

Recognition Of Privacy As A Fundamental Right: A Study Of Indian Constitution Vis-À-Vis Australian Constitution

Siddharth Kumar Jha¹, Dr. Ashish Kumar Singhal², Prateek Tripathi³

Icfai Law School, Icfai University, Dehradun, India

siddharth.ghoghardiha@gmail.com

Abstract: Privacy is the ability of an individual to seclude themselves or a piece of information about themselves and thereby express him or herself selectively. The boundaries and content of what is considered private differ between cultures and individuals. In simple term, it is the right to be let alone or freedom from interference or an intrusion. Privacy, as it is conventionally understood, is only about 150 years old. Most humans living throughout history had little concept of privacy in their tiny communities. Sex, breastfeeding and bathing were shamelessly performed in front of friends and family. The lesson from 3000 years of history shows that privacy has usually been a back-burner priority. Let's go in the history earlier than 6000 BC where almost humans were living tribal life. The hunter-gatherer children used to sleep with their parents, either in the same bed or in the same hut, there was no privacy. Children see their parents having sex. Parents took no special precautions to prevent children from watching them having sex: they just scolded the child and asked them to cover their heads that's it. As appears from the history initially it was not a norm, then the question arises from where did it start? In the ancient age, the Greeks displayed some preference for privacy by using their sophisticated understanding of geometry while making houses. In early middle age, early Christian Saints pioneered the modern concept of privacy i.e. Seclusion. In late medieval period, the foundation of privacy was built. Moreover, In Pre-industrial age, the home becomes private and by this age, it was quite common for the wealthy to shelter themselves away in the home. In the period of 1840-1950, which is also called as gilded age, privacy became the expectation and by this time, officials began recognizing privacy as the default setting of human life. In the late 20th Century, the world was feared for privacy. By the '60s individualized phones, rooms and homes began the norm. Upon entering the office, the former Vice-President Gerald Ford assured the American people that their privacy was safe and there will be strict laws to prevent illegal invasions of privacy in government and private activities. The word Constitution means the basic document, which determines or lays down the formation of any particular state or country, together with that it also specifies the structures, the powers and the functions of the organs of the state. The constitution is important for a country because it secures the basic rights of the citizens and ensures the aims, objectives, values, and goals, which they want to secure. This paper aims at analysing the recognition of the right to privacy as a fundamental right in India and Australia. In achieving this aim, the paper will be focusing on a blend of evaluative and descriptive doctrinal research methodology and would be limiting the study solely as a comparison between the Indian and Australian Constitution. Privacy in the Context of Modern Society has emerged as the very essential element for self-development, as it allows us to make our own decisions free from any compulsion; it allows us the time and space for self-evaluation. It also allows us to maintain our own dignity to keep some aspect of our life or behaviour to ourselves and to ensure our physical and mental security by controlling the personal information shared.

[Siddharth Kumar Jha, Ashish Kumar Singhal, Prateek Tripath. **Recognition Of Privacy As A Fundamental Right: A Study Of Indian Constitution Vis-À-Vis Australian Constitution.** *Researcher* 2019;11(6):29-43]. ISSN 1553-9865 (print); ISSN 2163-8950 (online). <http://www.sciencepub.net/researcher>. 5. doi:[10.7537/marsrsj110619.05](https://doi.org/10.7537/marsrsj110619.05).

Keywords: Privacy, Right to Privacy as a fundamental right in India, the importance of Constitution, Privacy in International Law, Right to Privacy in Australia

¹Siddharth is currently a 2nd year law student at The ICFAI University, Dehradun. He is pursuing BA-LL.B (Hons.). The author can be reached at siddharth.ghoghardiha@gmail.com.

Introduction

Unlike other human rights in the international catalogue, privacy is perhaps the most difficult to define and circumscribe. The concept of privacy has roots deep in history. The Bible has numerous references to privacy, in which the story of “sons of Noah”, Genesis 9:20-27 is very relevant to the concept of privacy. In which one of the sons of Noah named Ham, saw him naked, laying inside the tent in a drunken state and when he informed about the same to his brothers i.e. rest two sons of Noah, both of them covered their eyes with cloths, and walking in backwards covered their father's body. They turned their faces to the other direction so that they would not see their father naked. When Noah awoke from his drunken state and came to know that his youngest son Ham has seen him naked, he cursed him and his upcoming generations to be the slave of his brothers and blessed the other two sons viz. Shem and Japeth with prosperity. By reading this story, we came to know how annoying is the invasion of privacy and that to recognize the other's right to privacy. There are a number of references in the Bible relating to privacy. There was also substantive protection of privacy in early Hebrew culture, classical Greece and ancient China². However, these protections were mostly focused on solitude. Definition of privacy varies according to context, environment and even individual as well.

1. Facets Of Privacy³

- Information Privacy: It involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
- Bodily Privacy: It concerns the protection of people's physical self against invasive procedure such as drug testing and genetic test etc.;
- Privacy Of Communications: It covers the security and privacy of e-mail, telephones and other forms of communications; and
- Territorial Privacy: It concerns the settling of limits on intrusion into domestic and other environments such as the workplace or public space. This includes searches, video surveillance and ID checks etc.

1.1. Privacy As Defined By Different Scholars⁴:

² Barrington Moore, privacy: studies in social & cultural history (1984)

³ <https://www.alrc.gov.au/publications/1.%20Introduction%20to%20the%20Inquiry/meaning-privacy> (last accessed on 14.03.2019 at 11:40)

⁴ Retrieved from (last accessed on 14.03.2019 at 11:47)

According to Alan Westin, author of seminal 1967 work “Privacy and Freedom” — Privacy is the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviour to others. According to Edward Bloustein, the professor of law at New York University School of Law, privacy is an interest of the human personality.

It protects the inviolate personality, the individual's independence, dignity and integrity. According to Professor Ruth Gavison, the law professor at the Hebrew University of Jerusalem, there are three elements of privacy: secrecy, anonymity and solitude. It is a state which can be lost whether through the choice of the person in that state or through the action of another person.

The Calcutt Committee in the UK in its first report on privacy, defined privacy as the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by the publication of information.⁵

This paper will be focusing on recognition of privacy as a fundamental right in India and Australia as well as the internationalization of right to privacy. For this purpose, the paper has been divided into three parts containing three research questions in total. The first part of the paper will deal with privacy in India along with its emergence, precedential trend as well as the challenges relating to privacy and future roadmap in India. The second part will deal with privacy in Australia along with its emergence, precedential trend as well as challenges relating to privacy and future roadmap in Australia. The third part would be dealing with the internationalization of right to privacy and its future trend, which will consist of international instruments relating to the right to privacy, issues relating to privacy in cyberspace, threats to privacy and privacy as a catalyst or a factor resisting human development.

I. The Concept of Privacy in Indian Scenario

A. The Emergence of Right to Privacy in India

In the earlier times in India, the law would give protection only from physical or tangible dangers and protection of the same was considered the right to life. Gradually, it was realized that not only the physical security was required, but also the security of the spiritual self as well as of his feelings, intellect was required. Now the right to life has expanded in its

⁵ Report of The Committee on Privacy & Related Matters, Chairman David Calcutt QC, 1990, Cmnd. 1102, London: HMSO page 7.

scope and comprises the right to be let alone and the right to liberty secures the exercise of civil privileges.⁶

The constitution does not grant in specific and express terms any right to privacy as such. Right to privacy is not enumerated as a fundamental right in the Indian Constitution. However, such a right has been culled by the SC from article 21 and several other provisions of the constitutions. This strategy adopted by the SC with a view to expand the ambit article 21 and to imply certain rights therefrom, has been to interpret article 21 along with international charters on human rights.

The court has implied the right of privacy from article 21 by interpreting it in conformity with article 12 of the UDHR, 1948 and article 17 of the ICCPR, 1966. Both of these documents provide for the right to privacy.

For the first time as early as 1963, in Kharak Singh case⁷, a question was raised whether the right to privacy could be implied from the existing fundamental right, such as articles 19(1) (d), 19(1) (e) and 21. The majority of judges participating in the decision said of the right to privacy that "Our Constitution does not in terms confer any like constitutional guarantee. On the other hand, the minority opinion (Subba Rao J.) was in favour of inferring the right to privacy from the expression 'personal liberty' in article 21.

The dissenting opinion of Subba Rao J.:

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements but also free from encroachments on his private life. It is true our constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life."

However at a later stage, the judiciary has realized the significance of the right to privacy and that it is one of the facets of the right to life and it found that the word life in article 21 does mean a mere animal existence rather it includes all those aspects which are going to make once life meaningful. It is evident from the examples of the cases viz. from *Govind Vs State of MP*, *R. Rajagopal Vs State of TN* and *PUCL Vs Union of India to Justice KS Puttaswamy (Retd.) Vs Union of India* that right to privacy now has been recognized as a fundamental right and especially an important facet of right to life. The further discussion on the cases will be done in the

⁶ <http://www.legalservicesindia.com/article/1630/Right-To-Privacy-Under-Article-21-and-the-Related-Conflicts.html> (last accessed on 13/03/19 at 14:33)

⁷ Kharak Singh Vs State of UP, AIR 1963 SC 1295 (India)

next section viz. Precedential trends towards the right to privacy.

B. Precedential Trend towards Right to Privacy

Since the 1960s, the Indian judiciary and the SC, in particular, have dealt with the issue of privacy as a fundamental right under the constitution. The common thread through all these judgements has been to recognise a right to privacy but to refrain from defining it in iron-clad terms. Instead, the courts have preferred to have it evolve on a case by case basis.

1.2. Right to Privacy in the context of surveillance by the state

*Govind Vs State of MP*⁸

The court undertook a more elaborated appraisal of the right to privacy. In this case, the court considered the constitutional validity of a regulation, which provided for surveillance. The court upheld the regulation by ruling that article 21 was not violated, as the regulation in question was "Procedure establish by Law" in terms of article 21. Further, the court accepted the right to privacy as an emanation from article 19(1) (a), (d) and 21 and also said that it is not an absolute right and a reasonable restriction can be imposed thereon.

The opinion of Mathew J.:

"The Right to Privacy, in any event, will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them, which one can characterize as a fundamental right, we do not think that the right is absolute. "

Further, he observed on the same point:

"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right of privacy is itself a fundamental right, that fundamental right must be subject to the restriction on the basis of compelling public interest."

*PUCL Vs Union of India*⁹

The court has observed:

We have; therefore, no hesitation in holding that the right to privacy is part of the right to life and "personal liberty" enshrined under article 21 of the constitution. Once the facts in a given case constitute a right to privacy, article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law'.

2. Balancing the right to privacy against the right to free speech

*R. Rajagopal Vs State of TN*¹⁰

⁸ Govind Vs State of MP, AIR 1975 SC 1378 (India)

⁹ PUCL Vs Union of India, AIR 1991 SC 207 (India)

The SC has asserted that in recent times the right to privacy has acquired constitutional status. Further, the court laid down certain propositions denoting the right to privacy. These propositions are:

1. The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters.

None can publish anything concerning the above matters without his consent— whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.

2. The rule previously mentioned is subject to the exception, that any publication concerning the previously mentioned aspects becomes unobjectionable if such publication is based on public records. Because once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others.

3. There is yet another exception to the rule in (1) above— indeed this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy or for that matter, the remedy of an action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true unless the official establishes that the publication was made by the defendant (the member of press or media) with reckless disregard for the truth. In such a case the defendant has to prove that he acted after a reasonable verification of the facts and has not acted in pursuance of malice, otherwise he would not have any defence at all.

4. So far as the government local authority and other organs, as well as institutions exercising governmental powers, are concerned, they cannot maintain a suit for damages for defaming them.

5. Rules 3 & 4 do not, however, mean that Official Secrets Act, 1923 or any similar enactment or provision having the force of law does not bind the press or media.

6. There is no law empowering the state or its officials to prohibit or to impose a prior restraint upon the press or media.

*District Registrar & Collector Vs Canara Bank*¹¹

¹⁰R. Rajagopal Vs State of TN, AIR 1995 SC 2064 (India)

¹¹ District Registrar & Collector Vs Canara Bank, (2005) 1 SCC 496 (India)

The court recognised that fundamental rights such as personal liberty, freedom of expression and freedom of movement, gives rise to the right to privacy. Further, it also held that the right to privacy deals with persons and not places and that an intrusion into privacy may be made by (i) legislative provisions, (ii) administrative/executive orders and (iii) judicial orders.

*Justice KS Puttaswamy (Retd.) Vs Union of India*¹²

In this case, the question before the court was whether the right to privacy is guaranteed under the constitution of India? The government argued that the right to privacy is not expressly included in the constitution as the founding fathers rejected the idea of inclusion of privacy as a fundamental right. Finally, the matter was referred to the nine-judge bench of the SC which held that right to life and personal liberty includes right to privacy as an integral part guaranteed under Part III of the Constitution and earlier judgments of Kharak Singh and other cases which denied to accept the right to privacy as a fundamental right was stand overruled.

The above decision upholding the right to privacy as a fundamental right must be viewed as a historic decision that will not only determine the fate of India’s digital data and footprints but the country’s social and cultural landscape as well.

Privacy is not a verb for hiding something from someone. It is a noun that is defined as a state of being alone and not watched or disturbed by other people. The court highlighted this aspect of privacy when it stated in the case: “the duty of the state is to safeguard the ability to take decisions —the autonomy of the individual and not to dictate those decisions”.¹³

The extended form of Right to privacy:

The right to privacy has several aspects and the judiciary has expanded this right to the possible interpretation. The cases below will be focusing on the various aspects of privacy that has been recognized by the courts from time to time.

2.1. Tapping of Telephone

Emanating from the right to privacy of an individual is the question of tapping of the telephone. Telephone tapping constitutes a serious invasion of an individual's right to privacy.

*PUCL vs Union of India*¹⁴

The court articulated that telephone tapping is an important facet of a man’s private life. The telephonic conversation is a part of modern man's life and is of an

¹²Justice KS Puttaswamy (Retd.) Vs Union of India, AIR 2017 SC 4161 (India)

¹³ <https://thewire.in/politics/restrictions-court-privacy-india> last accessed on 22/03/2019 at 1:25.

¹⁴PUCL vs Union of India, AIR 1997 SC 568 (India)

intimate and confidential character. Thus tapping of the telephone is a serious invasion of privacy and thus violative of Article 21 'except according to the procedure established by law', which has to be just, fair and reasonable.

In India, telephone tapping is permissible u/s 5(2) of the Telegraph Act, 1885 as the grounds mentioned there under are similar to Article 19(2) of the Indian Constitution.

2.1.2. Right To Privacy of HIV (+ve) patients

*Mr X Vs Hospital Z*¹⁵

The respondent hospital, in this case, has disclosed, without the permission of the blood donor, the fact that the blood donor was diagnosed as being an HIV patient. Due to this disclosure by the hospital, the lady who was to have been married to the blood donor had broken off her engagement and the donor was subject to social ostracism. Discussing the issue of privacy of medical records, the SC ruled that why medical records are considered to be private, doctors and hospitals could make an exception in certain cases where the non-disclosure of medical information could endanger the life of another citizen.

3. Right to procreation

One of the aspects of the right to privacy is right to procreate. This is also known as "the right of reproductive autonomy". The right to have an abortion is a part of the fundamental constitutional right of privacy of the women and the state can interfere with such a right only to promote some compelling interest of the state example the health of the women seeking an abortion.

*BK Parthasarathi Vs state of Andhra Pradesh*¹⁶

The right to make a decision about the reproduction is essentially a very personal decision on the part of either the men or women. Necessarily, such a right includes the right not to reproduce. The intrusion of the state into such a decision-making process of the individual is scrutinised by the constitutional courts both in this country and in America with great care.

3.1. Right not to be compelled to impart personal knowledge about a relevant fact- Mental privacy

*Selvi Vs State of Karnataka*¹⁷

The court acknowledged the distinction between bodily\physical privacy and mental privacy. The scheme of criminal and evidence law mandates interference with the right to physical and bodily privacy in certain circumstances, but the same cannot

¹⁵Mr X Vs Hospital Z, AIR 1999 SC 495 (India)

¹⁶BK Parthasarathi Vs state of Andhra Pradesh, AIR 2000 AP 156 (India)

¹⁷Selvi Vs State of Karnataka, AIR 2010 SC 1974 (India)

be used to compel the person "to impart personal knowledge about a relevant fact". An individual's decision to make a statement is the product of the private choice and there should be no scope for any other individual to interfere with such autonomy. Subjecting a person to techniques such as Narco analysis, polygraph examination and the BEAP test without his/her, consent violates the subject's mental privacy. The right to privacy has a wide ambit and it can include many of the rights –

3.2. Privacy in the context of sexual identities

Sexual orientation is a person's private matter and with whom he/she wants to satisfy the same, be it homosexual or heterosexual are all personal affairs. An intrusion by the state into these matters is a serious invasion of privacy. The judgement of the SC in *Navtej Singh Johar & Ors. Vs Union of India and others*¹⁸, "the choice of whom to partner, the ability to find the fulfilment of sexual intimacies are intrinsic to the constitutional protection and hence section 377 of IPC which criminalizes consensual sexual acts of an adult in private is violative of the constitution" is in conformity with this idea that this is of a private matter.

3.3. Privacy in the Context of choosing a sex partner

The sexual intercourse between a married man and a married woman (not his wife) is a personal matter for both and it is solely their privacy to enter into sexual intercourse with a person other than their spouse and an intrusion by the state under section 497 of IPC is violative of the constitutional right to privacy. The judgement of Supreme Court in *Joseph Shine Vs Union of India*¹⁹, which held section 497 of IPC as unconstitutional, stating that the husband is not the master of a wife. The judgement fosters and furthers the idea that decisions relating to satisfaction of sexual instincts are purely a private affair and no one has the right to intervene in between.

3.4. Privacy in the Context of the menstrual cycle

A biological or physiological reason concerning a woman is completely a subject of her privacy and no one can interfere on that right nor is anyone authorized to discriminate with her on that ground. The

¹⁸Writ Petition (Criminal) no. 76 of 2016 judgement dated 6 Sept 2018 see at <https://www.livelaw.in/section-377-ipc-summary-of-judgement-in-4-points/> (Last accessed on 22/03/18 at 10:36)

¹⁹Writ Petition (criminal) no. 194 of 2017 judgment dated 27 Sept 2018 see at <https://www.livelaw.in/husband-is-not-the-master-of-wife-sc-strikes-down-158-year-old-adultery-law-under-section-497-ipc/> (Last accessed on 22/03/19 at 10:51)

judgement of SC in *Indian Young Lawyers Association & Ors. Vs The State of Kerala and Ors.*²⁰, removing ban on the entry of women in Sabarimala Temple due to some biological reasons is very relevant to the aforesaid statement.

C. Unresolved Challenges and Future Roadmap

In spite of the stance of judiciary towards recognizing the right to privacy as a fundamental right and essential aspects of human life and moreover a necessary ingredient of a free and democratic country, the government had not shown any such responsibility as is needed. The irony is that the right to privacy can be restricted by the 'procedure established by law', but in order to ensure the individual's right to privacy, be in terms of data protection or physical, mental or in any terms there has not been any such procedure established by law, nor there is any particular law under which one can claim and get the remedy if his privacy has been infringed either by the individual or state.

Why the need to protect?

- India is rapidly becoming a digital economy. We are a nation of billion cell phones and yet we don't have laws for data protection and privacy.

- Problems of ID theft, fraud and misrepresentations are real concerns.

- Due to technological developments and emerging administrative challenges, several national programmes and schemes are being implemented through information technology platforms, using computerised data collected from citizens.

- With more and more transaction being done over the internet, such information is vulnerable to theft and misuse.

Even the SC in *KS Puttaswamy case*²¹ expressed the apprehension about the collection and use of data and said that there is the risk of personal information falling into hands of private parties and service providers.

Chandrachud J. on the nine-judge bench:

"I don't want the state to pass on my personal information to some 2000 service providers who will send me WhatsApp messages offering cosmetics and air conditioners—that is our area of concern. Personal details turn into vital commercial information for private service providers." Both the government and

²⁰ Writ Petition (Civil) no. 373 of 2006, judgement dated 28 Sept 2018 see at <https://www.livelaw.in/sabarimala-devotion-cannot-be-subjected-to-gender-discrimination-sc-allows-women-entry-by-4:1-majority-loan-woman-in-the-bench-dissents/> (Last accessed on 22/03/19 at 11:07)

²¹ *Supra*, see at fn 12.

service providers collect personal data. This adds to the danger of data leakage.

4. Aadhaar relating issues

The concept of Aadhaar proposed by current UIDAI Chairman, Nandan Nilekani that is considered as it has transformed the service delivery in our country with convenience to residents and reducing leakages like:

1. Direct benefit transfer
2. Subscription to various services, and
3. Authentication at the point of service delivery.

The Aadhaar which is designed as a digital identity platform which is inclusive and unique because it contains our entire personal data including our Biometric information as well has been criticised as a project which violates privacy and India not having a law on privacy has added to this problem. Even the person who proposed the Aadhaar concept has also suggested at that time that there was a need to have data protection and privacy law.

The SC in recent cases has repeatedly asked the government whether it plans to set up a "robust" data protection mechanism". Further, the court pointed out that a large chunk of personal information is already in the public domain and gave an example of how a person accesses his Apple iPad by using his fingerprints. In furtherance, the court pointed out that "the state is obliged to put a robust personal data protection mechanism in place in this digital age."

4.1. Surveillance by State

In the era where the judiciary is recognising and ensuring the protection of individual's privacy, the government is continuously performing the actions, which ultimately breaches the privacy. Recently MHA issued a notification authorizing 10 central government agencies to act as agencies for the purpose of surveillance²². The grounds for surveillance u/s 5(2) of Indian Telegraph Act, 1885 and section 69 of IT act are same as the grounds mentioned under article 19(2) of the Indian Constitution. Which uses very wide terms using which government can wisely invade into the privacy of the citizen? But, the question is on which basis surveillance decisions are taken and how legal standards are applied? The answer to it is very disappointing. According to a 2014 RTI request, 250 surveillance request are approved every day, it clearly indicates how reckless the authority is towards our privacy. The matter does not stop here, another

²² full order, please visit <https://www.thehindu.com/news/resources/full-text-of-union-home-ministrys-computer-surveillance-order/article25799124.ece> (Last accessed on 11/03/19 at 20:18)

question arises that is it able to enhance the national security at all, the answer is no. A heavily bureaucratized and minimally accountable regime of surveillance does nothing to enhance security but does have significant privacy costs. While examining the US National Security Agency's programmes of mass surveillance, an American court found that out of 50 instances where terrorist's attacks had been prevented, not even a single successful pre-emption was based on material collected from the NSA's surveillance regime²³. It can't be said that the surveillance is completely useless, it is a matter of importance, but the order or approval of surveillance request should be considered judicially, and for this purpose nothing would be better than referring this matter to the court or setting up a separate court consisting eminent judges and making a particular area on which relevant information will be gathered which will serve as a material for ensuring national security. After the various judicial pronouncements and the compelling social interests, now the government has felt the need for introducing laws relating to data protection and subsequently the Data (Privacy & Protection) Bill in 2017 and the Personal Data Protection Bill in 2018 has been proposed in the Parliament, but neither of both has come into effect till date. This has shown the government's somewhat negative attitude towards protection of this right. Even some of the provisions of the bill which implicitly allows processing of data without consent viz. section 13 of the proposed data protection law 2018 and other sections like section 19, these all allow the processing of personal data for certain functions of the state. This may lead to use of personal data for the political gain. The example of Facebook's Cambridge Analytica scandal, where a third party app saw millions of users' profile data scraped allegedly to influence the outcome of the 2016 election, is very relevant in context of use of personal data for political gains and similarly the government in collaboration with such social networking sites can use the citizen's personal data for the self-interest. Despite of the shortcomings and criticism, it also not to be denied that the effort on the part of government has been made in recent years and we can expect that in upcoming years we would be having laws relating data protection in particular, which would not only be adequate to our day to day needs but also be efficient in terms of regulation of the rules made by it. Furthermore, the government should also endeavour to make laws relating to privacy apart from data protection as no country can claim to be democratic

²³ Retrieved from <https://www.thehindu.com/opinion/lead/the-case-against-surveillance/article25822069.ece> (Last accessed on 22/03/19 at 20:05)

and free if it is unable to protect the individual's basic freedoms including privacy as well.

II. The Concept of Privacy in Australian Scenario

Neither the Australian Federal Constitution nor the Constitution of the six states contain any express provisions relating to privacy. There is a periodic debate about the value of a Bill of Rights, but no concurrent proposals.

A. The Emergence of Right to Privacy in Australia²⁴

Privacy was not a major item of discussion during the immediate post-war period. This was a time in which recovery, progress, the communist menace, and the cold war dominated. At about the same time as privacy issues were beginning to attract attention in Europe and North America, the wake-up call was issued in Australia by Zelman Cowen (some years later Governor-General), in his ABC Boyer Lecture Series in 1969 (Cowen 1969).

Later on, in April 1976, the Commonwealth government of the Liberal PM Malcolm Fraser gave the Australian Law Reform Commission a reference to study the interferences with privacy arising under the laws of commonwealth or commonwealth territories. In the meanwhile, during 1978-79, the OECD Expert Group met to prepare and OECD Guidelines introduced in 1981. In 1983, ALRC presented its report to the new Labour Government of Bob Hawke.

4.2. The Australia card campaign, 1985-87

Instead, the question of privacy became caught up in the maelstrom of a much more divisive issue. The government committed itself to the introduction of a national multipurpose identification scheme, the purpose of which was to address tax evasion, welfare fraud and illegal immigration²⁵. The Privacy Bill – 1986 was intricately interwoven with the Australia card Bill. The Australia card Bill was defeated in the Senate, in December 1986 and March 1987, by the combined opposition of the three non-Labor parties. However, some months after winning a further term, the government was overwhelmed by public opinion against the scheme and withdrew both Bills in Sept 1987.

4.3. The Privacy Act, 1988

During 1988, as an alternative to the withdrawn Australia card proposal, the government set out to significantly enhance the Tax File Number (TFN) scheme used by the Australian Tax Office. In order to gain the necessary support of the Senate, the

²⁴ Retrieved from www.rogerclarke.com/DV/OzHistory.html (last accessed on 22/03/19 at 20:23)

²⁵ For details visit www.rogerclarke.com/DV/OzCard.html (last accessed on 22/03/19 at 23:09)

government introduced a Privacy Bill developed largely from the 1986 Bill. The Act made explicit reference to ICCPR (1966), OECD (1981) and ALRC (1983). The government accepted a number of amendments to it, which were proposed by the opposition. The two Bills were passed in December 1988, the Privacy Act (1988) was promptly submitted for assent and a Privacy Commissioner was promptly appointed. He was Kevin O'Connor who served from 1988-97.

The concept of privacy in Australia is to some extent similar and very different to India. Both have similarity because in both of the countries there is no law, which explicitly deals with the breach of the right to privacy. However, in such case, the remedy can be claimed by the person aggrieved for the same but through different cause of actions. Both the countries differ because in India it has been recognised as a fundamental right by the rule of judiciary through case by case development whereas in Australia, it has not been recognised as a fundamental right as there is no Bill of Rights in Australian Constitution and there is also a different act dealing with privacy which is nothing more than a principle regulating how personal information is handled.

A. Precedential Trend Towards Right to Privacy²⁶

Prior to 2001, the major obstacle to the recognition in Australia of a Common Law right to privacy was the 1937 High Court decision in *Victoria Park Racing & Recreation Grounds Co. Ltd Vs Taylor*²⁷. In this case, the court ruled that there is no general legal right to privacy in Anglo-Australian law as the common law did not recognise any general right to privacy nor any tort in violation of privacy. However, the situation changed to some extent when the commonwealth government enacted the Privacy Act, 1988.

*Australian Broadcasting Corporation Vs Lenah Game Meats Pty Ltd*²⁸

The HC clearly indicated that the decision in *Victoria Park* does not stand in the path of the development of a cause of action for invasion of privacy. The elements of such a cause of action and whether the cause of action is to be left to the common law tradition of incremental development or provided

for in legislation – remain open questions²⁹. After this case, two subsequent cases viz. *Grosse Vs Purvis* and *Doe Vs Australian Broadcasting Corporation* have recognised expressly a common law right of action for invasion of privacy.

*Grosse Vs Purvis*³⁰

In the Queensland district court decision, Skoien SDCJ awarded aggravated compensatory damages and exemplary damages to the plaintiff for the defendant's breach of the plaintiff's privacy. After noting that the HC in *Lenah Game Meats* had removed the barrier the *Victoria Park* case posed to any party attempting to rely on a tort of invasion of privacy, his Honour took what he viewed as 'a logical and desirable step' and recognised 'a civil action for damages' based on the actionable right of an individual person to privacy.

Further, Skoien SDCJ enumerated the essential elements of the cause of action:

1. A willed act by the defendant;
2. which intrudes upon the privacy or seclusion of the plaintiff;
3. in the manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and
4. which causes the plaintiff detriment in the form of mental, physiological or emotional harm or distress, or which prevents or hinders the plaintiff from doing an act, which he/she is lawfully entitled to do.

*Giller Vs Procopets*³¹

Gillard J. Supreme Court of Victoria:

"Although it has been advocated from time to time that there should be a cause of action based on failure to respect the privacy of a person, both English and Australian Law have not recognised a cause of action based upon breach of privacy".

Further, he concluded that 'in my opinion, the law has not developed to the point where the law in Australia recognises an action for breach of privacy'.

*Doe Vs Australian Broadcasting Corporation*³²

The defendant broadcaster published in its radio news bulletins information that identified the plaintiff – a victim of sexual assault and breached section 4 (1A) of the Judicial Proceedings Reports Act, 1958 (Vic), which makes it an offence in certain

²⁶ Retrieved from <https://www.alrc.gov.au/publications/74%20Protecting%20a%20Right%20to%20Personal%20Privacy%20/right-personal-privacy-developments-austral> (last accessed on 23/03/19 at 23:46)

²⁷ *Victoria Park Racing & Recreation Grounds Co. Ltd Vs Taylor*, (1937) 58 CLR 479 (Australia)

²⁸ *Australian Broadcasting Corporation Vs Lenah Game Meats Pty Ltd*, (2001) 208 CLR 199 (Australia)

²⁹ G Taylor and D Wright 'Australian Broadcasting Corporation Vs Lenah Game Meats: Privacy, Injunctions and Possums: An Analysis of the Court's decision' (2002) 26 Melbourne University Law Review 707, 709)

³⁰ *Grosse Vs Purvis*, (2003) Aust Torts Reports 81 – 706 (Australia)

³¹ *Giller Vs Procopets*, [2004] VSC 113 (Australia)

³² *Doe Vs Australian Broadcasting Corporation*, [2007] VCC 281 (Australia)

circumstances to publish information identifying the victim of the sexual offence. Consequently, the defendant broadcaster and two of its employees were liable to the plaintiff in equity for breach of confidence, and in tort for invasion of privacy. In holding that a tort for invasion of privacy had been proved, Hampel J. noted that:

“This is an appropriate case to respond, although cautiously, to the invitation held out by the HC in *Lenah Game Meats* and to hold that the invasion or breach of privacy alleged here is an actionable wrong which gives rise to a right to recover damages according to the ordinary principles governing damages in tort. Responding to the repeated suggestion by defense counsel that recognition of a tort of invasion of privacy would be a ‘bold step’, her Honour stated:

If the mere fact that a court has not yet applied the developing jurisprudence to the facts of a particular case operates as a bar to its recognition. The capacity of the common law to develop new causes of action or to adapt existing ones to contemporary values or circumstances is stultified. *Lenah Game Meats* and the UK cases, in particular, those decided since *Lenah Game Meats*, demonstrate a rapidly growing trend towards recognition of privacy as a right in itself deserving of protection.

*Wilson Vs Ferguson*³³ (*Revenge Porn case*)

In early 2015, the SC of Western Australia issued a decision in a matter involving the posting of private images on Facebook. The plaintiff relied on a breach of confidence cause of action, which involves the unauthorized use of confidential information. The court issued an Injunction against further disclosure of the photographs and ordered the defendant to pay compensation.³⁴

A. Unresolved Challenges Relating To Privacy & Future Roadmap

The survey of Australia's Information commissioner says that only nine per cent of people trust social media websites to protect their information and almost 50 per cent say it is their biggest point of concern and despite these fears, nearly everyone uses social media. According to him, the security of information people provide to online services is among the major concerns they have relating to privacy. The commissioner McMillan further said, "close to a hundred per cent of people expressed that they expect organizations to tell them what information they are collecting and how it's being

used".³⁵ It shows how the people of Australia are worried about their privacy and how vulnerable their privacy is to be infringed.

Further, the provision of section 3 of the Privacy Act which states that it is the intention of the parliament that this act is not to affect the operation of a law of a state or of a territory that makes provision with respect to the collection, holding, use, corrections, disclosure or transfer of personal information. This provision expressly empowers the state to intrude into the privacy of individual even without these reasonable grounds. It shows that in the era where the judiciary is capable to realise the need for privacy, the legislature is ignoring towards the changed circumstances and is not capable to provide a law for privacy. The question of the invasion of privacy is not confined to the states and data protection, rather there are other areas of concern which affects the privacy. Modern privacy concerns are not however limited to the use of personal information by organizations. Many disputes about invasions of privacy are between individuals. Many of the cases in other jurisdictions involve the conduct of individuals. The ALRC has received summations from individuals and representative groups concerned about.³⁶

- People installing surveillance cameras which can record their neighbour's activities;
- surveillance cameras installed by activists trespassing onto private property and the subsequent posting footage on websites; and
- Harmful, invasive and distressing disclosure of personal information and images by an individual's former partner.

Australia does not have only problems relating to privacy rather but it has the laws too. The Australian Constitution establishes a Federal system of government in which powers are distributed between the Commonwealth and the six states. The principal piece of Federal legislation regulating privacy in Australia is the Privacy Act. The act has its reference from ICCPR, OECD Guidelines and the Council of Europe's convention for the protection of individuals with regard to automatic processing of personal data and it regulates the handling of personal information

³³Wilson Vs Ferguson, [2015] WASC 15 (Australia)

³⁴ Retrieved from <https://www.loc.gov/law/help/online-privacy-law/2017/australia.php> (Last accessed on 24/03/19 at 00:33)

³⁵ Retrieved from <https://www.sbs.com.au/news/australia-s-privacy-challenges-in-the-digital-era> (Last accessed on 25/03/19 at 22:13)

³⁶ Retrieved from <https://www.alrc.gov.au/publications/1-introduction/emerging-threats-privacy> (Last accessed on 25/03/19 at 22:38)

by organisations. Apart from the Privacy Act, there are other Federal Laws and each state and territory has legislation or guidelines dealing with the protection of personal data.³⁷ The recent introduction of Europe's GDPR has a very positive effect on the protection of personal data. Furthermore, there is also a need for a law, which specifically deals with privacy of all types so that the Australians will have such rights. The Bill of Rights Bill proposed in 2017 is an appreciable step of the Australian parliament and it shows that gradually it has felt the need for privacy law and it should make the laws in future dealing with day-to-day challenges to privacy.

III. Internationalization of Right to Privacy

A. International Instruments Relating to Right to Privacy

The 21st century has brought with it rapid development in the technological capacities of governments and corporate entities to intercept, extract, filter, store, analyse and disseminate the communications of the whole population. The costs of retaining data have decreased drastically and continue to do so every year and the means of analysing the information have improved exponentially due to developments in automated machine learning and algorithmic designs. These technological advancements have rendered the safeguards protecting the right to privacy obsolete. These revelations about the scope of privacy have led to a surge in the legal discourse surrounding the role that international law, and in particular international human rights law can and should play in responding to this evolving reality.³⁸ International and regional courts, international human rights treaty bodies, UN agencies, multilateral organisations, and special rapporteurs, have all published authoritative statements on the law surrounding the right to privacy.

Right to Privacy in International Instruments³⁹

Numerous international human rights covenants give specific reference to privacy as a right: *Universal Declaration of Human Rights, Article 12 (10 Dec 1948)*

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks on his honour or

reputation. Everyone has the right to the protection of the law against interference or attacks".⁴⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms, article 8: Right to Respect for Private and Family Life (4 Nov 1950):*

"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 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, for the protection of the rights and freedoms of others."

The convention created the European Commission of human rights and the European Court of Human rights to oversee enforcement. Both have been particularly active in the enforcement of privacy rights and have consistently viewed articles protections, expansively and the restriction narrowly⁴¹. The commission found in its first decision on privacy: for numerous Anglo-Saxon and French authors, the right to respect private life is the right to privacy, the right to life as far as one wishes, protected from publicity. In the opinion of the commission, however, the right to respect for private life does not end there. It comprises also to a certain degree, the right to establish and develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.⁴²

The court has reviewed member states' laws and imposed sanctions on several countries for failing to regulate wiretapping by governments and private individuals⁴³. It has also reviewed cases of individuals access to their personal information in government files to ensure that adequate procedures were implemented⁴⁴. It has expanded the protections of article 8 beyond government actions to those of private persons where it appears that the government should have prohibited those actions. *International*

⁴⁰ Universal Declaration of Human Rights, <<http://www.hrweb.org/legal/udhr.html>> (Last accessed on 19/03/19 at 21:20)

⁴¹ Nadine Strossen, recent US and international judicial protection of individual rights: a comparative analysis and proposed synthesis, 41 *Hastings, L.J.* 805 (1990).

⁴² *X Vs Iceland*, 5 *Eur. Comm. H.R.* 86.87(1976)

⁴³ *European Court of Human Rights, case of Klass and Others: judgement of 6 Sep 1978, Series A no. 28 (1979) Malone Vs Commissioner of Police, 2 All E.R. 620(1979)*

⁴⁴ *Leander Vs Sweden App no. 9248/81, European Court of Human Rights judgement of 26 March 1987.*

³⁷ Retrieved from www.austlii.edu.au/au/other/lawreform/ALRCDP/2007/72_overview.html (Last accessed on 25/03/19 at 21:35)

³⁸ Guide to International Law and Surveillance – Privacy International see at <https://privacyinternational.org/files> (Last accessed on 19/03/19 at 23:32)

³⁹ Ibid

Covenant on Civil and Political Rights, Article 17 (16 Dec 1966):

“1. 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”.⁴⁵

OECD Guidelines Governing the Protection of Privacy and Trans border flows of personal data Part-1: General (23 Sept 1980):

“2. These Guidelines apply to personal data, whether in the public or private sectors, which because of the manner in which they are processed or because of their nature or the context in which they are used pose a risk to privacy and individual liberties.

6. These Guidelines should be regarded as minimum standards which can be supplemented by the additional measure for the protection of privacy and individual liberties, which may impact trans-border flows of personal data.”

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Article 1: Object & Purpose (28 Jan 1981):

"The purpose of this convention is to secure in the territory of each party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him."

Convention on the Rights of the Child, Article 16 (20 Nov 1989):

“1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family or correspondence, nor to does an unlawful attack on his/her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.”

International Convention on the Protection of the Rights of All Migrant Workers and Members of their families, Article 14(18 Dec 1990):

“No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his/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/her family shall have the right to the protection of the law against such interference or attacks. “

Charter of the Fundamental Rights of the EU Article 7: Respect for Private and Family Life, and Article 8: Protection of Personal data (7 Dec 2000):

“Article 7: Everyone has the right to respect for his/her private and family life, home and communication.

Article 8(1): Everyone has the right to the protection of personal data concerning him/her;

(2) Such data must be processed fairly for specified purposes and based on the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data, which has been collected concerning him/her, and the right to have it rectified;

(3) Compliance with these rules shall be subject to control by an independent authority.”

Convention on the Rights of Persons with Disabilities, Article 22: Respect for Privacy (13 Dec 2006):

“1. No person with disabilities, regardless of place of residence or living arrangement, shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence or to unlawful attacks on his/her honour and reputation. Persons with Disabilities have the right to the protection of the other law against such interference or attacks.

2. State’s parties shall put it the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others."

The recent introduction of Europe’s GDPR is also a major step towards the protection of privacy in terms of personal data.

B. Threats to privacy

The increasing sophistication of information technology with its capacity to collect, analyse and disseminate information on individuals has introduced a sense of urgency to the demand for legislation. Particular attention has been directed recently to the rapidly expanded technological capacity of organisations not only to collect, store and use personal information, but also to track the physical location of individuals under surveillance, to collect and use information posted on Social media, to intercept and interpret the details of telecommunications and emails, and to aggregate, analyse and sell data from many sources.⁴⁶

The breaches of privacy do occur because of the activities of the various organisations for a range of regions. Some breaches of a person’s privacy might be unavoidable; others might come about due to systemic weaknesses in a system of data protection, or through incompetence or lack of care. Some may be caused by

⁴⁵ICCPR<<http://www.hrweb.org/legal/cpr.html>> (Last accessed on 19/03/19 at 21:45)

⁴⁶<https://www.alrc.gov.au/publications/1-introduction/emerging-threats-privacy> (Last accessed on 20/03/19 at 21:30)

deliberate and unpredictable activities of unauthorized third parties, intent on breaking into a data system. Some activities may be outside or exempted from any existing regulation or law. Some activities may amount to an indefensible, unlawful and deliberate privacy of an individual.⁴⁷

According to opinion polls, concern over privacy violations is now greater than at any time in recent history⁴⁸. Uniformly, populations throughout the world express fear about encroachment on privacy, prompting an unprecedented number of nations to pass laws, which specifically protect the privacy of their citizens.

It is now common wisdom that the power, capacity and speed of information technology are accelerating rapidly. The extent of privacy invasion – certainly the potential to invade privacy – increases correspondingly. Furthermore, there are a number of important trends that contribute to privacy invasion:⁴⁹

- Globalization removes geographical limits to the flow of data. The development of the internet is perhaps the best-known example of global technology.
- 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.

These macro-trends have had particular effect on surveillance in developing nations. In addition, they rely on first world countries to supply them with technologies of surveillance such as digital wiretapping equipment, deciphering equipment, scanners, tracking equipment and computer intercept systems.

According to a 1997 report "Assessing the Technologies of Political Control" commissioned by the European Parliament's Civil Liberties Committee and undertaken by the European Commission's Science and Technology Options Assessment office

(STOA)⁵⁰, much of this technology is used to track the activities of dissidents, human rights activists, journalists, student leaders, minorities, trade union leaders, and political opponents. The report concludes that such technologies (which it describes as "new surveillance technology") can exert a powerful 'chill effect' on those who "might wish to take a dissenting view and few will risk exercising their right to democratic protest". Large-scale ID systems are also useful for monitoring larger sectors of the population. As Privacy International observed, "In the absence of meaningful legal or constitutional protections, such technology is inimical to democratic reform. It can certainly prove fatal to anyone 'of interest' to a regime".

Government and citizen alike may benefit from the plethora of IT schemes being implemented by the private sectors. However, the initiatives will require a bold, forward-looking legislative framework. Whether the governments can deliver this framework will depend on their willingness to listen to the pulse of the emerging global digital economy and to recognize the need for strong protection of privacy.

B. Issues Relating to Privacy in Cyber Space

We are living in an era where most of our activities are being done by the use of the internet. It is obvious because we all want to save our time and complete our work instantly and that is why we chose to online activities but at the same time, we are becoming vulnerable to be affected by the emerging issues, which inevitably affects our privacy as well.

Here are some examples of privacy issues in cyberspace:

❖ **Identity Theft:** - Almost every website that asks for registration such as banking apps, wants our basic information, which is sufficient for hackers to invade into our privacy and cause damage. Identity theft is a method used by hackers using basic information of another person and to get the benefit on his name. It does not merely causes financial loss to a person but also traps one a legal problem.⁵¹

❖ **Tracking:** - when we visit a website it notifies us about cookies and in order to continue we have to click on the option of 'ok', 'accept' or 'agree'. These cookies store a certain amount of our data, which it uses or can use for commercial purpose. Moreover, the smartphone era has brought the biggest privacy issues because while installing an App it demands access to our entire phone and we allow the same without thinking about consequences. Because

⁴⁷ Ibid

⁴⁸ Simon Davis, "re-engineering the right to privacy: how privacy has transformed from a right to a commodity", In Agre and Rotenberg (ed) "technology and privacy: the new landscape", (143 MIT Press, 1997)

⁴⁹ Retrieved from <http://gilc.org/privacy/survey/intro.html> (Last accessed on 20/03/19 at 23:36)

⁵⁰ Published by Science and Technology Options Assessment (STOA). Ref: project no. IV/STOA/RSCH/LP/politicon.1.

⁵¹ <https://secureswissdata.com/internet=privacy-issues/> (Last accessed on 15/03/19 at 14:15)

of this, we are becoming more prone to be victimized either by this website or by another and our location and information can be traced.

Facebook has announced recently that it is now able to trace even non-users with the help of like button and cookies available on websites and can display ads for non-users as well.

❖ **Search Engine Related Issues:** - Google, the biggest and most used search engine, which collects the entire data of its users. Although it often states that, it is only for creating the personalized user experience, but at the same time it also uses this for increasing revenue by sharing some of our information to collaborate websites, so that they can show their ads related to our choice.⁵²

❖ **Social Media Privacy Issues:** - Undoubtedly, the emergence of social media was a step towards modernization, as because of it we are able to convey our messages to anyone at any time instantly. However, it has now rendered privacy issues as after in the user base, the massive influx of personal information is now available online, and it serves as a significant source of income for social networking sites. Moreover, they are prone to get public or hacked.⁵³

The reason is not only that the companies are negligent in handling our data; rather we are also responsible for it because relying on the big brands we take our security for granted. It cannot be denied that the features of these sites are helpful for us at some times but they create privacy issues as well.

❖ **Telephone Tapping:** - It is the monitoring of telephone or internet conversations by a third party. Telephone Tapping is a serious invasion to our privacy as telephonic conversations are of very private in nature and that is why in most of the countries it is illegal and in certain cases, it is permissible only to the government authority in public interest.

With the world becoming more connected and internet savvy, social networks become more vulnerable. Moreover, the system of earning through data collection is something very hazardous. Unless the social network companies see a dip in their consumer base and take actions, the consumer himself has to take precautions so that benefit of social networking will reach to him without any dear cost.

5. Recognition of Cyber Crimes Affecting Privacy, by International Organisations

Furthermore, some of the international organizations have provided the list of cyber-crimes on which the member countries can make laws:⁵⁴

OECD (Organization for Economic Cooperation & Development) initiated the first comprehensive International effort dealing with Criminal law problems of Computer Crime. In Sept. 1985, the ad hoc committee of OECD recommended that member countries should consider the extent to which knowingly committed acts in the field of computer-related abuse should be criminalized and covered by national penal legislation. Subsequently, in 1986, based on a comparative analysis of substantive law, OECD suggested the list of acts on which member countries would be taking steps. Similarly, the Select Committee of Experts on Computer-Related Crime of the Council of Europe has submitted the report on Computer Crime, which was adopted by the Council on 13 Sept. 1989. It contains the guidelines *viz.* the list of conduct on Computer Crime such as Computer fraud, Computer forgery, Damage to computer data or computer programs, Computer sabotage, unauthorized access or interception, unauthorized reproduction of a protected computer program or of a Topography etc. on which the member countries should consider while reviewing or enacting a new legislation. The guidelines provided by these organisations have had a profound effect on the adoption of laws around the world and it has been widely used in national legislation even by those countries who were not the member of it.

B. Privacy vis-à-vis Human Development: A Catalyst or Hindrance

The term 'privacy' is not confined to a single definition. To some, it means the 'right to be let alone'; this is the classic definition of privacy provided in 1890 by Louis Brandeis, later a judge of the US Supreme Court. For others, it means anonymity, while still others believe it means the right to be unobserved. In true sense, privacy is certainly a rich concept with several dimensions. It includes the right to control access to our physical space, our body, our thoughts, our communications, and our information.

Privacy matters for human development because we do need and have a right to maintain a private life, separate and apart from our public life. Because at sometimes we can, do a certain type of activities efficiently and in a proper manner when we are in private or in the absence of any control or interference by any other person or being unobserved. It is our privacy that allows us to be free and perform the acts in a manner, which we desire, and is convenient to

⁵² <https://safety.google/privacy/ads-and-data/> (Last accessed on 15/03/19 at 15:07)

⁵³ <https://ventsmagazine.com/2018/02/11/social-media-vs-privacy-can-maintain-privacy-social-media/> (Last accessed on 15/03/19 at 17:15)

⁵⁴ Rohas nagpal, international cybercrime law (Asian School of Cyber Laws, 2016)

achieve the ends. For example, when a professor is delivering a lecture and is conveying the knowledge to the students in the manner he thinks to be efficient and useful for the students. Suppose in the same situation if see that the principal is watching him, his mind will lose the feeling of being unobserved and his way of teaching the subject or interacting with the students may change and this might lead to failure to convey the knowledge of the subject effectively.

Take another example we do not want our mom having read our text messages. Definitely, it is not illegal, but will do text the same messages if we knew that mom is watching us? Probably not! This is privacy, which allows us to be free and to be who we are. In fancy words, this is called the 'normalizing effect of surveillance'. If we are constantly being watched, or think that we are constantly being watched or observed, we are losing our ability to be free. Privacy encompasses along with it the control of one over one's self and the decision about oneself, which one finds to be fruitful in his endeavours. The essence of liberty in a democratic society is the right of individuals to autonomy, to be generally free from the interference in their lives. In addition, this freedom enables the individual's development. Less interference in the private life or affairs of individuals leads more and more human development.

However, sometimes and in some situations, unfettered exercise of privacy serves as a hindering factor of human development. For example, if parents will not observe their children about what they are doing, to whom they interact, how they behave in front of society, probably, obviously the feeling of being uncontrolled will make them deviant, their personality development and character building will not occur, and consequently they will be unable to develop themselves. Furthermore, the people who exercise the privacy as the right to be let alone and thus do not interact with the outer world nor let anyone interact with him or her, factually keeps themselves away from the development process. For example, most of the tribes living in the forest usually try to avoid to interact with the people of other society nor to take any help of them. Due to which they are unaware of the modern technologies and techniques and they are very backward due to this and are living in the same condition as they were living thousands of year before. They are vulnerable to the new and harmful diseases and are losing their population gradually, example-Tribes living in North Sentinel Island. Privacy undoubtedly is a catalyst to human development, but at certain extent, it needs to be regulated so that it could be prevented from being a hindrance in human development.

Conclusion

The state of privacy in India has developed by case-to-case development. Moreover, the judiciary has played a very significant role in recognizing the right to privacy, due to which 'from we have no right and law for privacy, to we are having the right to privacy as a fundamental right and certainly we would be having the law for privacy' in coming years. Gradually the legislature is also taking its responsibility towards bringing new legislation, which will meet day-to-day challenges to privacy. Furthermore, what we need is an efficient and accountable governmental role and a check on the government activities in a meaningful way so that in its governing process, it will not gather our data inevitably and in larger quantity, which will not serve any purpose, and it might get leaked. Therefore, it is exceedingly important to assess the balance based on constitutional principles and fundamental rights rather than blindly accepting the government's rhetoric of national interest. Similarly, in Australia also the right to privacy has its status by case-to-case development due to the significant and positive intervention of Australian judiciary. Furthermore, it has Privacy Act, 1988 that governs the handling of personal data and the right to privacy will be a legal right in contrast to India in coming years as the Bill of Rights Bill is being passed in Australian Parliament. Indeed, now Australia has some laws for privacy but it is not sufficient in changing circumstances. Therefore, it is the duty and the responsibility of the Australian Legislature to construe the law according to the changed circumstances so that the citizens of Australia will feel secure for their privacy and related matters. The international organisations are however more capable to realise that the issue of invasion of privacy is not confined to national level rather it is a matter of global concern and consequently they made laws for privacy such as OECD Guidelines, European Convention on Data Protection, Europe's GDPR and so on. These all instruments recognises and protects the individual's right to privacy. However, in order to ensure the implementation and protection of this right efficiently, the organizations should be vigilant towards the coming challenges and should deal with them objectively, so that the citizen of each country will feel that a responsible body is protecting their right to privacy.

Acknowledgement

Authors are thankful towards Jawaharlal Nehru University, New Delhi and ICCFAI University Library for providing valuable informations on the topic.

Corresponding Author

Dr. Ashish Kumar Singhal
Associate Professor
Rajawala Road, Central Hope Town
ICFAI Law School, ICFAI University,
Dehradun, Uttarkhand, India

References

1. AIR (All India Reporter) Journal.
2. Australia Law Reform Commission (www.alrc.gov.au)
3. David Banisar, Simon Davis, *et.al.*, *Privacy And Human Rights: An International Survey Of Privacy Laws & Practice*, Global Internet Liberty Campaign (gilc.org)
4. Gautam Bhatia, The Case against surveillance (The Hindu)
5. Live Law (www.livelaw.in)
6. MP Jain, *Indian Constitutional Law* 1219-1224 (8th Ed. 2018)
7. Rohas Nagpal, *International Cyber Crime Law* (Asian School of Cyber Laws, 2016)
8. Report of the Group of Experts on Privacy (chaired by Justice AP Shah, Former Chief Justice, Delhi High Court) Constituted by the Planning Commission of India.
9. SCC (Supreme Court Cases) Journal.
10. State of Privacy in India, Privacy International (<https://privacyinternational.org/state-privacy/1002/state-privacy-india> Last accessed on 13/04/19 at 17:29)

6/15/2019