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Right To Privacy Vis-À-Vis Cyber Law: National and International Perspective.

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ABSTRACT: *The demarcating line between one's Right to Privacy and one's access to information is a debate that is wildfire today. We all know that right to privacy is a violable human right. The quest for privacy is an inherent instinct of all human beings. As a matter of fact it is a natural need of an individual to establish individual boundaries with almost perfect seclusion it is the ability of an individual or group to seclude them or information about themselves and thereby reveal them selectively. It is a wrongful intrusion into a person's private activities by other individual (s) or by the government. Moreover with the advancement of information and technology things have become more complicated and those issues needs immediate attention. It is now a very common phenomenon that the power, capacity and speed of information technology has improved beyond imagination and is constantly accelerating rapidly. The extent of privacy invasion or certainly the potential to invade privacy has also increased correspondingly. Cyber law revolves around the issues laws relating to Cyber crimes, electronic & digital signatures, intellectual property, data protection and privacy. The researcher for the purpose of this article will solely contratrte on the specific issue of privacy and its relationship with cyber laws in India. The researcher will try to demarcate the line of control between the two and will also try to maintain a fair balance between the privacy rights of an indivijual and the data controllers.*

Key Words: Right to Privacy, Cyber Laws, Human rights, Technology, Digital Signatures etc

INTRODUCTION

The world today seems to be a village and thus with the development of internet and computer applications, suddenly everything seems to be possible and withinn reach. It is nothing but a global technology readily available for everyone by just a click. Such a convergence is leading to the elimination of technological barriers between systems. The Information Technology has changed the way business was being conducted. Now it is done electronically – without the use of paper.¹ Modern information systems are increasingly interoperable with other systems, and can mutually exchange and process different forms of data, multi-media fuses many forms of transmission and expression of data and images so that information gathered in a certain form can be easily translated into other forms.

It's completely a cyber world today and thus it becomes very pertaint to understand analyse and make the society more aware with the dynamics of Cyber Law. Cyber law is the law governing cyber space. Cyber space is a wide term and includes computers, networks, software, data storage devices (such as hard disks, USB disks, etc), the internet, websites, emails and even electronic devices such as cell phones, ATM machines, etc.² With the advent of internet and sharing of information/data has unfolded new possibilities for every person to exploit and explot. The enormous flixibility, speed and accuracy in the business and personell transactions triggers us to use and depend on this system without knowing anything or being completely aware pros and corns of it . E-commerce is not new to the world and here in India also it has been a trend and necessity as well. In this context there is often a direct clash of rights and interests about the diferrent stakeholders within and outside the system. We dont know the what to share, how to share, when to share and when to share data/information in the domain.

Conceptual Analysis

Amongst all the rights that are enshrined under the Indian Contituion, fortunately or unfortunately to define or demarcate the scope of the Right to Privacy is the most dificcult one. Before we start to discuss anything on the matter, it becomes very pertaint to highlight the very fact that privacy has no definite The term privacy is sometimes related to anonymity, the wish to remain unnoticed or unidentified in the public realm. It has no definite boundaries and has diferrent meanings for diferrent people. It means many things to many people and diferrent things in diferrent contexts.³ It is considered as a "the rightful claim of the individual to determine the

¹ Justice Ytindra Singh, *Cyber Laws*, Universal Law Publishing Co. (2013), 5th Edn. p.7

² Rohas Nagpal, *Cyber Crime and Corporate Liability*, Wolters Kluwer (India) Pvt Ltd, New Delhi, p.3

³ *Legal Dimensions of Cyberspace* edited by S.K.Verma, Raman Mittal, The Indian Law Institute, 2004, p. 198.

extent to which he wishes to share of himself with others and his control over the time, place and circumstances to communicate with others.”⁴ The word is derived from the Latin Term *privatus* meaning withdrawn from public life. It is the ability of an individual or a group to keep their lives and personal affairs out of public view, or to control the flow of information about themselves. It is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is to be communicated to others.⁵ Further it is defined as an autonomy or control over the intimacies of personal identity. Privacy requires a private enclave, where an individual is at liberty to do what he wants. In fact, the right to privacy is more of an implied obligation.⁶

A right of privacy is predicated on the belief that each human being has intrinsic value, which is valuable in and of him or herself. Respect for this belief becomes the fundamental source of all human rights. The notion of privacy embodies two kinds of conceptions. First, it can be viewed as a state of non-access to individual's physical or psychological self. Secondly, privacy can be seen as a state in which personal information about an individual is in a state of non-access from others. Thus on unifying, the definition that can be deduced is that privacy is a state of separateness from others.⁷

The concept of privacy has intertwined with itself the three broad concepts i.e. intimacy, identity and autonomy, which are basic amenities of any individual in the society.⁸ It is through these principles; any society is diverted from the egalitarian to an individualist society, where the shift is made from the society as a larger towards the individual space of any person. Every society believes in the uniqueness of the individual, his basic dignity and which in turn makes him worth a human being. Certain aspects of an individual are differentiated or are divided into series of layers consecutive circles, out of which the inner circle prescribes the ultimate secrets, those hopes, aspirations which are beyond sharing. The law of privacy was evolved to protect such emotions. The violation or any interference in the above enumerated emotions would strictly be an intrusion upon a person's solitude and seclusion or into his own affairs. The protect interest in these cases are the mental distress due to public disclosure and unnecessary harm to one's reputation.

There's a fundamental belief that under the privacy laws every person has a right to restrict his private life or others are bound to respect one's private life, unless it's repugnant to any moral, public or legal norms. The right also involves right to make choices and decisions. It also encircles within it, the concept of decency and dignity. It is a simple right which says, Right to be alone, even the government and the state are barred to violate such right without reasonable cause. It was very truly described as the most comprehensive of rights and the right most valued by the civilized man.⁹ Privacy as a 'zero relationship' between two or more persons in the sense that there is no interaction or communication between them if they so choose.¹⁰

Right to Privacy was recognized as a penumbral extension of substantive fundamental rights. Under the Indian law it is not stated as the fundamental right under Part-III of the Constitution, but it is said right is an essential ingredient of personal liberty.¹¹ The concept holds ground on the notion that certain private sphere of individual liberty will be kept largely beyond the reach of the government and the person belongs to himself and not to others living in the society. The concept of privacy is also documented by the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties.¹²

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⁴ Edward Shils, *"Privacy: Its Constitution and Vicissitudes"*, Law and Contemporary Problems 31, No. 2 (Spring 1966).

⁵ Dr. Vimlendu Tayal, *Cyber Privacy in Indian Information Technology Regime: Issues and Challenges*

⁶ Vakul Sharma, *Information Technology: Law and Practice-Cyber Law & E-commerce*, Universal Law Publishing Co. (P) Ltd., 2004

⁷ *Supra* n.4

⁸ Samuel D Warren & Louis D Brandies, *The Right to Privacy*, (1980) 4 HARV. L. REV. 193, 205

⁹ *Supra* n. 1.

¹⁰ *Olmstead v. United States*, 277 US 438 (1928).

¹¹ M.P. Jain, *Indian Constitutional Law*, 5th Edn, Reprint 2006, Wadhwa & Company Nagpur, p.453.

¹² Art 12 of UN DECLARATION OF HUMAN RIGHTS, 1948, provides; *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence not to attack upon his honour and reputation. Everyone has the right to protection of law against such interference or attack*, Art 17 of INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966).

most valued by the civilized man.¹³ Another author defines privacy as a 'zero relationship' between two or more persons in the sense that there is no interaction or communication between them if they so choose.¹⁴

In the early 1970s, countries began adopting broad laws intended to protect individual privacy. Throughout the world, there is a general movement towards the adoption of comprehensive privacy laws that set a framework for protection. Most of these laws are based on the models introduced by the Organization for Economic Cooperation and Development and the Council of Europe.

Thus the lack of a single definition should not imply that the issue lacks importance. It has been aptly observed, "in one sense, all human rights are aspects of the right to privacy."

CHALLENGES FACED

The recent use of internet has unfolded many issues which needs urgent attention. It has given the entrepreneurs and the businessman both to explore and exploit at the same time. Electronic transactions have increased thereby giving more flexibility to the users. The whole world is just a click away. The increasing sophistication of information technology with its capacity to collect, analyze and disseminate information on individuals has introduced a sense of urgency to the demand for legislation. Furthermore, new developments in medical research and care, telecommunications, advanced transportation systems and financial transfers have dramatically increased the level of information generated by each individual. Computers linked together by high speed networks with advanced processing systems can create comprehensive dossiers on any person without the need for a single central computer system. New technologies developed by the defense industry are spreading into law enforcement, civilian agencies, and private companies.

As a result of it many new forms of cyber crimes have come up very recently in the form of publishing sexually explicit materials, video voyeurism, breach of confidentiality, leakage of confidential data by different persons, e-commerce frauds, identity theft, other offensive messages through communication¹⁵ etc. According to opinion polls and other surveys concern over privacy violations is now greater than at any time in recent history. Uniformly, populations throughout the world express fears about encroachment on privacy, prompting an unprecedented number of nations to pass laws which specifically protect the privacy of their citizens. Human rights groups are concerned that much of this technology is being exported to developing countries which lack adequate protections. Currently, there are few barriers to the trade in surveillance technologies.

It is now common wisdom that the power, capacity and speed of information technology is accelerating rapidly. The extent of privacy invasion or certainly the potential to invade privacy increases correspondingly. Beyond these obvious aspects of capacity and cost, there are a number of important trends that contribute to privacy invasion: Globalisation removes geographical limitations to the flow of data. The development of the Internet is perhaps the best known example of a global technology. This convergence is leading to the elimination of technological barriers between systems. Modern information systems are increasingly interoperable with other systems, and can mutually exchange and process different forms of data, multi-media fuses many forms of transmission and expression of data and images so that information gathered in a certain form can be easily translated into other forms.

Therefore while the information technology and internet presents an unparalleled opportunity for the people of the world to facilitate, improve the quality of lives and for the betterment of the society, there is a price that needs to be paid at the same time.

INTERNATIONAL TRENDS

Legal protection for privacy existed in western countries for hundreds of years. In England, the Justice of Peace Act 1361 provided for the arrest of peeping Toms and eavesdroppers.¹⁶ The Swedish Parliament enacted the Access to Public Records Act, 1776, which required all government-held information be used for legitimate purposes. While another European country France prohibited the publication of private facts and set stiff fines for violators in 1858.¹⁷ In 1889, Norway passed a criminal code which prohibited the publication of information relating to "personal or domestic affairs".¹⁸ The UDHR, 1948 specifically protects any arbitrary interference

¹³ *Supra n. 1.*

¹⁴ *Olmstead v. United States*, 277 US 438 (1928).

¹⁵ Farooq Amir Mir, *Legal Aspects of E-commerce in India*, p.96 Bharat Law Publications

¹⁶ Justice and Peace Act, 1361 (Eng.), 34 Edw. 3, c.1.

¹⁷ Jeanne M. Hauch: *Protecting Private Facts in France; The Warren & Brandeis: Torts is Alive and Well and Flourishing in Paris*, 68 Tulane Law Review 1219 (May, 1994).

¹⁸ Juris Jon Bing: "Data Protection in Norway" (1996), available at [Http://www.jus.uio.no](http://www.jus.uio.no)

from the State to a person's right to privacy¹⁹. Similarly, International Covenant on Civil and Political Rights, 1976 (ICCPR) under Article 17 imposes the State to ensure that individuals are protected by law against "arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."²⁰

Also, European Convention on Human Rights (ECHR), guarantees the right to privacy under Article 8 of the Convention: "Everyone has the right to respect for his private and family life, his home and his correspondence."²¹ That right is, however, subject to some qualifications. Article 8(2) of the Convention provides that: 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 well-being of the country, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.

Thus, ensuring that States enact laws to protect individual's right to privacy. India has ratified the above conventions. The ratification of the Conventions mandates the State to take steps to enact laws to protect its citizens. Although, human right activists have periodically demanded that the State take adequate measures to protect human rights of the vulnerable in society, the right to privacy has received attention²².

Although there is no express right to privacy under English law – and therefore no civil action available for a purported breach of such a right – there are a number of rights that, in various ways, relate to privacy. The Human Rights Act 1998 (the "Act") incorporated the European Convention on Human Rights (the "Convention") into UK law. Article 8(1) of the Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence." So the Act and the Convention confer a right of "respect for" private life, and provide a number of reasons why a public authority would be justified in interfering with that right. Some have argued that this is tantamount to a "right to privacy" but the courts – in England, at least – have rejected that notion.

In *Campbell v. MGN*,²³ Naomi Campbell, an international supermodel brought an action against the Mirror group of newspapers claiming damages for of privacy of confidence and invasion of privacy for disclosing that she was receiving treatment for drug addiction. Campbell's claim was not that the disclosure that she had a drug problem was a breach of confidentiality, but that the obtaining and publishing of information relating to her treatment at a rehabilitation centre was in breach of confidence. The trial judge upheld her claim. The order was reversed by the Court of Appeal but subsequently restored by the House of Lords.

In USA, until 1965 the existence of an independent right to privacy or what Justice Brandies described "to be left alone" was not recognized apart from specific guarantees against compulsory self-incrimination, or statutory remedies for civil damages suffered. The bugging of Democratic Party office at Watergate added momentum to the debate as to whether an independent right of privacy existed and, if so, what it was.²⁴

It's a piece of appreciation to the American Supreme Court and the Congress who contributed a lot to define and enlarge the scope of the privacy right. In 1885, the US Supreme Court, deciding *Boyd v. United States* showed a generous attitude towards the origins and meaning of a right to privacy. The Court held privacy included prohibition against "unlawful search and seizure"²⁵. In 1920s Chief Justice Taft in *Olmstead v. United States*²⁶ gave a setback to privacy right when he upheld the obtaining of incriminating evidence through tapping of

¹⁹ United Nations. (1948). Universal Declaration of Human Rights. from <http://www.un.org/Overview/rights.html>

It states that "No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack on his honour or reputation. Everyone has the right to protection of the law against such interferences or attacks"

²⁰ [International Covenant on Civil and Political Rights, Part III Art. 17. Available at http://www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm) [Last accessed 20/04/2011].

It states "a) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to attack on his honour and reputation;"

b) "Everyone has the right to protection of law against such interference or attack"

²¹ Moreover it also states that "There shall be no interference by a public authority with the exercise of the right except such as in accordance with the law and it is necessary in democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the protection of health or morals or for protection of the rights and freedom of others"

²² Eric Barendt, *Freedom of Speech*, Oxford University Press, (2006 Ed.)

²³ (2004) UKHL 22

²⁴ Richard Clayton, Hugh Tomlison; *Privacy and Freedom Of Expression*, 2010 Edn (Oxford University Press. 2010)

²⁵ 116 US 616

²⁶ 277 US 438(1927)

telephones. Mr. Justice Brandies dissented. It took forty years to overrule Olmstead decision and recognise Brandies dissenting opinion in which he credited the framers of the constitution as having: Conferred, as against the government, the right to be left alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of individual, whatever the means employed, must be deemed to be a violation of the Fourth Amendment²⁷.

In several cases the Supreme Court recognised the right to privacy and set aside the unreasonable searches and seizures. Justice Frankfurter recognised the security of one's privacy against arbitrary intrusion by the police. In *Griswold v. Connecticut*²⁸ Justice Douglas held though the right of privacy is not specifically mentioned in the constitution, it is peripheral right similar to freedom of association which has previously been found by the court to be a right peripherally protected by the First Amendment.

INDIAN PERSPECTIVE

Article 246 (1) of the Constitution of India gives the Parliament the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List). This power of Parliament is unfettered by Article 246(2) and (3). Article 246 (2) of the Constitution of India gives the Parliament and the State Legislature the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (Concurrent List). The power of the State Legislature is subject to Article 246(1) while the power of Parliament is unfettered by Article 246(3). Article 246 (3) of the Constitution of India gives the State Legislature the exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule (State List). This power of the State Legislature is subject to Article 246(1) and (2).

"Privacy" is not a subject in any of the three lists in Schedule VII of the Constitution of India. But Entry 97 of List I states: "any other matter not enumerated in List II and List III" Thus only the Indian Parliament is competent to legislate on privacy since it can be interpreted as any other matter not enumerated in List II and List III.

Till date there is no specific enactment on Privacy. But the Constitution of India has embodied many Rights in Part III, which are called Fundamental Rights. In India there is no comprehensive or sectoral privacy legislation or any independent oversight agency²⁹ till date. Moreover even about sixty five years of enforcing the Constitution, we have failed to incorporate any express provisions which recognize the right to privacy as a fundamental right.³⁰

These are enumerated in Article 14-30 of the Constitution. From the above discussion it follows that while no legislative competence is found for the subject of Privacy, yet the Constitution of India has provided for many Rights (Fundamental Rights), which cannot be taken away by the State and are legally enforceable against the State.

At this point begins the role of the Judiciary. Judicial activism has brought the Right to Privacy within the realm of Fundamental Rights. Article 141 of the Constitution states that "the law declared by the Supreme Court shall be binding on all courts within the territory of India." Therefore, the decisions of The Supreme Court of India become the Law of the Land.

The Supreme Court of India has come to the rescue of common citizen, time and again by construing "right to privacy" as a part of the Fundamental Right to "protection of life and personal liberty" under Article 21 of the Constitution, which states "no person shall be deprived of his life or personal liberty except according to procedures established by law". In the context of personal liberty, the Supreme Court has observed "those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must strictly and scrupulously observe the forms and rules of the law".

²⁷ "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

²⁸ 381 US 479 (1965)

²⁹ Dr. Badar Ahmad, *Cyber World, Privacy and the Law, Cyber Law Cyber Crime Internet And E-Commerce*, Edited By Prof. Vimlendu Tayal, Bharat Law Publications, (2011). P. 213.

³⁰ Constituent Assembly Debates, Vol. VII p.794. During the debates in the Constituent Assembly, Mr. K.S. Karimuddin moved the following amendment (No. 512)on the lines of the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or the things to be seized".

Dr. B.R. Ambedkar, as the Chairman of the Drafting Committee despite his positive view about the amendment (No. 512) and indicating that the aforesaid amendment may find a place in the Constitution, failed to give it due consideration and consequently it failed to be incorporated which otherwise could have provided the right of privacy in the Constitution, CAD Vol. VII, p. 796

Even the fundamental right “to freedom of speech and expression” as enumerated in Article 19(1)(a) of the Constitution of India comes with reasonable restrictions imposed by the State relating to (i) defamation; (ii) contempt of court; (iii) decency or morality; (iv) security of the State; (v) friendly relations with foreign states; (vi) incitement to an offence; (vii) public order; (viii) maintenance of the sovereignty and integrity of India. Thus, the right to privacy is limited against defamation, decency or morality.

Concluding observation

At this point of time, it is very pertinent to mention that the issues relating to misuse of cyber space, insecurity and uncertainty in the electronic data protection system, and other privacy related matters have gone sky-high as it is an after effect of the very advancement of information technology. It is equally relevant to mention the very fact that the Information and Technology Act, 2000 is a necessary step taken in the right direction. However it is not foolproof and there are areas which has to be looked upon with seriousness. The IT Act Moreover, the IT Act discusses a range of themes, like digital signatures, public key infrastructure, e-governance, cyber contraventions, cyber offences and confidentiality and privacy, many individuals and multi-national companies have complaints that it does not lay down any specific data protection principles. Also, there exists no actual legal framework or authority to oversee the functioning of this act. Moreover the IT Act does not lay down anything on the protection of the intellectual property rights, domain names, cyber squatting etc. The area governing cyberspace is absolutely open to participation to all and provides an enormous scope for anonymity to all as well. Moreover issues become more aggravated in nature as it has no jurisdictional boundaries. Hence it become very necessary for the legislature to think on this issue more specifically and frame a legislation which provides a platform to overcome offences relating to information and technology like software piracy, software theft, data theft, misuse of data, making contracts with no intension to perform, pornography, commission of sexual offence, maintaining utmost confidentially and maintaining privacy (both at individual and institutional basis). The legislation desired should also aim at maintaining a balanced approach between the growth and regulation at the same time.

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