The Right to Privacy: A Reflection on Warren and Brandeis' Interpretation and the Case of Ethiopia 1991-2018

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ABSTRACT

The Right to Privacy is a form of negative liberty that ensures people to enjoy life without unlawful interference from the state or other agents. Samuel Warren and Louis Brandeis are the two forerunner activists on the Right to Privacy. Although some of their propositions are debatable, their insight into the Right to Privacy is still valid. This article tries to reflect on Warren and Brandeis" contribution to the concept of the "Right to Privacy" and its practical application in the contemporary world taking Ethiopia as a case study.

Keywords: Right to Privacy, Warren and Brandeis, Ethiopia

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INTRODUCTION

The Right to Privacy Defined

Downes [1] and Thomson [2] define privacy as a component of negative liberty; a form of liberty people should enjoy without unlawful interference from the state or other agents. Allen [3], Schwartz [4], and Cohen [5] define privacy in a much broader sense - as a vital enabler of positive liberty. According to them, privacy enables people to attain independence and self-confidence. In human development, during adolescence, a young person asserts his autonomy by establishing private spaces. Without such private spaces, self-knowledge and self-determination are impossible. Privacy, therefore, can be understood as a peaceful breathing space, an essential element to sustaining personal development and self-management. Privacy enables individuals to determine the depth and breadth of their relationships with their surroundings, including the state.

Everyone has the right to life; it is one of the fundamental civil rights [6]. The right to life means the right to enjoy life [7], and this may include the right to be left alone [8]. At times, people may want to be forgotten. From this perspective, privacy compliments the right to life, more specifically, the right to enjoy life.

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property [6]. The right to property includes not only the tangibles but also intangible assets. A person‟s dignity, reputation [9], goodwill, and private knowledge about himself [10] are the person‟s intangible properties. From this perspective, the right to privacy augments the property right.

Warren and Brandeis' Account on the Right to Privacy

Samuel Warren and Louis Brandeis are believed to be pioneers in writing on the Right to Privacy in Harvard Law Review in 1890. Warren and Brandeis [8] argue a person‟s reputation, his standing among his fellows, is an asset that can be trespassed by publicising personal information without his knowledge and/or consent. A person‟s family is also part of his life. Damaging an individual‟s reputation may inflict damage on the whole family, and it is a trespass.

The proposition that it is a right of humans "with whose affairs the community has no legitimate concern" to not be dragged into undesirable and undesired publicity" was provided in the article published in Harvard Law Review by Warren and Brandeis [8]. Warren and Brandeis listed five points to show the boundaries of the right of privacy. According to them:

1) The right to privacy does not prohibit any publications of matter which is of public or general interest;

2) The right to privacy does not prohibit the communication of any matter that can be administered by the law of slander and libel;

3) The right to privacy would probably not grant any redress for invasion of privacy by oral publication in the absence of special damage;

4) The right to privacy would cease upon the individual himself published the content of the facts; or published by others with his consent;

5) Whether the published issue is true or false, (i.e., the truth of the matter) does not afford a defence; and

6) The absence of "malice" in the publication does not afford a defence.

The first point "[t]he right to privacy does not prohibit any publications of matter which is of public or general interest" (p. 214) raises several questions. What is "public interest"?

What does “general interest” mean? Who is to decide whether a publication is of public or general interest? How it will be decided? Warren and Brandeis did not answer these and similar questions. Rather, they give the following general principle:

> *The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.*
>
> Warren and *Brandeis* [8]

A community may have “legitimate concerns” about the “private” affairs of an individual. Warren and Brandeis mention a person who is running for a public office, as an example. The public may have “legitimate concern” to know more about this person than it does about other ordinary citizens. Therefore, publicising issues that may show the person is not fit for the office cannot be prohibited by the right to privacy, according to Warren and Brandeis. It is presumed, that the person renounced some of his rights to privacy when he decided to run for public office. There are others who, by virtue of their profession or popularity, are presumed to have renounced their right to privacy because they have to avail themselves to public comments, albeit to varying degrees. In contrast, to publish an ordinary individual who suffers from an impediment in his speech or who cannot spell correctly is unlawful; his right to privacy has trespassed if his impediments are published without his consent.

The general objective of the right to privacy, Warren and Brandeis argue is to “protect the privacy of private life” (p.215). Here questions arise: What are the distinctions between “private life” and “public life”? Who is going to decide the boundary between the two? Warren and Brandeis acknowledge that there are no simple answers to such questions. For practical reasons, habits, actions, and relations that do have connections with the person‟s official duties can be considered in the public domain. These habits, actions, and relations do not warrant the right to privacy. Habits, actions, and relations that do have direct connections with the person‟s official duties are in the person‟s private realm; these issues warrant the right to privacy. Warren and Brandeis acknowledge this description is not exhaustive and leaves room for subjective judgment. In such cases, the court of law or legitimate authorities will decide what is in the public domain and what is not.

The author of this article understands that Warren and Brandeis have taken a legitimate government for granted. However, this is not the case in reality. Does “legitimate concern” exist when there is no “legitimate government”? How do we understand the activities of authoritarian governments to speak on behave of the public? Is there any distinction between the “public interest” and the “government interest”? Warren and Brandeis ‟ proposition will be more difficult to defend when we take the impacts of information communication technology (ICT) into consideration. ICT has made legal

boundaries indistinct. How can we explain “legitimate concern” about cross-border cyber espionage? Is it true that “privacy is no longer a social norm” as Max Zuckerberg is reportedly said [11]?

Warren and Brandeis " preposition to “protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity” has the second caveat.

> *The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication made under circumstances which would render it a privileged communication according to the law of slander and libel.*
>
> Warren and Brandeis 8]

What the above remarks mean is that the right to privacy is not trespassed by any publication made by authorities. Warren and Brandeis presented a list of authorities that do have this right. The list includes a court of justice, legislative bodies, or the committees of those bodies, municipal assemblies, or the committees of such assemblies, and practically any other public body or quasi-public like the voluntary association for almost every purpose of benevolence, business, or other general interest will be accorded this privilege. This author finds it difficult to accept this caveat. Warren and Brandeis seem to have excessive trust in democratic governance, more specifically in the judiciary. Even if we accept the argument that in countries where rule of law reigns, the principle will be unacceptable in the majority of the world countries in which the government is above the law. Furthermore, this argument gives ammunition to authoritarian governments who claim that they have a “legitimate right” to define the public interest. The case of Ethiopia will briefly be discussed below.

Warren and Brandeis" [8] third point that the law “would probably not grant any redress for invasion of privacy by oral publication in the absence of special damage” can also raise some concerns. Their argument highlights that there must be a distinction between oral and written publications. They assume that the injury resulting from oral communication would ordinarily be so “trifling that the law might well, in the interest of free speech, disregard it altogether” (p.217). This also changed a lot after they have written the article in 1890 due to rapid development in ICT. Today, the distinction between oral and electronic publication is blurred. Any spoken statement can be broadcasted to the whole world by uncontrolled social media.

Warren and Brandeis" fourth point that “the right to privacy ceases upon the publication of the facts by the individual, or with his consent” (p. 218) is fully acceptable. Once the person has published or authorised to publish content, privacy issues cannot be raised.

Warren and Brandeis" fifth remark is an important notice for human rights activists around the world. “The truth of the matter published does not afford a defence” (p. 218). Authoritarian regimes around the world justify their intrusions in the affairs of political opposition figures on the basis that “they know the truth”. However, the law, (assuming that there is an independent judiciary) “should have no concern with the truth or the

falsehood of the matters published" (p.218). It is not the truthfulness of the issue that matters in this case but the person‟s right to privacy.

Similarly, the sixth point "[t]he absence of „malice‟ in the publication does not afford a defence" is an acceptable argument. The intent of the offender should be immaterial to the law. It is too common that "public interest and safety" have been used to justify human rights atrocities. "Intent" is not an excuse to trespass on a person‟s property; the same principle should apply to the right to privacy. A person‟s privacy should be protected whatever the motives might be.

The Case of Ethiopia 1991-2018

The Federal Democratic Republic of Ethiopia (FDRE) can be a case study where the rule of law is in short supply. This article focuses on the period 1991-2018. The FDRE Constitution [12] has the following provision on Privacy.

Article 26: Right to Privacy

1) Everyone has the right to privacy. This right shall include the right not to be subjected to searches of his home, person, or property, or the seizure of any property under his personal possession.

2) Everyone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices.

3) Public officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.

However, on March 25, 2014, Human Rights Watch (HRW) [13] published a 145-page report entitled ""They Know Everything We Do": Telecom and Internet Surveillance in Ethiopia". In this report, HRW presents evidence that the Ethiopian government uses telecommunication infrastructure to crackdown on opposition groups and individuals, both in Ethiopia and Diaspora. The report contained data on Unrestricted Access to Phone Call Recordings and Metadata; Targeting Foreign Communications; Live Interception of Phone Communication; Restricting Access to Phone Networks; Geotracking of Individual Locations; Controlling the Internet; Internet Filtering; Email Monitoring and Voice Over IP (Skype, WhatsApp, Facebook, Viber … etc) monitoring and many other privacy intrusions. The report lists names of people, as evidence, who suffered due to these intrusions.

A year later, on March 8, 2015, HRW had another report entitled “Ethiopia: Digital Attacks Intensify: Spyware Firm Should Address Alleged Misuse” [14]. This report starts with:

> *The Ethiopian government has renewed efforts to silence independent voices abroad by using apparent foreign spyware, …. The Ethiopian authorities should immediately cease digital attacks on journalists, while foreign surveillance technology sellers should investigate alleged abuses linked to their products.*
>
> HRW, [14]

The “foreign surveillance technology sellers” mentioned in the report are European companies including British ones. HRW[13, 14] gives evidence that Ethiopia has been evading the privacy of individuals living in Ethiopia, Europe, and the USA, using the technology obtained from Europe.

The author of this article is one of these victims. Clara Usiskin [15] has remarked: “One victim I interviewed in London, Tadesse Kersmo, eloquently described his sense of violation when he learned that the government from which he had fled had commandeered his computer and had been using it to spy on him and his family in his new home in London” (p.180). Usiskin continues to describe that the “disturbing sense of intrusion ... did not compare to his sense of fear and guilt that his hacked communications may have been used to target vulnerable activists still in Ethiopia” (p.180).

CONCLUSION

Although there are several debatable propositions, the contributions of Warren and Brandeis on the Right to Privacy are still valid. It is true that “it is a right of humans „with whose affairs the community has no legitimate concern‟ to not be „dragged into undesirable and undesired publicity”; although it leaves many questions unanswered. The above assertion seems to assume democratic governance and rule of law, which are scarce. The Right to Privacy has not been observed not only in Ethiopia but also in Europe; since Europe has allowed Ethiopia to use its technology to spy on decedents seeking asylum in their countries.

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