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## Right to Privacy, a Complicated Concept to Review

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### Abstract

The Concept and definition of the privacy has been changed during the time affecting by different factors. At the same time, the boundaries of privacy may differ from one place to another affecting by the culture, religion, etc. Nonetheless, there is not a unique general accepted definition for the privacy. Privacy has been considered from different disciplines like sociology, psychology, law and philosophy. It is a multidisciplinary domain, having an easy concept but difficult to define. However, by reviewing all different viewpoints, it can be concluded that privacy is an individual tendency, wish and natural need to be away from others' control and surveillance. Moreover, it is the physical as well as impalpable limits of an individual who likes to be free from others intrusion. The present review, is a doctrinal legal study on background, concept, limits and legal development of privacy through comparative and descriptive approach in order to offer a general and understandable idea of the right to privacy.

**Keywords:** Privacy, Human rights, Common law, Information privacy, Tort, Islam, Warren and Brandeis.

### 1. Introduction

Former chief executive of Sun Microsystems Scott McNealy stated that "Privacy was dead".<sup>1</sup> In response, Chesterman argued that we are who kill the privacy though accidentally. He argues that even in theory, people demand for privacy, but in practice, does not care about it and just

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<sup>1</sup> It has to be noted that this consideration is before the emergence and spread of modern technologies like social networks and new electronic devices like smart phones. See: Sprenger, P. (1999). Sun on Privacy: "Get Over It. Wired News, 26, at 4; available at: <http://web.cs.dal.ca/~jamie/CS4173/Mats/Lecture/Security+Privacy/Wired%20News-%20%20Netscape.pdf>

click 'I accept'.<sup>2</sup> Right to privacy is an important concept under the human rights principles. Privacy was a part of human life from the beginning of human history.<sup>3</sup> The medieval Anglo-Saxon law approach and also the German tribal law, had some kind of protection for the property of a freeman, compensation if a damage caused to property and insult.<sup>4</sup> Naturally, individuals like to be free from others' invasion, access, and expect that their premises, property, body and personal information to be kept free from any intrusion. In a sense, humans desire privacy instinctively, which includes physical, property and personal information privacy. People like that their premises, property and body to be kept free from any intrusion. However, the concept and extend of privacy may differ from one society to another affecting by the factors like the place, culture, religion and so on.<sup>5</sup> The survey results in the late 20<sup>th</sup> century indicate the rapid increase in privacy concerns of the public,<sup>6</sup> which is increasing day by day.<sup>7</sup>

The international attempts to recognize the right to privacy largely started after the Second World War. In this stage, the European Union initiated the recognition of the privacy right and laws have been enacted by some member states. The concept of privacy in last century was limited like the prohibition of intrusion to individuals' house, prohibition of wiretapping and prohibition of reading individuals' letter. Shils has construed the first half of the twentieth century as the "golden age of privacy".<sup>8</sup> Konvitz argues that the right to privacy was pointed out in oldest legal codes in America, in philosophical writings and also in traditions.<sup>9</sup> However, the new definition of the privacy and considering it as a fundamental human right, was mostly affected by the advancement in the new technologies specially computer and internet in the last decades of the 20<sup>th</sup> century. According to Ragland, 'privacy' at the early stage of development was vague to the American courts in considering it as either a personal right or a property right.<sup>10</sup>

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<sup>2</sup> Chesterman, S. (2012). Who Killed Privacy? Straits Times, 26.

<sup>3</sup> Elison, L. M., & NettikSimmons, D. (1987). Right of Privacy. Mont. L. Rev., 48(1), at 1.

<sup>4</sup> Newell, P. B. (1995). Perspectives on privacy. Journal of environmental psychology, 15(2), at 95.

<sup>5</sup> Acquisti, et al (2015) reviewed empirical researches on privacy behavior which published in Science. They concluded that norms and behaviors on public and private, highly depends on the culture while in a given culture also individuals are different regarding to the importance of their privacy. See: Acquisti, A., Brandimarte, L., & Loewenstein, G. (2015). Privacy and human behavior in the age of information. Science, 347(6221), 509-514.

<sup>6</sup> Dixon, T. (2001). Valuing Privacy: An Overview and Introduction. UNSWLJ, 24, at 241.

<sup>7</sup> The UMR (a full-service market research company) public opinion surveys in 2012 and 2014 in New Zealand indicate a sharp risen on public concern on privacy. Available at: <https://www.privacy.org.nz/news-and-publications/corporate-reports/annual-report-of-the-privacy-commissioner-2014/>

<sup>8</sup> Shils, E. (1966). Privacy: Its constitution and vicissitudes. Law and Contemporary Problems, 31(2), at 292.

<sup>9</sup> Konvitz, M. R. (1966). Privacy and the law: A philosophical prelude. Law and Contemporary Problems, 31(2), at 272.

<sup>10</sup> Ragland Jr, G. (1929). The Right of Privacy. Kentucky Law Journal, 17(2), at 86.

Westin has categorized the privacy development from the American perspective based on technological developments.<sup>11</sup> Simon Chesterman has classified the 'privacy development' under three stages as follows:<sup>12</sup>

1. the primary notion of privacy as a right to 'be let alone' in the late 19th century due to the development in the USA, resulting from the sensationalistic journalism, the invention of the camera, and new trend considering the appropriate role of mass media;
2. second half of the 20th century it was announced that the computerization of the information has increased the government and other bodies access to data; and
3. beginning of the 21st century by emerging of the social networks and mobile devices by which a huge amount of information was flowing, so in response, the right to personal data protection was developed rather than merely a right to privacy.

## **2. Concept of Privacy**

Definition, features and boundaries of privacy are different in each society. This is evident in the definitions proposed by scholars from different cultures, legal systems and also from different disciplines. The diversity of the proposed definitions by scholars from different cultures and disciplines indicate that there is not a unique, universal accepted definition of privacy.<sup>13</sup>

Hence, "the idea of privacy is a vague one and difficult to get into a right perspective".<sup>14</sup> Post argues that 'privacy' is an intricate value, opposite features and different denotation, which I despond whether it can be addressed effectively or not.<sup>15</sup>

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<sup>11</sup> 1. First era 1961-1979 that was affected by the high-technology age and the demands for civil rights and social movements were featured. This era has witnessed the first generation of legal and organizational actions; 2. Second era or "period of relative calm before the storm" 1980-1989; computer and telecommunications technology and new devices were prevailed, although still no worldwide connection of computers. This stage is significant for Federal legislations on privacy; and 3. Third era 1990-2002; Privacy was the first social and political issue of the USA, affecting by internet, wireless communication devices, human genome project, data mining software and automation of public record systems by the government, and finally blocking the use of encryption tools by private and FBI's Carnivore program that was developed to enable accessing to online communications. See: Westin, A. F. (2003). Social and political dimensions of privacy. *Journal of social issues*, 59(2), at 435-441.

<sup>12</sup> Chesterman, above n 2.

<sup>13</sup> The difficulty in defining the privacy and determining its limits, lack of a universal agreement on the concept of privacy and its analysis are pointed in many researches done in this area. For more information see: Kuner, C., Cate, F. H., Millard, C., & Svantesson, D. J. B. (2011). Privacy—an elusive concept. *International Data Privacy Law*, 1(3), at 141; Moore, A. (2008). Defining privacy. *Journal of Social Philosophy*, 39(3), at 411; Parker, R. B. (1973). A Definition of privacy. *Rutgers L. Rev.*, 27, at 276; Bloustein, E. J. (1974). The First Amendment and Privacy: The Supreme Court Justice and the Philosopher. *Rutgers L. Rev.*, 28, at 52.

<sup>14</sup> Shils, above n 8, at 281.

<sup>15</sup> Post, R. C. (2001). Three concepts of privacy. *Geo. LJ*, 89, at 2087.

According to Shils, “The idea of privacy is a vague one and difficult to get into a right perspective”.<sup>16</sup> Shils,<sup>17</sup> as a sociologist defined the privacy as a “zero-relationship”<sup>18</sup> between persons or groups or group and individual. Hence, we speak about the privacy of a person, two or many individuals against other individuals.<sup>19</sup> He added that privacy will forms in conditions in which communication or realization is exercised and it can be invaded from outside or giving up from inside.<sup>20</sup> In fact, the concerns on privacy raises when the seclusion of an individual or group of people may be contravened.<sup>21</sup> Shils proposed “sharing of the privacy” in which an individual voluntarily discloses his information to others vis-à-vis the disclosure of information in the absence of voluntary consent. However, privacy is not absolute and the preservation of privacy is not an obstacle for individuals and groups communication.<sup>22</sup>

Post argues that privacy is an intricate value, opposite features and different denotation which I despond whether it can be addressed effectively or not.<sup>23</sup> Hence, the privacy is considered as a difficult concept to define.<sup>24</sup> Privacy is peculiarly everything and at the same time nothing.<sup>25</sup>

Dixon elaborates privacy in the following well favored statements: “It is a universally recognized human right; a fundamental feature of a free society; a central element in the checks and balances which a democratic society places on the authority of institutions and individuals, and a critical component of any society which allows people to start afresh without being forever shadowed by the mistakes in their past”.<sup>26</sup>

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<sup>16</sup> Shils, above n 8, at 281.

<sup>17</sup> Edward Shils was a Professor of Sociology and Social Thought at University of Chicago. He has looked to the notion of privacy from the sociological perspectives.

<sup>18</sup> He described the phrase “zero-relationship” as: “it is constituted by the absence of interaction or communication or perception within contexts in which such interaction, communication, or perception is practicable-i.e., within a common ecological situation, such as that arising from spatial contiguity or membership in a single embracing collectivity such as a family, a working group, and ultimately a whole society”. See: Shils, above n 8, at 281.

<sup>19</sup> Privacy forms in conditions by which communication or realization are exercised and it can be invaded from outside or giving up from inside. In fact, the concerns on privacy raises when the seclusion of an individual or group of people may be contravened. He proposed “sharing of the privacy” in which an individual voluntarily discloses his information to others vis-à-vis the disclosure of information in the absence of voluntary consent. However, privacy is not absolute and the preservation of privacy is not an obstacle for individuals and groups communication. See: Shils, above n 8, at 281-305.

<sup>20</sup> Ibid, at 282.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid, at 305.

<sup>23</sup> Post, above n 15, at 2087.

<sup>24</sup> Moore, above n 13, at 411.

<sup>25</sup> Dixon, above n 6, at 240.

<sup>26</sup> Ibid.

According to Moore,<sup>27</sup> 'Privacy' is a difficult concept to define.<sup>28</sup> It is “a condition or as a moral claim on others to refrain from certain activities”,<sup>29</sup> suggested a reasonable understanding for the notion of privacy which clarifies its urgency and seriousness.<sup>30</sup> Moore suggested a definition for condition of privacy along with right to privacy which is more descriptive or non-normative.<sup>31</sup> The condition of privacy is the situation in which an individual keeps himself inaccessible.<sup>32</sup> In another word, privacy enables individuals to limit others' access to themselves and their information.<sup>33</sup> Privacy is a great value in a civilized nation<sup>34</sup> and the human being desire which is rooted in the social factors.<sup>35</sup>

Maarten, argues that the trust, respect and agreement must be supported by the law and technology in order to protect the right to privacy.<sup>36</sup> According to him, protection of privacy leads to its invasion since it may abuse by the authorized people or government, therefor it is not a right.<sup>37</sup> According to Kalven, indeed privacy is a great value in a civilized nation.<sup>38</sup> Bygrave believes that privacy is the human being desire rooted in social factors.<sup>39</sup> He refers to Moore's view as the demand for privacy is created socially. He extended that Moore's influential research shows that the privacy concern is merely possible through a connected complex society that understand the distinction and boundaries of the private and public domain. He noted that culture, religion and philosophical factors are the main and determinative components of the privacy along with the technology and organizations.<sup>40</sup>

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<sup>27</sup> Adam D. Moore has written extensively on privacy and related issues. Dr. Moore is an “Associate Professor in the Information School at the University of Washington, examines the ethical, legal, and policy issues surrounding intellectual property, privacy, freedom of speech, accountability, and information control.

<sup>28</sup> Moore, above n 13, at 411.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid, at 412.

<sup>31</sup> Ibid, at 421.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, at 420.

<sup>34</sup> Kalven, H. (1966). Privacy in Tort Law: Were Warren and Brandeis Wrong? *Law and Contemporary Problems*, 31(2), at 326.

<sup>35</sup> Bygrave, L. A. (2010). Privacy and data protection in an international perspective. *Scandinavian Studies in Law*, 56, at 175.

<sup>36</sup> Van Swaay, M. (1995). The value and protection of privacy. *Computer Networks and ISDN Systems*, 26, Supplement 4(0), at S149.

<sup>37</sup> Ibid, at S152.

<sup>38</sup> Kalven, above n 34, at 326.

<sup>39</sup> Bygrave, above n 35, at 175.

<sup>40</sup> Ibid.

Bloustein,<sup>41</sup> defined the privacy as a "general theory of individual privacy which will reconcile the divergent strands of legal development".<sup>42</sup> While he denoted to political, psychological and social dimensions of privacy, he proposed the theory of "individual privacy".<sup>43</sup> According to him, "I shall consider only that limited aspect of privacy having to do with the interest of an individual in being free of undue and unreasonable publicity".<sup>44</sup> He added that his study on the researches done and courts proceedings indicates that our privacy law tries to protect individuality, liberty and dignity through sanctions if breached.<sup>45</sup> Newell has written a literature review on the concept of privacy. According to him, the literature review of the privacy studies indicate that all agree on the value of privacy.<sup>46</sup> He added that privacy is a requisite for human existence from the philosophical perspective. Newell explains the psychologists' viewpoint on privacy to "ego development and maintenance".<sup>47</sup> His review clears that according to sociologists, the privacy is worthy to uphold the individuals' relation generally and support their sincerity, particularly while politicians and lawyers regard the privacy as a fundamental human right.<sup>48</sup> The review results indicate that most of the researches done on privacy issues concern the "interaction of person and environment".<sup>49</sup> In eyes of Gross, privacy is the state of living in which obtaining knowledge on peoples life is restricted.<sup>50</sup> Jourard as a psychologist defined the privacy as it is the individuals' desire to conceal certain information from others' access.<sup>51</sup>

The right to identity and right to privacy are considered as the same essence since both are components of the general rights of personality rights. Both encompass the honor and respect that human own and are originated from rights to dignity and self-determination.<sup>52</sup> However, the right to privacy and freedom of expression are closely related and supportive to each other.<sup>53</sup>

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<sup>41</sup> EDWARD J. BLOUSTEIN was a Professor of Law at New York University School of Law and former President of Rutgers University from 1971 to 1989. He was qualified in both law and philosophy.

<sup>42</sup> Bloustein, E. J. (1964). Privacy as an aspect of human dignity: An answer to Dean Prosser. *NYUL Rev.*, 39, at 963.

<sup>43</sup> *Ibid.*

<sup>44</sup> Bloustein, above n 13, at 51.

<sup>45</sup> Bloustein, above n 42, at 1002-03.

<sup>46</sup> Newell, above n 4, at 98.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, at 99.

<sup>50</sup> Gross, H. (1967). Concept of privacy, the. *NYUL Rev.*, 42, at 36.

<sup>51</sup> Jourard, S. M. (1966). Some psychological aspects of privacy. *Law & Contemp. Probs.*, 31, at 307.

<sup>52</sup> de Andrade, N. N. G. (2010). Data protection, privacy and identity: distinguishing concepts and articulating rights Privacy and Identity Management for Life (pp. 90-107): Springer, at 99.

<sup>53</sup> Ahmad, N. (2008). The right to privacy and challenges: a critical review. *Malayan Law J*, 5(10), at cxxviii.

According to Yankwich,<sup>54</sup> in *Roberson v. Rochester Folding Box Co.*,<sup>55</sup> in 1902 the court while rejecting the right of privacy in the absence of any legislation, has defined the notion of privacy right.<sup>56</sup> In this case, a woman picture was used by the defendants to advertise flour while she did not consented. The Court of Appeal of New York in this case impliedly recognized the right to privacy,<sup>57</sup> although it was rejected by majority.<sup>58</sup> The court suggested for a legislation approach to protect right to privacy.<sup>59</sup> However, this case was considered as the first high court recognition of the right to privacy.<sup>60</sup>

Professor Rubinfeld has examined the right to privacy since the emergence to its present status from the constitutional law perspective. Rubinfeld in his famous article "*The right of privacy*", considered the overall development of privacy right from the judiciary perspective (American case laws). He has criticized the principle of personhood and finally propounded a new theory to understand the privacy.<sup>61</sup> He argued that the privacy is a political doctrine and its protection under the constitution is the result of a democratic polity.<sup>62</sup> It is the democracy that puts forward the limitations for the government surveillance.<sup>63</sup> However, Greene argued in contrary that there

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<sup>54</sup> "Chief Judge, United States District Court for the Southern District of California. LL.B., 1909, Willamette University. Formerly, Judge, Superior Court of Los Angeles County, 1927-35; Lecturer in Law, Loyola University of Los Angeles, 1925-34; Judge, United States District Court for the Southern District of California, 1935-51. Author of numerous books and articles on defamation, state and federal procedure, anti-trust law and the law of copyrights". Reference: Yankwich, L. R. (1952). Right of Privacy: Its Development, Scope and Limitations. *Notre Dame Law.*, 27(4), at 528.

<sup>55</sup> *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).

<sup>56</sup> Yankwich, above n 54, at 500.

<sup>57</sup> For minority Judge Gray wrote: "It seems to me that the principle which is applicable is analogous to that upon which courts of equity have interfered to protect the right of privacy in cases of private writings, or of other unpublished products of the mind. The writer or the lecturer has been protected in his right to a literary property in a letter or a lecture, against its unauthorized publication, because it is property, to which the right of privacy attaches.... I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes as she would have if they were publishing her literary compositions". See: *Roberson*, above n 55, at 450.

<sup>58</sup> For the majority of the court, Chief Judge Parker wrote: "If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply". See *Roberson*, above n 55, at 443.

<sup>59</sup> The court held that: "The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others,...". See: *Roberson*, above n 55, at 443.

<sup>60</sup> Yankwich, above n 54, at 503.

<sup>61</sup> Rubinfeld, J. (1989). The right of privacy. *Harvard Law Review*, 102(4), at 739.

<sup>62</sup> *Ibid*, at 804.

<sup>63</sup> *Ibid*, at 805.



is no constitutional privacy right but also the constitutional right of liberty and equality. He declared that the constitutional right to privacy is dead through what Justice Steven did.<sup>64</sup> Steven prescribed "liberty clause" of the constitution in his decisions.<sup>65</sup> Greene reasoned that some cases are defending as the constitutional right to privacy is in fact a constitutional right to liberty.<sup>66</sup> He pointed out the examples of abortion and intimate sexual conduct.<sup>67</sup>

Parker has suggested three criteria to be included in definition of privacy, namely: "it should fit the data", simplicity and "applicability by lawyers and courts".<sup>68</sup> Post has reviewed three conflicting conceptions of privacy were stated in Prologue to *The Unwanted Gaze*, namely: splicing privacy to the creation of knowledge, to the dignity and also with freedom.<sup>69</sup> He argues that the first notion should not understand as a question of privacy, the second idea is useful to perceive privacy if attracts the awareness to the types of social structure, and the third conviction is the excellent one since justifies limitations on government rules and regulations.<sup>70</sup> Bygrave who has written extensively on privacy issues has summarized the proposed definitions of privacy systematically as follows:

1. Non-interference definition of privacy;
2. Limited accessibility definition for privacy;
3. Information control is the task of privacy (which is more popular); and
4. The definition which includes all the above aspects plus considering sensitive features of individuals' lives.<sup>71</sup>

### **3. Encyclopedic Definition of Privacy**

The definition of the term 'privacy' is also considered by different legal encyclopedias. The term privacy originates from Latin words "privatus" and "privo" which means to deprive.<sup>72</sup> Privacy is defined as individuals' regard to shield his life form undesirable intrusion or

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<sup>64</sup> Greene, J. (2010). So-Called Right to Privacy, The. UC Davis L. Rev., 43, at 718.

<sup>65</sup> Ibid, at 719.

<sup>66</sup> Ibid, at 717.

<sup>67</sup> He explained that although abortion and intimate sexual conduct are historically considered under the right to privacy, however in case of *Gonzales v. Carhart* and also *Lawrence v. Texas*, it is evident that these rights are not justified by the as the result of constitutional privacy. See: Greene, above n 64, at 715.

<sup>68</sup> Parker, above n 13, at 276-7.

<sup>69</sup> Post, above n 15, at 2087.

<sup>70</sup> Ibid.

<sup>71</sup> Bygrave, above n 35, at 170.

<sup>72</sup> Leino-Kilpi, H. (2000). Patient's autonomy, privacy and informed consent. Amsterdam, IOS Press, at 80.

scrutiny.<sup>73</sup> Black's Law Dictionary directly defines the term 'right of privacy' as individuals' right "to be free from unwarranted publicity. It is a general and common term comprises many inherent rights like liberty. These rights are protecting citizens against government."<sup>74</sup> Concise Law Dictionary provided the legislative and judicial references for both privacy and data protection under the definition of 'privacy'.<sup>75</sup>

According to Dictionary of Law, the term 'privacy' did not defined by the legislations. It cites the recognition of right to privacy under English law through doctrine of breach of confidence.<sup>76</sup> However in its fourth edition, it defined the privacy as "individuals' personal seclusion". The citizens' right or their family to be safeguarded against others' intervention into their life and affairs through physical actions or publications.<sup>77</sup> Oxford Dictionaries also defined privacy in the following words: "a state in which one is not observed or disturbed by other people" and "the state of being free from public attention".<sup>78</sup> It is synonymous to the words seclusion, privateness.<sup>79</sup> Longman Dictionary provides that it is "the state of being able to be alone, and not seen or heard by other people and being free from public attention".<sup>80</sup> The gist of all proposed definitions by the law dictionaries is the individuals' right to be free from others access.

#### **4. Warren and Brandeis**

The notion of 'privacy' was propounded by two Americans, Samuel D. Warren and Louis D. Brandeis in their famous article titled '*The Right to Privacy*' that was published in 1890.<sup>81</sup> They argued that the right to life has been evolved during the time and now it denotes the "right to enjoy life".<sup>82</sup> Warren and Brandeis have regarded the privacy as the individual's right "to be let alone", although they refer to the Judge Thomas Cooley's Law of Torts who propounded this opinion.<sup>83</sup> They analyzed that privacy is "inviolable personality",<sup>84</sup> and "man's spiritual nature, of his feelings and his intellect".<sup>85</sup>

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<sup>73</sup> Nygh, P. E., & Butt, P. (1998). Concise Australian Legal Dictionary. Victoria, Australia: Butterworths.

<sup>74</sup> Campbell, H. (1979). Black's Law Dictionary, West Publishing Co., at 1075.

<sup>75</sup> Woodley, M. (2013). Osborn's Concise Law Dictionary, London: Sweet & Maxwell-Thomson Reuters, at 332.

<sup>76</sup> Curzon, L. B. (2003). Dictionary of Law. Kuala Lumpur, International Law Book Services, at 331.

<sup>77</sup> Curzon, L. B. (1998). Dictionary of Law. Kuala Lumpur, International Law Book Services, at 300.

<sup>78</sup> Privacy. (n.d.). Retrieved February 5, 2015, from <https://en.oxforddictionaries.com/definition/privacy>.

<sup>79</sup> The synonym words for the term 'privacy' are as follows: seclusion, privateness, solitude, isolation, retirement, peace, peace and quiet, peacefulness, quietness, lack of disturbance, lack of interruption, freedom from interference.

<sup>80</sup> Privacy. (n.d.). Retrieved February 5, 2015, from <http://www.ldoceonline.com/dictionary/privacy>

<sup>81</sup> Warren, C., & Brandeis, L. D. (1890). The Right to Privacy. Harvard Law Review, IV(5), 193-220.

<sup>82</sup> Ibid, at 193.

<sup>83</sup> Ibid, at 195.

Warren and Brandeis offered the non-interference aspect of privacy.<sup>86</sup> They argued that the law basically protects from tangible harms, but in the new era, the law is developing in order to protect intangible harms.<sup>87</sup> In fact, they tried to protect people against mental harm.<sup>88</sup> However, affected by their own contemporary needs, they mostly concentrated on the related journalistic issues.<sup>89</sup> By giving examples, they discussed the protection of individuals against press (publication) without their consent under the Common Law legal system. They argued that the courts can balance the privacy interests with public disclosure interests in order to solve the conflict between the proposed remedies and freedom of press.<sup>90</sup> In fact, they considered the tort law as a basic remedy.<sup>91</sup> They proposed remedy for privacy injuries by advocating tort damages or even maybe a criminal punishment.<sup>92</sup> This masterpiece was considered as the main endeavor to attract attentions toward the recognition of the right to privacy and also was considered in many reputable researches on privacy issues.

Bloustein called them as the fathers of the right to privacy,<sup>93</sup> and their work as a “germinal article”.<sup>94</sup> Elison and Simmons believe that the right to privacy developed after this article.<sup>95</sup> Warren and Brandeis theory was regarded as the chief cause in the legal recognition of privacy right through the judiciary and was the basis for subsequent extension and development of the privacy right.<sup>96</sup> This work was the basis of privacy torts in many American jurisdictions as well.<sup>97</sup>

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<sup>84</sup> Ibid, at 205.

<sup>85</sup> Ibid, at 193.

<sup>86</sup> Bygrave, L. A. (2001). Place of Privacy in Data Protection Law, The. UNSWLJ, 24(1), at 279.

<sup>87</sup> Richards, N. M., & Solove, D. J. (2010). Prosser's Privacy Law: A Mixed Legacy. California Law Review, 98(6), at 1922.

<sup>88</sup> Schwartz, P. M., & Peifer, K.-N. (2010). Prosser's "Privacy" and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept? California Law Review, 98(6), at 1986.

<sup>89</sup> Warren and Brandeis stated that: “The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise. If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation”.

<sup>90</sup> Richards, above n 87, at 1892.

<sup>91</sup> Ibid.

<sup>92</sup> Warren, above n 81, at 219.

<sup>93</sup> Bloustein, above n 13, at 52.

<sup>94</sup> Bloustein, above n 42, at 962.

<sup>95</sup> Elison, above n 3, at 5.

<sup>96</sup> Ragland Jr, above n 10, at 87.

<sup>97</sup> Bratman, B. (2001). Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy. Tenn. L. Rev., 69, at 624.

The unreported case of *Manola v. Stevens*,<sup>98</sup> was the first judicial recognition of the right to privacy by the New York trial court in America.<sup>99</sup> However, the Supreme Court of Georgia was the first court that recognized a common law right of privacy and endorsed the Warren and Brandeis view on privacy unanimously.<sup>100</sup>

In 1905, the Supreme Court of Georgia in *Pavesich v. New England Life Insurance Co*,<sup>101</sup> has accepted the invasion of privacy cause of action,<sup>102</sup> and referred to ‘*The Right to Privacy*’ article.<sup>103</sup> In *Pavesich* Case, Justice Cobb of the Supreme Court of Georgia, wrote unanimously: “*The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, ...*”.<sup>104</sup> This was the first recognition of the right to privacy in America.

Davis has discussed on torts of privacy and examined the Warren and Brandeis article.<sup>105</sup> He argued there is no evidence that indicates the recognition of the right to privacy in England or American courts prior to this article.<sup>106</sup> Most of the American Courts based their reasoning on the Warren and Brandeis article and declared that their work is the origin of the right to privacy in America.<sup>107</sup> In fact, their masterwork which was a “voice before the law”,<sup>108</sup> gave birth to the

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<sup>98</sup> Marion Manola v. Stevens & Myers, N. Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890.

<sup>99</sup> Glenn, R. A. (2003). The right to privacy: rights and liberties under the law: ABC-CLIO, at 51.

<sup>100</sup> Kramer, I. R. (1990). Birth of Privacy Law: A Century since Warren and Brandeis, The. Cath. UL Rev., 39, at 717-18.

<sup>101</sup> *Pavesich v. New England Life Insurance Co*, 122 Ga. 190; 50 S.E. 68; 1905.

<sup>102</sup> Bratman, above n 97, at 642.

<sup>103</sup> In *Pavesich v. New England Life Insurance Co*, the Supreme Court of Georgia while referring to the case of *Manola v. Stevens*, has noted the theory of Warren and Brandeis in the following words: “It seems that the first case in this country where the right of privacy was invoked as a foundation for an application to the courts for relief was the unreported case of *Manola v. Stevens*, which was an application for injunction to the Supreme Court of New York, filed on June 15, 1890. The complainant alleged that while she was playing in the Broadway Theatre, dressed as required by her role, she was, by means of a flash-light, photographed surreptitiously and without her consent, from one of the boxes by the defendant; and she prayed that an injunction issue to restrain the use of the photograph. An interlocutory injunction was granted ex parte. At the time set for a hearing there was no appearance for the defendant, and the injunction was made permanent. See 4 Harv. Law Rev. 195 (note 7). The article in this magazine which refers to the case above mentioned appeared in 1890, and was written by Samuel D. Warren and Lewis D. Brandeis. In it the authors ably and forcefully maintained the existence of a right of privacy, and the article attracted much attention at the time. It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed”.

<sup>104</sup> *Pavesich*, above n 101, at 201.

<sup>105</sup> Davis, F. (1959). What Do We Mean by “Right to Privacy”? . SDL Rev., 4, 1-24.

<sup>106</sup> *Ibid*, at 3.

<sup>107</sup> *Ibid*, at 626.

<sup>108</sup> *Ibid*, at 650.

notion of right to privacy.<sup>109</sup> In *Cox Broadcasting Corp. v. Cohn*,<sup>110</sup> the court used the phrase “root article” to address Warren and Brandeis article.<sup>111</sup>

Although, many scholars have emphasized on the role of this essay in modern development of the notion of right to privacy, however, their viewpoint and approach was criticized by some others. It was argued that the concept of privacy as defined by them is too broad since it indicates the immunity of almost every aspect of a human life from others interference.<sup>112</sup> Moreover, this viewpoint may differ according to the place and time criteria. In *Roberson v. Rochester Folding Box Co.*,<sup>113</sup> the majority of judges have rejected the theory of Warren and Brandeis on the ground that it is “litigation bordering upon the absurd”.<sup>114</sup>

According to Konvitz, although the Cooley’s statement is preferred to the Warren and Brandeis, but in fact the Supreme Court in case of *Adair v. United States*,<sup>115</sup> transcribed Cooley’s “the right to be let alone”.<sup>116</sup> The Cooley’s notion is preferable to the Warren and Brandeis notion of “the right to privacy” since it bears a limited concept.<sup>117</sup> The right to be let alone includes both public and private environments, from public places of the city to inside the house.<sup>118</sup>

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<sup>109</sup> Ibid, at 627.

<sup>110</sup> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>111</sup> “Indeed, the central thesis of the root article by Warren and Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 196 (1890), was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses”. See: Ibid, at 420.

<sup>112</sup> Warren and Brandeis have pointed out some general rules which developed under the law of slander and libel, the law of literary and artistic property: “1. The right to privacy does not prohibit any publication of matter which is of public or general interest. 2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel. 3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage. 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent. 5. The truth of the matter published does not afford a defence. 6. The absence of “malice” in the publisher does not afford a defence”. For more information see: Warren, above n 81, at 214-8.

<sup>113</sup> *Roberson*, above n 55.

<sup>114</sup> The Court of Appeal of New York held that: “...a “right of privacy” -- in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness and no inconsiderable ability in the *Harvard Law Review* (Vol. IV, page 193) in an article entitled, ‘*The Right of Privacy*’ ”. See: *Roberson*, above n 55, at 443.

<sup>115</sup> *Adair v. United States*, 208 U.S. 161 (1908).

<sup>116</sup> Konvitz, above n 9, at 279-80.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

According to Ruebhausen & Brim, while the "right to be let alone" was expounded by the scholars and supported by the judges, the right to share and the right to communicate also need similar regards and considerations since they are a need in social life.<sup>119</sup>

## 5. William Prosser

William Prosser is much well-known by his proposed privacy torts. Prosser has classified 'privacy' cases under four torts. In his famous article "*Privacy*" in 1960,<sup>120</sup> he explained four distinct torts as follows:

1. Intrusion: intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. Private Facts: public disclosure of embarrassing private facts about the plaintiff;
3. False Light: publicity which places the plaintiff in a false light in the public eye; and
4. Appropriation: appropriation for the defendant's advantage, of the plaintiff's name or likeness.<sup>121</sup>

Prosser has proposed these torts by investigation and analysis of judicial cases. In fact, he has categorized the invasion of four distinct interests having a common component, named as 'privacy'.<sup>122</sup> However, it was argued that the common factor among these torts is invasion of the plaintiff's right to be let alone.<sup>123</sup> Moreover, most of the American States recognized the privacy right through legislations or judgments by which a tort action is permitted for at least one of the features of privacy right.<sup>124</sup> Parent has criticized him as the second tort, "public disclosure of embarrassing private facts about the plaintiff" is defensible if it contains undocumented personal information, the first may encompass privacy issue, but the third and fourth torts are matters of the law of defamation and the law of property respectively.<sup>125</sup>

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<sup>119</sup> Ruebhausen, O. M., & Brim, O. G. (1965). Privacy and behavioral research. *Columbia Law Review*, 65(7), at 1189.

<sup>120</sup> Prosser, W. L. (1960). Privacy. *Cal. L. Rev.*, 48(3).

<sup>121</sup> *Ibid*, at 389.

<sup>122</sup> *Elison*, above n 3, at 5.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid*.

<sup>125</sup> Parent, W. A. (1983). Recent work on the concept of privacy. *American Philosophical Quarterly*, 20(4), at 348.

Richards and Solove while calling the Prosser as “law's chief architect”,<sup>126</sup> argued that he has centered the privacy right and prior to him, the privacy was progressed slowly.<sup>127</sup> However, they criticized him under some grounds. Prosser's privacy torts are narrow and weak to adapt to upcoming new situations like cyberspace issues,<sup>128</sup> although he influenced the courts to apply his recommended torts of privacy.<sup>129</sup> They discussed the critics to the Prosser’s privacy torts as they are not able to provide remedies and redress,<sup>130</sup> and unable to adapt to the cases arising from the Information Age.<sup>131</sup>

Professor Bloustein has written an article to examine the Prosser’s notion of privacy torts. In the famous referred essay of ‘*Privacy as an Aspect of Human Dignity: an Answer to Dean Prosser*’ that published in 1964, he phrased the “dean of tort scholars” to address the Prosser. According to him, the modern right to privacy developed by the Prossers’ analysis of the torts.<sup>132</sup> He explained that the Prossers’ paper was comprehensive, but it just repudiated the Warren and Brandeis since he suggested the privacy as a dependent value.<sup>133</sup> Prosser made mistake in his theory which necessitates a correct alternative theory.<sup>134</sup> The tort of privacy which involves "insult to human dignity and individuality" can be recognized from other torts through the “the means used to perpetrate the wrong”.<sup>135</sup>

Bloustein argued that the Prossers’ understanding of the privacy is just a shell of something that has claimed to be. It is application of the traditional legal rights instead of a modern one.<sup>136</sup> He challenged Prosser on the ground that his theory is merely a new style of doing “old tort” not a “new tort”, added that if Prosser is correct, then what we assume as privacy is a dependent entity since it will be a compound of the values like “protecting mental tranquility, reputation and intangible forms of property”.<sup>137</sup> Although the Prosser’s torts are not flawless, they are practical

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<sup>126</sup> Richards, above n 87, at 1888.

<sup>127</sup> Ibid, at 1904.

<sup>128</sup> Ibid, at 1887.

<sup>129</sup> Ibid, at 1890.

<sup>130</sup> Ibid, at 1889.

<sup>131</sup> Ibid, at 1890.

<sup>132</sup> Bloustein, above n 42, at 963.

<sup>133</sup> Ibid, at 962.

<sup>134</sup> Ibid, at 964.

<sup>135</sup> Ibid, at 1003.

<sup>136</sup> Ibid, at 965.

<sup>137</sup> Ibid, at 966.

and predictive.<sup>138</sup> In fact, these four torts motivated the application of privacy right in the tort law.<sup>139</sup> Prosser's attempt was a translation of Warren and Brandeis to fit the USA legal system.<sup>140</sup>

## 6. Alan Furman Westin

According to Jeffrey,<sup>141</sup> after Louis Brandeis, Westin was the most important privacy researcher.<sup>142</sup> His famous book "Privacy and Freedom" in 1967,<sup>143</sup> along with his articles, were the basis for the modern privacy laws, like privacy Act 1974.<sup>144</sup> In fact, he was the principal scholar in the USA who bridged the primary notion of privacy with new technological developments specially the computer era. The contributions of fathers of privacy analysis, Professor Allan Westin and David Flaherty to the notion of privacy even affected the working group on drafting of the OECD Guidelines during 1978-80.<sup>145</sup>

Professor Westin,<sup>146</sup> defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".<sup>147</sup> It is the demand of a person by which he decides that what kind of his personal information can be accessed by others.<sup>148</sup> He further added that it is "arena of democratic politics".<sup>149</sup> According to him, privacy as "a quality of life topic worth the best scholarship, thoughtful advocacy, and continuing attention of us all".<sup>150</sup> He has commented that privacy includes social groups and associations and a limited-temporary privacy right for

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<sup>138</sup> Schwartz, above n 88, at 1986.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Jeffrey Rosen, Professor of law at George Washington University and legal affairs editor of the *New Republic*.

<sup>142</sup> Fox, M. (2013, February 22). Alan F. Westin, Who Transformed Privacy Debate Before the Web Era, Dies at 83. *The New York Times*. Retrieved December 7, 2015, from:

[http://www.nytimes.com/2013/02/23/us/alan-f-westin-scholar-who-defined-right-to-privacy-dies-at-83.html?\\_r=2](http://www.nytimes.com/2013/02/23/us/alan-f-westin-scholar-who-defined-right-to-privacy-dies-at-83.html?_r=2)

<sup>143</sup> Ronald L. Goldfarb, reviewer of the *New Republic* magazine, called the book a "hallmark contribution to the public enlightenment". See: Langer, E. (2013, February 19). Alan F. Westin, scholar of privacy in the information ages, dies at 83. *The Washington Post*. Retrieved December 7, 2015, from [https://www.washingtonpost.com/national/alan-f-westin-scholar-of-privacy-in-the-information-ages-dies-at-83/2013/02/19/7258b28c-7aa6-11e2-a044-676856536b40\\_story.html](https://www.washingtonpost.com/national/alan-f-westin-scholar-of-privacy-in-the-information-ages-dies-at-83/2013/02/19/7258b28c-7aa6-11e2-a044-676856536b40_story.html)

<sup>144</sup> Ibid.

<sup>145</sup> Kirby, M. (2011). The history, achievement and future of the 1980 OECD guidelines on privacy. *International Data Privacy Law*, 1(1), at 10.

<sup>146</sup> Professor Alan Furman Westin was emeritus Professor of Public Law & Government at Columbia University for 40 years, former President of the Center for Social & Legal Research, editor in chief of the *Civil Liberties Review*, and publisher of *Privacy & American Business*. He was a well-known contributor of the modern privacy law who extensively written books, articles, spoke in TV and radio on privacy issues.

<sup>147</sup> Westin, A. F. (1967). *Privacy and Freedom*, New York: H: Wolff, at 7.

<sup>148</sup> Westin, above n 11, at 431.

<sup>149</sup> Ibid, at 433.

<sup>150</sup> Ibid, at 451.



processing by the government.<sup>151</sup> Westin has categorized three types of surveillance as follows:<sup>152</sup>

1. *Physical surveillance*: this includes observing individuals' acts, speech and location using listening or watching instruments without their consent;<sup>153</sup>
2. *Data Surveillance*: it denotes a data processing through collection, storage, exchange and integration of individuals and groups' data by using any data-processing system like a computer;<sup>154</sup> and
3. *Physiological Surveillance*: in this type of scientific surveillance, the techniques will use to find out the individuals' information, mostly related to health, mental and body information while the individual is not aware of revealing.<sup>155</sup>

Westin believes that culture, tradition, lifestyle, religion, economy and political system affect the dimensions of privacy and based on these factors, the need for a specific political regime is crucial in each society.<sup>156</sup> In Westin's view, the main objective of the privacy is to provide a right for individuals and associations by which they determine how and when their speech, thoughts or conduct to be publicized. He argues that privacy aims to protect versus being "turned on" when the consent is dismissed.<sup>157</sup> In fact, he believed that individuals must decide that how far their personal information can be shared, when and how can be shared and with whom.

## **7. WA Parent**

Parent,<sup>158</sup> has defined the condition of the privacy as "not having undocumented personal knowledge about one possessed by others".<sup>159</sup> He has classified the information into two categories as 'documented information' and 'undocumented information'. According to him, privacy is about "undocumented information". If the personal information becomes available to

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<sup>151</sup> Ibid, at 431.

<sup>152</sup> He provided this classification based on the prevalent technologies on his era and what he has predicted for future technologies.

<sup>153</sup> Westin, A. F. (1966). Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I--The Current Impact of Surveillance on Privacy. Columbia Law Review, 66(6), at 1005.

<sup>154</sup> Ibid, at 1010.

<sup>155</sup> Ibid, at 1014.

<sup>156</sup> Ibid, at 1018.

<sup>157</sup> Ibid, at 1050.

<sup>158</sup> Parent has written on privacy extensively and his papers received many citations.

<sup>159</sup> Parent, W. A. (1983). Privacy, morality, and the law. Philosophy & Public Affairs, 12(4), at 269.

the public through public records such as reading a report of the conviction of a person published in a newspaper years ago, then such information is called documented personal information.<sup>160</sup>

He has excluded the documented personal information in his proposed definition of privacy. In the other words, he argues that privacy is the situations of an individual in which the others do not know anything about his undocumented personal data which simply is “the absence of undocumented personal knowledge about a person”.<sup>161</sup> Hence, privacy protects access to the undocumented personal knowledge which are not available publicly. Parent ratiocinates that the definition of privacy must be familiar with its ordinary usage and while the privacy belongs to a family of values, it should define independently.<sup>162</sup> In a new fashion,<sup>163</sup> he excludes the condition of privacy from the right to privacy as a condition in which others do not have any undocumented personal knowledge of an individual.<sup>164</sup>

Parent in defining the personal knowledge stated that it includes the facts which typically people do not like to be possessed by others, but maybe accept to share with relatives, sincere friends, or professional associates.<sup>165</sup> He purposely added the ‘given society’ and ‘given time’ as two conditions of personal knowledge to indicate the fact that personal information maybe differ from one society to another and the present personal information in a society maybe lose their concern and importance after some years.

He completed this definition as he considered the undocumented information only and excluded the documented information like information of an individual in a court proceeding, official records or newspaper.<sup>166</sup> However he reserved an exception for some cases like the health information although are recorded in the file but are not public.<sup>167</sup> Although many definitions and interpretation proposed by scholars from different expertise, Parent commented that these researches are in “hopeless disarray”.<sup>168</sup> He clarified that the researches failed to consider the

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<sup>160</sup> Parent, above n 125, at 347.

<sup>161</sup> Ibid, at 346.

<sup>162</sup> Parent, above n 159, at 269.

<sup>163</sup> He remarked in his essay that: “My definition is new, and I believe it to be superior to all of the other conceptions that have been proffered when measured against the desiderata of conceptual analysis above”.

<sup>164</sup> Parent, above n 159, at 269.

<sup>165</sup> Ibid, at 270.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid, at 271.

<sup>168</sup> Parent, above n 125, at 341.

related values like autonomy, solitude and secrecy.<sup>169</sup> The Posners' view on secrecy and seclusion as a bona fide sense of privacy was objected by Parent since it just results in confusion.<sup>170</sup> He opposed Warren and Brandies theory of right to be let alone on the ground that it is too broad and has confused the privacy with other values of this family.<sup>171</sup> He also rejected the definition of privacy as 'control over information' on the ground that it is too broad.<sup>172</sup> However, Moore has criticized him since the definition of privacy will be depended to the society to decide what is documented and what is not.<sup>173</sup> Moore says that it is a non-normative or descriptive approach to define privacy.

## 8. Privacy as Control

The privacy has been defined as 'control'. Many scholars emphasize on the element of 'control' while defining privacy. For instance, it emphasizes on the control over the personal information by individuals. Parker defines 'control' is sensing others which denotes many actions like hearing, watching, smelling, tasting and touching by a person or through the use of any devices.<sup>174</sup> Moore explains that privacy is the individuals' control over the information<sup>175</sup> and generally, a right to control body and information.<sup>176</sup> He defends his definition as it includes all different submitted definitions.<sup>177</sup>

Moore's definition is the gist of control proposers as it enables individuals to have control over their personal information.<sup>178</sup> He further added that the right to privacy is about control of access to the peoples' places and use their goods.<sup>179</sup> The privacy torts offered by Prosser also comprise the control factor.<sup>180</sup> Allen Westin also pointed out the control-based definition of privacy.<sup>181</sup> The control criterion for privacy is regarded as "sense of control over what we share, and

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<sup>169</sup> Ibid.

<sup>170</sup> Ibid, at 348.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid, at 344.

<sup>173</sup> Moore, A. D. (2003). Privacy: its meaning and value. *American Philosophical Quarterly*, 40(3), at 217.

<sup>174</sup> Parker, above n 13, at 282-3.

<sup>175</sup> Moore, A. D. (2007). Toward informational privacy rights. *San Diego L. Rev.*, 44, at 812.

<sup>176</sup> Ibid, at 818.

<sup>177</sup> Ibid.

<sup>178</sup> Moore, above n 13 at 414.

<sup>179</sup> Ibid, at 425.

<sup>180</sup> Moore, above n 175, at 813.

<sup>181</sup> Bryce, J., & Klang, M. (2009). Young people, disclosure of personal information and online privacy: Control, choice and consequences. *Information Security Technical Report*, 14(3), at 161.

with whom, that is at the heart of the notion of privacy”.<sup>182</sup> Privacy is a kind of controlling the time and people who are allowed to see, hear, smell, taste and touch different parts of our body, voice and body products.<sup>183</sup> Also, privacy is to be considered as “the right to keep control over one’s own information and determine the manner of building up one’s own private sphere”.<sup>184</sup> As a result of intrusive technologies and sophisticated data collection systems, the right to privacy has shifted from an expectation of being "let alone," to a desire to control the flow of personal information”.<sup>185</sup> Hence, if a person loses the control over his information, then his privacy is invaded.

The control criterion again was objected by other scholars like Schoeman mostly on the ground that if a person loses the control, it does not result in loss of privacy. In the other words, in the absence of control, the individual may still have privacy. It is argued that limiting privacy to the control of information is a narrow concept.<sup>186</sup> Moreover, the mental control of an individual is not part of his privacy.<sup>187</sup> Parker opposed this definition on the grounds that:

1. it is too narrow, since does not include data collection and investigation by the government when the individual did not inform. In this situation, there is no loss of control, but the privacy is invaded; and
2. the control criterion is more instrumental to reserve a higher honor, while privacy merits its reputation since it is significant to employ rights and freedom.<sup>188</sup>

According to Parent, the control element associated with the privacy is a confusion with other related values.<sup>189</sup> He objected the definition of privacy as control over the information which defended by some scholars like the Fried, Parker and Gross by providing an example and question. He added that when a person voluntarily discloses his undocumented personal

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<sup>182</sup> Van Swaay, above n 36, at S149.

<sup>183</sup> Parker, above n 13, at 281.

<sup>184</sup> Rodotà, S. (2009). Data protection as a fundamental right Reinventing Data Protection? (pp. 77-82): Springer, at 78.

<sup>185</sup> Basho, K. (2000). The licensing of our personal information: Is it a solution to Internet privacy? California Law Review, 88(5), at 1509.

<sup>186</sup> Parker, above n 13, at 280.

<sup>187</sup> Ibid, at 281.

<sup>188</sup> Ibid, at 283-4.

<sup>189</sup> Parent, above n 159, at 271.

information to his friend voluntary, he is protecting his privacy or in fact, he gives up his privacy?<sup>190</sup>

## 9. Classification of privacy

Clayton and Tomlinson have categorized the privacy issues as follows:<sup>191</sup>

(a) *Misuse of personal information*: A right to restrict the use of “personal” or “private” information about an individual is central to the right to privacy. The information which is held by public bodies is open to abuse. Privacy issues arise when the release of the information is uncontrolled;

(b) *Intrusion into the home*: The right of the individual to respect for the home is fundamental to any notion of privacy. Unreasonable searches and seizures trigger privacy issues;

(c) *Photography, surveillance and telephone tapping*: The “private sphere” would not be invaded by physical intrusion; and

(d) *Other privacy rights*: There is a range of other privacy rights which covers all forms of interference in the “private sphere” including appropriation of a person’s image, interference with private sexual behavior and questions of the sexual identity of transsexuals.

However, the main and most referred classification of privacy is categorization of privacy into four general categories namely: (a) Informational Privacy, (b) Bodily Privacy, (c) Privacy of Communications; and (d) Territorial Privacy.<sup>192</sup> Information privacy is equivalent to the phrase data protection and data privacy.<sup>193</sup> It is comprised of the individual rights’ to control his/her information in the process of collection, processing and storage.

Bodily Privacy involves the physical protection of individuals against intrusion like testing of genetic, drug and cavity searches.<sup>194</sup> Privacy of Communications concerns the privacy of individuals’ communication. It includes any types of communicating such as telephone calls, mail, e-mail and using new skills like WhatsApp, Telegram. The territorial privacy governs the privacy and security of the places like house, public areas.

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<sup>190</sup> Ibid, at 273.

<sup>191</sup> Clayton, R., & Tomlinson, H. (2009). *The law of human rights* (2nd ed.): Oxford: Oxford University Press, at 1005.

<sup>192</sup> Munir, A. B. and S. H. M. Yasin (2010). *Personal Data Protection in Malaysia, Law and Practice*. Malaysia, Sweet & Maxwell, at 3-4.

<sup>193</sup> Ibid, at 4.

<sup>194</sup> Ahmad, above n 53, at cxxvi.

## 10. Reductivists Approach

Moore has quoted the Schwartz important paper on social psychology of privacy which provided universal bases for privacy.<sup>195</sup> He added that Schwartz considered privacy as group preservation and also maintenance of status divisions, eke permits digression whilst maintaining social establishments.<sup>196</sup> He argues that privacy is much depends on societies and cultures.<sup>197</sup>

There are different philosophical views propounded by jurists to define privacy. Moore categorized two accounts of privacy as 'Reductionist' and 'Non-Reductionist'.<sup>198</sup> The reductionist believe that privacy is obtained from other rights like right to life, liberty or property. In a simple language, it recognizes the privacy indirectly under the related rights. However, non- reductionist are of the view that privacy is a distinct right, although it has relationships with other fundamental rights.<sup>199</sup>

## 11. Common law Perspectives

Usually the privacy related cases in the common law legal systems especially in UK, are rooted in the principles of breach of confidence, nuisance, defamation and trespass.<sup>200</sup> However, there is a legal question as to whether this traditional approach in protecting the right to privacy can adequately respond the new arising complex privacy issues? Hence, upon development of data protection laws and also public demand, the courts tried to recognize a new tort of privacy.

Kacedan in 1932 suggested that the privacy right to be recognized as a common law right. Referring to the experience of the New York Civil Rights, he argued that the mere legislation is inadequate and incompetent to protect individuals' privacy right since this issue has quiet numerous situations. He added that the rules enacted by the legislature are hard and rigid, while the judgments can be flexible.<sup>201</sup> As explained earlier, Posner has analyzed the torts of privacy under the Common Law. According to him, the tort of privacy under the Common Law legal system has been motivated by the Warren and Brandeis paper, though the law has evolved much

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<sup>195</sup> Moore, above n 175, at 816-7.

<sup>196</sup> Ibid.

<sup>197</sup> Moore, above n 173, at 215.

<sup>198</sup> Moore, above n 13, at 413.

<sup>199</sup> Ibid.

<sup>200</sup> Yusoff, Z. M. (2011). The Malaysian Personal Data Protection Act 2010: A Legislation Note. NZJPIIL, 9, at 120.

<sup>201</sup> Kacedan, B. W. (1932). The Right of Privacy. *Boston University Law Review*, 12, at 646.

different from what they suggested.<sup>202</sup> He argues that the torts of privacy regard the private invasion rather than governmental.<sup>203</sup>

As stated, the *Pavesich* case,<sup>204</sup> was the first recognition of a common law privacy right for the first time in the USA.<sup>205</sup> In case of *kaya v Robertson*,<sup>206</sup> in 1990, Bingham LJ held that there is no common law tort or any statute in order to protect individuals' privacy.<sup>207</sup> In 2001, Sedley LJ in *Douglas v Hello! Ltd*,<sup>208</sup> claimed the recognition of right to privacy under the UK legal system, but was opposed by the other members of the Appeal Court.

The trend toward recognition of the right to privacy was highly affected by the enactment of UK human Rights Act 1998 which required the courts to consider the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>209</sup> In case of *Wainwright v Home Office*,<sup>210</sup> the House of Lords held that there is no tort of invasion of privacy under the Common Law. One year later in 2004, again the House of Lords in *Campbell v MGN*,<sup>211</sup> held that there is no cause of action for breach of privacy in the UK legal regime. Eventually, in case of *Judith Vidall-Hall & Ors v. Google Inc*,<sup>212</sup> for the first time the court has recognized the right to privacy under the common law legal system.

Richards and Solove proposed some approach in order to address the privacy challenges through the tort law:

1. the outdated concept of privacy must change through tort law. The law should recognize the privacy toward a new understanding of the preferment between “purely public and purely private”. Hence, the tort law must regard the social grounds in which individuals exchange their data, and furthermore to extend and enlarge the tort of breach of confidence;
2. a greater advanced conception of the harm is needed by tort law; and

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<sup>202</sup> Posner, R. A. (1978). Right of privacy, the. Ga. L. Rev., 12(3), at 409.

<sup>203</sup> Ibid.

<sup>204</sup> Pavesich, above n 101.

<sup>205</sup> Elison, above n 3, at 5.

<sup>206</sup> (1990) 19 IPR 147.

<sup>207</sup> Ibid, at 154.

<sup>208</sup> *Douglas v Hello! Ltd* [2001] QB 967.

<sup>209</sup> Munir, above n 192, at 17.

<sup>210</sup> [2003] 3 WLR 1137.

<sup>211</sup> *Campbell v MGN Ltd*, [2004] 2 AC 457.

<sup>212</sup> [2014] EWHC 13 (QB).

3. a well perceive of the relation between privacy tort remedies and free speech to be developed by the courts.<sup>213</sup>

They extended that the modern courts regard the free speech and privacy in contrast which affecting by Prosser.<sup>214</sup>

## 12. Privacy, a Human Right Perspective

Right to privacy as a fundamental right principle, is normally safeguarded under the human right instruments both regionally and internationally. The most important international document in which the right to privacy has been addressed is the Universal Declaration of Human Rights (UDHR).<sup>215</sup> On that time, the recognition of right to privacy as a constitutional principle was not popular. According to Article 12 of the UDHR, the right to privacy is considered as a fundamental right of human.<sup>216</sup> Under this Article, all citizens in each country, have to be protected by law against intrusion into their bodily, property and information privacy. Subsequently, affecting by the Article 12 of the UDHR, the right to privacy was incorporated under Article 17 of the International Covenant on Civil and Political Rights (ICCPR),<sup>217</sup> with almost same wordings.<sup>218</sup> ICCPR emphasizes on the protection of the right to privacy for citizens in each country.<sup>219</sup> It states that these fundamental rights derive from the inherent dignity of

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<sup>213</sup> Richards, above n 87, at 1922-23.

<sup>214</sup> Ibid.

<sup>215</sup> Adopted by the United Nations General Assembly in 10 December 1948 at the Palais de Chaillot, Paris. It has 30 principles addressing the fundamental human rights for human beings. It is accessible at: [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

<sup>216</sup> It provides that: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

<sup>217</sup> Adopted by the United Nations General Assembly Resolution 2200A (XXI) in 16 December 1966 at New York. It came into force on 23 March 1976 and signed by the 74 members till 19 May 2016. . It lacks any judicial enforcement authority, however, a Committee is provided to consider the referred complains, but the Committee decisions are not binding. For More information see: Tomuschat, C. (2008). International covenant on civil and political rights. United Nations Audiovisual Library of International Law, United Nations, 1-4; Hoag, R. W. (2011). International Covenant on Civil and Political Rights Encyclopedia of Global Justice (pp. 544-545): Springer; Quigley, J. (1992). International Covenant on Civil and Political Rights and the Supremacy Clause, The DePaul L. Rev., 42, 1287. The Covenant text is accessible at: <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

<sup>218</sup> Article 17 clearly recognized the right to privacy: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. everyone has the right to the protection of the law against such interference or attacks".

<sup>219</sup> Bygrave has examined Article 17 of the ICCPR along with Article 8 of the ECHR with special reference to the Case laws. For more information see: Bygrave, L. A. (1998). Data protection pursuant to the right to privacy in human rights treaties. International Journal of Law and Information Technology, 6(3), 247-284.



human beings.<sup>220</sup> Furthermore, the privacy right also can be traced in Article 14 of the ICCPR, however impliedly.<sup>221</sup>

The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>222</sup> also recognized the right of privacy for migrant workers and their family. Article 14 of this Convention again followed Article 12 of the UDHR in protection of migrant workers' privacy right. Article 14 specifies that migrant workers and their family have to be protected against any intrusion to their privacy, family, communication

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<sup>220</sup> The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The expression "arbitrary interference" is also relevant to the protection of the rights provided for in Article 17. In the UN Human Rights Committee has commented on Article 17 as the expression "arbitrary interference" can also be extended to interference provided under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The interference may occur by both government authorities and other individuals. The member governments to the Covenant must provide legislations in order to protect reputation and honor of citizens. Therefore individuals could protect themselves and able to ask for remedies in case of any invasion. For more information see: UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, available at: <http://www.refworld.org/docid/453883f922.html>

<sup>221</sup> Article 14 of the ICCPR specifies that: "1. all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

<sup>222</sup> Adopted by the United Nations General Assembly Resolution 45/158 in 18 December 1990. It entered into force on 1 July 2003. It is accessible at: <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>

and honor.<sup>223</sup> The United Nations Convention on the Rights of the Child (UNCRC or CRC) of 1989,<sup>224</sup> followed UDHR under Article 16.<sup>225</sup> The Convention on the Rights of Persons with Disabilities,<sup>226</sup> under Article 22,<sup>227</sup> has recognized the privacy right for individuals with specific conditions.<sup>228</sup> This Convention is the newest human right treaty has been adopted in 2006 by the United Nations General Assembly and entered into force 3 May 2008.<sup>229</sup>

Article 18 of the Organization of the Islamic Conference (OIC) Cairo Declaration on Human Rights in Islam (CDHRI) 1990,<sup>230</sup> has recognized right to privacy.<sup>231</sup> The CDHRI is a compilation of some of principles provided under the international human rights treaties stated above along with the human right principles stated in Quran. However, Article 18 is mostly affected by the Quranic verses which will discuss in next section. The preamble of the CDHRI specifies that freedom, human rights and right to life are protected and supported in Islam. It has emphasized the role of faith in order to reach these fundamental rights.<sup>232</sup>

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<sup>223</sup> Article 14 states that: "No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks".

<sup>224</sup> Adopted by UN General Assembly Resolution 44/25 in 20 November 1989 and entered into force on 2 September 1990. It is accessible at: <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>

<sup>225</sup> Article 16: "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. 2. The child has the right to the protection of the law against such interference or attacks."

<sup>226</sup> The Convention on the Rights of Persons with Disabilities includes a Preamble and 50 Principles. The text is accessible at the UN website: <http://www.un.org/disabilities/convention/conventionfull.shtml>

<sup>227</sup> Under Article 22 as: "1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others".

<sup>228</sup> The Committee on the Rights of Persons with Disabilities (CRPD) under the UN, is charged with the duty of monitoring compliance with the Convention on the Rights of Persons with Disabilities.

<sup>229</sup> The Convention on the Rights of Persons with Disabilities including 50 Articles is accessible at: <http://www.un.org/disabilities/convention/conventionfull.shtml>

<sup>230</sup> It was adopted by the Organization of the Islamic Conference (OIC) member states in 5 August 1990 at Cairo, Egypt. It is accessible at: <http://www.oic-oci.org/english/article/human.htm>

<sup>231</sup> Article 18 provides that: "(a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property. (b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference. (c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted".

<sup>232</sup> Preamble of the OIC Cairo Declaration on Human Rights in Islam (CDHRI) provides that: "In contribution to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah. Convinced that mankind which has reached an advanced stage in

The above mentioned instruments are the international endeavor with respect to protection of the right to privacy. However, privacy is protected under the regional instruments as well.

Prior to the UDHR, the American Declaration of the Rights and Duties of Man,<sup>233</sup> is the first treaty in the world, recognized human rights principles Under Article V.<sup>234</sup> EU gave particular significance to the recognition and protection of all aspects of privacy through different regulations and authorities.<sup>235</sup> Article 8 of the ECHR on “Right to respect for private and family life”,<sup>236</sup> specifies the individuals’ right to privacy.<sup>237</sup> ECHR in line with Article 12 of the UDHR recognized the privacy right for individuals. The principle is forbidden of invasion of this right by the government unless there are legal excuses. The breach of privacy right is allowed only if the law permits to protect and maintain a democratic society. Article 8 has figured 6 reasons the law can resort to restrict the right to privacy.

The Charter of Fundamental Rights of the European Union (EUCFR) 2010, which is a modified version of the Charter of 7 December 2000, under Article 7 on “*Respect for private and family life*” provides that: “*Everyone has the right to respect for his or her private and family life, home and communications*”. The EUCFR provides that the EU courts “to reconstruct data protection to a fully-functional fundamental right that adds something to privacy”.<sup>238</sup>

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materialistic science is still, and shall remain, in dire need of faith to support its civilization as well as a self-motivating force to guard its rights”.

<sup>233</sup> American Declaration of the Rights and Duties of Man or “Bogota Declaration” is the first international document on human rights adopted in Bogotá, Colombia, in April 1948. It is accessible at:

<http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>

<sup>234</sup> Article V of this Declaration on Right to protection of honor, personal reputation, and private and family life clarifies that: “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life”.

<sup>235</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union (EUCFR) 2010, the European Commission of Human Rights, and the European Court of Human Rights are some of the endeavors to address the importance and recognition of the right to privacy as a distinct value in the EU.

<sup>236</sup> Article 8 explains that” “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

<sup>237</sup> It was drafted by 10 members of the Council of Europe in 1950 and entered into force on 3 September 1953. To date, 47 members of the Council of Europe are parties to it. The European Court of Human Rights (ECtHR) was established through this Convention. The text of the convention had been amended several times. However the latest text from the date of its entry into force on 1 June 2010 is accessible at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

<sup>238</sup> Tzanou, M. (2013). Data protection as a fundamental right next to privacy? ‘Reconstructing’ a not so new right. International Data Privacy Law, 3(2), at 99.

Article 11 of the American Convention on Human Rights,<sup>239</sup> on *Right to Privacy* states,<sup>240</sup> Article 10,<sup>241</sup> of Declaration of Principles on Freedom of Expression in Africa 2002,<sup>242</sup> on *Protecting Reputations* are another examples. African Charter on Human and People's Rights did not include any provision on recognition of right to privacy.<sup>243</sup> Although the Charter did not address the right to privacy directly, however, there are some provisions in which, some aspects of privacy are protected like the right to integrity of the person (Article 4),<sup>244</sup> and right to liberty and the security of the person (Article 6)<sup>245</sup>. However Blume argues that human rights principles concern the citizens' relationship with the government. If considering privacy as a human right principle, the individuals' conflict with private sectors remains unsolvable.<sup>246</sup>

### 13. ISLAM and Privacy

Islam has recognized and regulated the "God Given Rights",<sup>247</sup> what is now called the fundamental human rights.<sup>248</sup> Human rights under the Islamic Jurisprudence is called "huquq al –

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<sup>239</sup> The American Convention on Human Rights or Pact of San José was adopted by Organization of American States (OAS) on 22 November 1969 and entered into force on 18 July 1978. It is accessible at:

[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

<sup>240</sup> "1. Everyone has the right to have his honor respected and his dignity recognized; 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; 3. Everyone has the right to the protection of the law against such interference or attacks".

<sup>241</sup> Article 10 has provided: "10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news".

<sup>242</sup> The Declaration is accessible at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>

<sup>243</sup> Adopted in 27 June 1981 and came into force in 21 October 1986. The Charter is accessible at: <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>

<sup>244</sup> African Charter on Human and People's Rights under Article 4 states that: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

<sup>245</sup> Article 6 of the African Charter on Human and People's Rights specifies that: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

<sup>246</sup> Blume, P. (1991). An EEC Policy for Data Protection. *Computer/Law Journal*, 11(3), at 406.

<sup>247</sup> Said, A. A., Abu-Nimer, M., & Sharify-Funk, M. (2006). *Contemporary Islam: dynamic, not static*: Routledge, at 38.

<sup>248</sup> Islam protects human rights such as right to life, right to basic necessities of life, right of property, right to equality before the law, right to access to justice, right to freedom of movement, freedom of religion, freedom of association and assembly, right of choice, freedom of expression, right to revolt, right to honor and dignity. These fundamental rights are categorized under Basic Rights: which protects all human beings, Muslims and non-Muslims; and Special Rights that assigned to different categories of individuals according to their position and status. This category also includes Muslim and non-Muslims. For more information on the definition and legal effects of each right under Islam. For more information For more information on the definition and legal effects of each right under Islam. For more information see: Hayat, M. A. (2007). *Privacy and Islam: From the Quran to data protection in Pakistan*. *Information & Communications Technology Law*, 16(2), at 143; Muhammad, M. Z., Amboala, T., & Ali, S. F. M. (2011). An overview of cyber laws in Malaysia from islamic point of view. Paper presented at the 5th International Conference on Cyberlaw and Information Security Malacca, Malaysia, at 3; Berween, M. (2002). *The Fundamental Human Rights: An Islamic Perspective*. *The International Journal of Human Rights*, 6(1), 61-79; Ansari, A. H., & Salman, R. (2011). *Human Rights, Human, Dignity and Justice: the Islamic Perspective*. *Journal of Islamic Law Review*, 7(1), 91-124.

insan”,<sup>249</sup> and is evident in the verses of the Holy Quran, the Sunnah and also Islamic Jurisprudence.<sup>250</sup>

Breween argues that the right to privacy is the “most precious freedoms” from the Islamic perspective.<sup>251</sup> He explained the categories of privacy under Islamic Jurisprudence.<sup>252</sup> The right to privacy under Islamic Jurisprudence is for an Islamic society which includes Muslims and Non-Muslims citizens.<sup>253</sup> Islam protects Human Rights such as Right to Life, Right to Basic Necessities of Life, Right of Property, Right to Equality before the Law, Right to Access to Justice, Right to Freedom of Movement, Freedom of Religion, Freedom of Association and Assembly, Right of Choice, Freedom of Expression, Right to Revolt, Right to Honor and Dignity.<sup>254</sup> These Fundamental Rights which can be categorized under two types:<sup>255</sup>

1. Basic Rights: which protects all human beings, Muslims and non-Muslims; and
2. Special Rights: that assigned to different categories of individuals according to their position and status. This category also includes Muslim and non-Muslims.

Human rights in Islam are an integral part in completion of faith,<sup>256</sup> and the remedies will apply in case of breach.<sup>257</sup> The privacy of premises to do not enter the house of others with no permission,<sup>258</sup> in order to protect properties’ privacy and the privacy of individuals who live in the premises, and to enter the houses from the main entrance to respect privacy and honor of the residents, the privacy of property (whether private or public) to not expend others' wealth through unfair means are some of Islamic privacy protections.<sup>259</sup> Moreover the *Amanat* or things deposited to you in the form of trust, must keep in favor of the owner and to give back those

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<sup>249</sup> Ansari, above n 248, at 95.

<sup>250</sup> Quran and Sunnah are two primary and main sources of Islam.

<sup>251</sup> Breween, above n 248, at 72.

<sup>252</sup> Breween explains the categories of privacy under Islamic Jurisprudence in order to define it in the following word: “1) The right for every individual to be left alone in their private life; 2) the right to be free from governmental surveillance and intrusion; 3) the right to not to have an individual’s private affairs made public without their permission; and, 4) the protection of persons, and places where they live, from searches and seizures; 5) the protection of knowledge and thoughts from compulsory self-incrimination; 6) This also means that government has no business regulating the intimate behaviour of individuals and, and this supports the right to keep all personal information confidential”, *Ibid*.

<sup>253</sup> For more information see: Hayat, above n 248, at 143; Muhammad, above n 248, at 3.

<sup>254</sup> For more information on the definition, features and legal effects of each right under Islam refer to: Breween, above n 248; Ansari, above n 248.

<sup>255</sup> Ansari, above n 248, at 97.

<sup>256</sup> Tahir, A. A True Vision of Human Rights in Islam. *AL-ADWA*, 40(28), at 16.

<sup>257</sup> *Ibid*, at 17.

<sup>258</sup> Verses: Al-Nur: 28; Al-Nur: 28; Al-Baqarah: 189.

<sup>259</sup> Verses: Al-Baqarah: 188; Al-Anfal: 27; Al-Nisa: 58; An-Nisa: 29;

thing were entrusted to their owners. Furthermore, protecting privacy of Individuals by the governors,<sup>260</sup> avoiding assumption (since some assumptions are sin),<sup>261</sup> forbidden of spying and search on other people,<sup>262</sup> which may include all types of privacy such as privacy of information, reading others email, letter, financial statement, calls,<sup>263</sup> privacy of family members,<sup>264</sup> forbidden of defamation whether by speaking, writing or any action,<sup>265</sup> Hijab or women dressing to protect the private parts of body,<sup>266</sup> are another samples of right to privacy under Islamic law.

#### 14. Conclusion

During the time, the concept of privacy has experienced significant changes affecting by the time and place circumstances. It is somehow elusive to define the concept of privacy. Lawyers feel it too difficult to define the privacy.<sup>267</sup> Lack of a universal definition for the term 'privacy' even a standard one within a country, reflects its wide coverage, cultural and religious based, time-based and also an individual based entity while indicating its importance and concern. At the present time, there is not a unique, universally accepted definition of privacy. Even in the absence of a privacy definition in the related legislations especially data protection Acts is evident.<sup>268</sup> Privacy includes a wide range of rights like right to be let alone, and right over personal information (data protection).

From the above mentioned literature review on the notion and concept of the privacy, it can be concluded that privacy is a domain or territory in which a person wishes to be free from others access. Privacy includes a wide range of rights like the right to be let alone and right over personal information (personal data protection). It is very important that the privacy is a natural desire of human being while numerous and different explanations of its nature and concept have been proposed. This diversity of perspectives arises from the multidisciplinary nature of privacy from one side and the effects of different variables on privacy like culture, religion, policy, time

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<sup>260</sup> Hayat, above n 248, at 140.

<sup>261</sup> Verse: Al-Hujurat: 12.

<sup>262</sup> The verbs 'spy' and 'search' indicate that the investigation and observing the private, secrets and confidential matters of the others are sins and therefore are forbidden since violate the right to privacy.

<sup>263</sup> Tahir, A. (2012). Right to Life as a Human Right, (A Comparative Study of Sharia'h and Law). *Al-Idah*, 25, at 44-45.

<sup>264</sup> Verses: Al-Nur: 58; Al-Nur: 59.

<sup>265</sup> Verse: Al-Hujurat: 11.

<sup>266</sup> Verses: Al-Nur: 30 and 31; Al-Ahzab: 35 and 59.

<sup>267</sup> Tzanou, above n 238, at 88.

<sup>268</sup> Bygrave, above n 86, at 278.

and place. However, the theoretical underpinning on privacy shows that privacy is a natural desire of human being to be away from unauthorized access by third parties.

Basically the right to privacy aims to protect the dignity, honor and esteem of the individuals. Privacy tries to safeguard against unwarranted publicity. Tarnishing these fundamental factors of the human personality will result in serious damages which is not easily compensable. In this situation, the privacy acts<sup>269</sup> mentally provide confidence for individuals and in practice, prevent any loss or damage to them. Privacy is directly connected with human dignity. Respect for the human dignity, will result in the sublimation of an individual's personality, flourishing the inner talents and enhance the sense of the mental security in the society.

It can be summarized that privacy is a multidisciplinary domain, having an easy concept but also difficult to define. Privacy is an individual tendency, wish and natural need to be away from others' control and surveillance. This is a natural demand of individuals regardless of time, place, nationality, race or religion. The gist of all these different definitions, theories and ideas is that privacy is the physical as well as impalpable limits of an individual which likes to be free from others intrusion.

### **Acknowledgment**

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<sup>269</sup> Privacy acts is defined in Black's Law Dictionary as: "Those federal and state statutes which prohibit an invasion of a person's right to be left alone (e.g. to not be photographed in private), and also restrict access to personal information (e.g. come tax resume, credit reports); and overhearing of private communications (e.g. electronic surveillance). Some provide for equitable relief in the form of injunction to prevent the invasion of privacy while others specially call for mOoney damages and some provide for both legal and equitable protection". See: Campbell, above n 74, at 1075.

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