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Privacy Rights in Israel and the U.S.

The 'right to privacy' is a right often assumed, but not easily defined. In the United States of America, this right is not explicitly defined in the constitution, but rather has been defined, to some extent, in case law. In comparison, while Israel does not actually have a constitution, they have a body of "Basic Laws" that serves a very similar purpose, until a time that a Constitution for that country can be passed; the set of basic laws under which privacy falls in Israel, is that of "Human Dignity and Liberty." Unlike the U.S. Constitution, the privacy section of the Israeli basic laws lays out some precise guidelines concerning what it protects. In actual practice, case law in Israel has demonstrated an interpretation of their Basic Law's right to privacy in a way that parallels many decisions made by the Supreme Court of the United States. However, this interpretation differs in a vitally important way: in the U.S. any violation of privacy that is not justified by the need of the state is considered unlawful, while in the Israeli Basic Law, case law has dictated that there must also be demonstrable infractions against "human dignity and liberty." The case law regarding this guarantee of privacy by the Basic Law in Israel, and the Constitution in the U.S., demonstrates that the right to privacy really is not concrete, and must be constantly measured against the demands of other equally important rights.

As mentioned, the right to privacy, as defined in the Constitution of the U.S., is not a single clause, but instead has been inferred to be a right guaranteed as the result of several

different amendments. These amendments to the constitution which have been interpreted by the Supreme Court of the United States (hereafter SCOTUS) in such a way that a right to privacy has been established are the majority of the first ten amendments as well as being more broadly covered by the 14th (Wex 1)(Griswold v. Connecticut). These rights to privacy largely stem from restrictions on the government intruding into private life, with the 14th amendment assuring that it is both the Federal and State governments to which the restrictions apply.

In 1965 privacy came to the forefront of political attention when the majority opinion of the Supreme Court discussed marital rights in the case of Griswold v Connecticut; specifically the right to privacy. The court acknowledged that the Constitution did not specifically grant this right, yet stated that the right of privacy was obviously covered by the 9th amendment's statement that, "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This protection was explicitly extended to protect citizens from state governments as well as the federal government in the 14th amendment of the U.S. Constitution. For this reason, the court in Griswold v. Connecticut concluded in the majority opinion that the ability to use birth control fell within the sphere of privacy created by the constitution, and that right could not be abridged by a state law. This decision helped lead to the decision in Roe v. Wade which in turn helped further clarify the boundaries to the right to privacy, and will be discussed later.

In apparent contrast to this historical process of defining the right to privacy with case law that interpreted the U.S. Constitution, Israel simply states these rights as a set of laws under Basic Law: Human Dignity and Liberty. In actuality, the statements under the privacy section resemble the U.S. Constitution's protections such as; "privacy and intimacy," freedom

from non-consented entry into a dwelling or the search of person, and protection of the "confidentiality" of communication (Israel Ministry of Foreign Affairs). In Nahmani v. Nahmani the Israeli supreme court even referenced the Roe v. Wade majority opinion when reaching the conclusion that "human freedom includes the freedom of independent decisions in matters of marriage, divorce, having children, and every other issue in the field of privacy..." (7). This demonstrates how each nation's supreme courts reflect each other in their interpretations of the scope of privacy. In both Roe v. Wade and Nahmani v. Nahmani however, their simple statement of the importance of privacy reflects the power of that statement: case law is what defines the right to privacy. This is true for both countries, despite fact that the supreme courts of both Israel and the United States are interpreting a law, it is the interpretation that carries the tangible power and affects the life of their respective citizens.

A difference in how each country's supreme court interprets the privacy rights of their citizens differs however, as referenced earlier. This difference simply further illustrates the power of the case law in determining these rights. Neither the Constitution of the United States, nor the Basic Law of Israel state whether an infraction against the rights protected therein must have actual damages associated with it. However, Chief Justice Rehnquist, delivering the opinion of the Court in Reno v. Condon, explains that for a database controlled by the Department of Motor Vehicles in various states to be considered constitutional there must be a justifying reason for its collection (3). Notably, this does not require an impact on human dignity. In contrast, because of the opinion of Justice Dalia Dorner in Miller v. Minister of Defense in Israel, a breach of the right to privacy must inflict humiliation in order to be considered a violation of dignity, which in turn must be the case if it is to be considered

a violation of privacy (Onn 3). Because there are violations to the right to privacy that do not violate dignity, under this interpretation, said violation would not infringe upon a Basic Law (3). For this reason, "it appears that collecting one's identifying details... without misuse of these details, does not amount to violation of human dignity"(4). This difference between the two nations concerning privacy is a result of case law, and their respective interpretations of their governing laws, not the result of literal and explicit statements within these codes.

The landmark case that defined privacy as being a broadly covered, although unspecified, aspect of the U.S. constitution is that of Roe v. Wade, which was decided by the SCOTUS in 1973. In their review of lower court decisions they concluded that "the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant (Roe v. Wade 8)." This finding by the supreme court more fully details the extent to which the right to privacy prevails. This issue, reflected in Israeli courts, is separate from that of whether there must be a violation of dignity or some humiliation caused. Instead it measures privacy as a continuum, with the individuals own needs and desires at one end, and the government's responsibility to represent citizens as a whole. It is then each nation's Supreme Courts' responsibility to define where along that continuum a particular issue lies. In Roe v. Wade the SCOTUS concluded that through the first trimester of a pregnancy, a woman's right to privacy outweighed the states interests in protecting "health, medical standards, and prenatal life." On the other side of that line, the states interests become dominant, with a few exceptions.

The Israeli Supreme Court followed a similar thought process when deciding whether a public figure's right to privacy was more important than a separate group's right to free assembly in the case of Dayan v. Wilk. This continuum was from the rights of one individual to another, and while in this particular instance Israel's Supreme Court ruled in favor of the public figures privacy rights, that is not always the case. The court's opinion makes this situation clear when they explain that their reasoning behind the rule is contingent upon various aspects of the case, such as the petitioner's refusal to agree to any restrictions on his demonstration, as well as the use to which the public figure put his house. This opinion lays the groundwork for other cases that are not clearly considered in the Basic Law. Each ruling further defines the extents of to the rights of privacy.

Privacy is a non-concrete idea that is as hard to define as it is vital to everyday life. The importance of privacy rights has been demonstrated by the results of case law decided by the SCOTUS. Israel equally values the ideal of privacy, and includes the right to privacy in its Basic Law as a set of guarantees that is considered essential to them. While these guarantees to privacy in the Basic Law of Israel are defined as such, in actuality they are interpreted by their Supreme Court in much the same way that the rights to privacy are interpreted as being part of the Constitution of the U.S. by its respective Supreme Court. A significant difference in their enacted interpretations stems from their different formats; Israeli case law dictates that there must be a violations of "human dignity" to be a violation of privacy, the SCOTUS determined that this was not a prerequisite in the U.S. system. Both countries have demonstrated their acceptance that the right to privacy is of primary concern to human existence, however, its limits are dictated by case law and must be continually measured against other concerns.

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