

## The Evolution Of Marcel Theory- A Principle And A Passion

written by Rhea Susan Verghese | April 6, 2021



Whenever there is a police probe into a matter involving certain individuals, there is a reasonable expectation of privacy attributable to the police officers, till the formation of charges.<sup>[1]</sup> This is a manifestation of the *Marcel* principle, where, if personal information is received pursuant to legal power or public authority, the recipient shall owe duty as ascribed from such authority to the person to whom it relates and not use the same for other purposes.

The principle stems from the case of *Marcel v Commissioner of Police of the Metropolis*<sup>[2]</sup> where the police investigation revolved around the property development in the dockyards, pursuant to which, the pertinent documents were seized. The claimants contended that such documents seized should not be made available to the third party who had a legal interest in the matter, being involved in civil litigation relating to the same property developments. Although the court rejected the arguments of the claimants, as the documents in question were the subject of a subpoena, it upheld the point that the police had a duty of confidence to the subjects of a criminal investigation. The Indian Statutes relating to fair-trial have shown a reliance on the *Marcel Principle*. In 2019, the Apex Court made some pertinent remarks in the case of *P. Gopalkrishnan @ Dileep v. State of Kerala & Anr.*<sup>[3]</sup> holding that “the right of the accused with regard to the disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial”. It should be equated under the aegis of Right to Privacy<sup>[4]</sup>, thus upholding the principles of natural justice.

### THE REASONABLE EXPECTATION

Critics of excessive privacy argue that disclosure about police investigation should be tested on the pedestal of natural justice and some information pertaining to the accused should not be kept confidential merely because it harms the reputation of the accused (as it harms both the law of privacy and defamation). But a defendant, who publishes information about a police investigation into a named individual’s conduct should be held liable. Just because a piece of information is confidential does not make it private, similarly, just because it is not private does not mean that it is always legitimate to disclose it.<sup>[5]</sup> This precludes the media houses from disclosing crucial information about the accused.

Recently, in *R (on the application of Ingenious Media Holdings plc and*

*another v Commissioners for Her Majesty's Revenue and Customs*<sup>[6]</sup> the UK Supreme Court held that the disclosure of a taxpayer's affairs to the press by HMRC was a breach of confidence, where one clause precluded revenue officials from disclosing information while placing an exception for cases involving the functions of Revenue and Customs<sup>[7]</sup>. Heavy reliance by the excise officials on the exception clause was abhorred by the Court. The Court of Appeal in *ZXC v Bloomberg*<sup>[8]</sup> recently held that for the purposes of misuse of private information tort, a person will generally have a reasonable expectation of privacy in the fact that they have come under suspicion by the police or any other state authority. There are a few criticisms that this point has to sustain.

#### ARGUMENTS AGAINST THE MARCEL PRINCIPLE

Firstly, there needs to be a distinction between what information is private and what is confidential. The courts have treated both under the same pedestal but they have fundamental differences. The confidentiality aspect rests on the fact that police investigations pertain to information that is inaccessible to those beyond the personnel leading the enquiry. But in the privacy aspect, to establish such a claim, the claimant has to prove that such information relates to an intimate part of his/her life that a third party should not be given access to.

Secondly, the privacy aspect is incidental in nature. The courts have regarded police investigations as private and that the disclosure of such information can render harm to the reputational interests of the claimant. For instance, in *Richard v BBC*<sup>[9]</sup> the court held that the defendant should compensate the claimant for releasing footage of a police search on his London property. Mann J, in his judgement, held the reason for such holding was the stigma attached to police investigation and the harm it does to a person's reputation.

This hardly seems like a valid point to award damages to the claimants, without giving the defendant the opportunity to prove the truth of the allegations.<sup>[10]</sup> Privacy action is sharply contrasted from a defamation action, as the latter succeeds where there is a false publication pertaining to the claimant, whereas the former succeeds, even when there is a reasonable amount of truth in the revelation of such information. So protection of private information, more than being a need, ends up being a convenience for the claimant.

A grave concern with relation to privacy in police investigations is the risk of suppression of evidence of wrongdoing. For instance, if the police are investigating a suspect, there is a reasonable belief that he/she might be guilty of an offence. Suppressing the fact that a person is under investigation shall preclude the public from finding out about a possible wrong-doing on his part.<sup>[11]</sup>

Lastly, as held in *In re Arrows Ltd (No 4)*,<sup>[12]</sup> the Marcel Principle can also be overridden by statutory provisions where statutory provisions require or authorise the disclosure of information obtained by a public officer.<sup>[13]</sup>

#### THE INDIAN VIEWPOINT

While the Indian Evidence Act, 1872 enshrines certain ramifications adhering to client-attorney privilege,<sup>[14]</sup> spousal privilege,<sup>[15]</sup> Section 123<sup>[16]</sup> precludes disclosure of information relating to affairs of state, and the *Marcel* principle is enshrined by Section 124 which restrains disclosure of all communication made in an official capacity, whether oral or written,

regardless of the fact that they relate to state affairs or not.<sup>[17]</sup> In the case of *In re. Mantubhai Mehta*,<sup>[18]</sup> it was held that it is upon the court to determine whether a document qualifies as a communication made to the public officer in official confidence and if such document does not relate to affairs of the state, it may be taken up as evidence.

The tryst of Indian judiciary with privacy has come a long way since *Kharak Singh vs. State of U.P.*<sup>[19]</sup>. The judgement rendered by the majority disregarded the idea of protection of privacy and did not consider protecting the privacy of a person based on a 'mere personal sensitiveness.' But, in the later judgement of *Govind v State of M.P.*,<sup>[20]</sup> the court approached with a limited right to privacy. Journalistic invasions of privacy of the prisoners were deliberated upon by the Apex Court in various judgements.<sup>[21]</sup> Although the issue of privacy *per se* was not directly deliberated upon; it held that the press had no right to interview or photograph a prisoner without his consent.

During the pendency of the appeal in *Sahara India Real Estate Corporation Ltd. and Ors. Vs. Securities and Exchange Board of India and Anr*<sup>[22]</sup> certain newspapers published the proceedings of the judgement despite there being an interim order against the same. The court laid down fair and reasonable standards with regards to reporting of matters which are *sub judice* in court. This included guidelines against public disclosure of documents forming a part of court proceedings. With this, it can be interpreted that the Indian judiciary has placed some reliance on the *Marcel* Principle, albeit in an indirect manner.

#### A PARALLEL CLOSURE

The *Marcel* principle in breach of confidence should be used as a method of redressal in situations, where police allow the media houses to procure and broadcast information before the formation of charges and with an intent to defame the subject than misuse of information that pertains to the private life of an individual. The courts should strike a fair balance between the importance of protecting people who are statutorily compelled to disclose private information to the investigating authority and the duty owed by the public authority to ensure that the society is well aware of the potential wrong-doing of a person.<sup>[23]</sup>

The Press Council of India (PCI) ensuring proper journalistic standards *vide* the Press Council Act 1978 stated that if someone believes that a news agency has committed any misconduct, the PCI can, emphasize the importance of accuracy and fairness encouraging the press to "*eschew publication of inaccurate, baseless, graceless, misleading or distorted material.*"<sup>[24]</sup> Hence, the *Marcel* principle can come in handy in protecting the journalistic standards of the country.

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- [1] N.A. Moreham, *Police Investigations, Privacy and the Marcel principle in breach of confidence*, <https://www.tandfonline.com/doi/abs/10.1080/17577632.2020.1760473?journalCode=rjml20>
  - [2] [1992] Ch 225.
  - [3] SLP(Crl.) No. 10189/2018.
  - [4] Article 21, Constitution of India, 1950.
  - [5] *Supra* Note 1.
  - [6] [2016] UKSC 54].
  - [7] Section 18, Commissioners for Revenue and Customs Act, 2005.

- [8] [2020] EWCA Civ 611.
  - [9] [2018] EWHC 1837 (Ch).
  - [10] NA Moreham, Why Police Investigations should not be regarded as private, Part 1,  
<https://inform.org/2020/02/18/why-police-investigations-should-not-be-regarded-as-private-part-1-n-a-moreham/>
  - [11] *Ibid*.
  - [12] [1995] 2 AC 75, 102.
  - [13] *Ibid*.
  - [14] Indian Evidence Act, 1872, Section 126.
  - [15] *Ibid*, Section 122.
  - [16] *Ibid*, Section 123.
  - [17] *Ibid*, Section 124.
  - [18] AIR 1945 Bom 122.
  - [19] AIR 1963 SC 1295.
  - [20] 2(1975) 2 SCC 148.
  - [21] Sheela Barse vs. Union of India, (1987) 4 SCC 373; Prabha Dutt vs. Union of India, (1982) 1 SCC 1.
  - [22] (2012) 10 SCC 603.
  - [23] NA Moreham, Police Investigations, Privacy and Breach of Confidence, Part 2,  
<https://inform.org/2020/07/30/police-investigations-privacy-and-breach-of-confidence-part-2-n-a-moreham/>
  - [24] PCI Rules.
  - [25] Marcel Principle  
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