources, like the benches presiding over *Kharak Singh* and *Govind*. In fact, as some scholars and I have argued here, developments in domestic law that led to the creation of these advantages were set in motion by majority and dissenting opinions in *Kharak Singh* and *Govind*, which themselves relied heavily and *creatively* on American jurisprudence of that time. [170]

CONCLUSION

One way of evaluating the decisions of the Indian Supreme Court in *Kharak Singh* and *Govind* is to see them as gradual nudging jurisprudence in the direction of affirming not only a fundamental right to privacy but also, in a larger sense, towards subversively introducing the bare bones of substantive due process. Against its own diktat in *AK Gopalan* and in defiance of the Constitution's framers, through these decisions the Court pioneered the expansion of judicial review by incorporating elements of American substantive due process, beginning with the usage of the ordered liberty framework to assess the scope of personal liberty in Article 21. These decisions reified as precedents, to be followed or distinguished by subsequent benches in a line of decisions concerning aspects of privacy, some of which were afforded protection by being read into the scope of personal liberty in Article 21.

However, while we may note their contribution to the expansion of judicial review and fundamental rights, the relationship is correlative and not causal. There is little evidence to suggest that the court intended to lay the groundwork for future benches to take a progressively expansionist role in the interpretation of the right to privacy or more generally, Part III of the Constitution. On the contrary, these decisions sowed conceptual and doctrinal confusion, which proved detrimental to the development of cogent jurisprudence around the right to privacy. And

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[169] Which in themselves might have heavily borrowed from foreign sources. *See generally, id.*

[170] Mate, *supra* note 27, at 218.

this confusion owes a deep debt to the nature of comparative analysis undertaken by the court.

The comparative method—or lack thereof—on display in these cases, reveals the court's staggeringly haphazard approach to borrowing from foreign sources. It's no doubt true that in the first instance the court engaged in comparison not of its own volition but at the behest of the Petitioners, who set out to make a case for a right to privacy by engaging in argument by analogy (for example, the analogy between the 4th Amendment and Article 21). However, once it waded into a comparative analysis, the court failed to set out a cogent framework in which to conduct the same. For instance, in *Govind* it failed to square its reliance on ordered liberty with its simultaneous rejection of substantive due process, a conservative application of which entails ordered liberty. It also failed to explain for the benefit of future benches the rationale behind borrowing from and lending equal weight to majority, plurality, and dissenting opinions rendered in such American cases. By omitting to do so, the court leaves the impression that it was either woefully misguided in its attempt to engage foreign material or worse, deliberately deployed it in a piecemeal manner to prop up foregone conclusions, which came at an immense cost to the cogent development of doctrine.

Even more broadly, none of these cases (and few, if any, after it) offer a critical analysis of when and how Indian courts may deploy foreign law. In the absence of any judicial guidelines and signposts, the court failed to locate the borrowed material in a broader comparative framework or rigorously analyze the legal context in which it arose. Judicial opinion that is predicated on foreign jurisprudence should elaborate on the permissive reasons to do so and the circumstances or contexts in which such reasons remain valid. Even if (or, especially if) the mode simply dialogic, the legal and historical context of what is being compared must reflect in the body of the judgment, lest subjectivities and reductionism become the norm. The Supreme Court's inchoate approach to the use of foreign sources in *Kharak Singh* and *Govind*—itself a substrate or symptom of a wider malaise of an undisciplined approach to judgment writing—had a cascading effect in subsequent cases, which had to contend, case after case, with the implications of importing and (mis)-applying decontextualized foreign jurisprudence due to the path dependence accompanying the norm of precedent.

Cherry picking doctrines; conflating legal concepts; isolating parts of foreign tests to apply them domestically; relying equally on isolated passages from majority, plurality, and dissenting opinions, while failing to distinguish between them; failing to set out the context from which jurisprudence is being borrowed—such convenient oversights are sometimes committed by courts in different jurisdictions to substantiate novel legal positions and validate outcomes. This is especially true when

such positions and outcomes are not contemplated in the Constitution or the corpus of domestic jurisprudence at hand. However, a cogent framework of comparative analysis that persuades not merely on the surface but also withstands deeper conceptual scrutiny is all the more significant and consequential in novel cases of constitutional importance. To countenance its absence as fair trade in the service of a liberal cause would be to accept a precariously poor evaluative standard for judicial discipline and its persuasions. Judicial activism and enthusiasm must not, after all, be a substitute for judicial discipline. To leave such an approach under-critiqued, present it as fait accompli, or justify it by means of post-hoc reasoning, would be a disservice to long-term goals of institutional stability and jurisprudential clarity.