RIGHT TO PRIVACY AND DATA PROTECTION IN INDIA

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INTRODUCTION OF PRIVACY:-

The desire for a private area in life is deeply rooted, and derives its jurisdiction from three sources. The first is the notion of personal autonomy, which is a powerful element in the ideology of freedom. Although not strictly necessary to freedom of choice, privacy, in the sense of a protected field of decision making within which an individual or a group of individuals is free from the meddling of outsiders, helps to produce the conditions in which freedom of choice can be exercise without interference. This is linked to the desire for defensible space, a physical area marked off in some way from other areas, to which a person, family, or group may withdraw and wherein they may protect themselves against all comers, unless entry is clearly justified by some supervening public interest.

Civilization has evolved with accepted division between private and public life of human being where one's privacy is "the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it"[2] or "the individual's ability to control the circulation of information relating to him."[3]

In 1888, Cooley planted the seeds of privacy for the legal profession's interest in the soil of United States of America. According to him the right to respect for private life is the right to be let alone 4. A couple of years later, in 1890, J.Warren and Brandeis cultivated the notion with the initial analysis of the concept of privacy[5]. Political, social and economic changes, they argued, entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demand of society. In very early times, the law gave a remedy for only physical interference with life and property.

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2.Hyman Gross, "Privacy and Autonomy, Privacy" 169 NOMOS XIII (1971).

3.Arthur R.Miller, "The Assault on Privacy", 169 Bookman Publishing 40(1972).

4.Thomas M. Cooley, Law of Torts 91 (2nd ed 1888).

5.Samuel D. Warren and Louis Brandeis, "*The Right to Privacy*", 4 Harvard Law Review, 193 (1890)

life the right to be let alone 6. The seeds of the concept of privacy in the US sprang from a

most unexpected source: The wedding of Samuel Warren's daughter in 1890. A number of Boston newspapers decided the wedding was an event of some note and as a result gave it major coverage in a number of the local papers. This included publication of the guest list. The irate father of the bride and his fellow law firm partner, Louis Brandeis, (who went to become Judge Brandeis of the US Supreme Court), sat down to write what would become a seminal work on the law of privacy. The resulting article, *"The right to privacy"*, was published in the Harvard Law Review in 1890 and is regarded by many "as the most influential legal article ever published". Indeed, it was instrumental in the acceptance by the majority of American States of the existence of a legal right to privacy within a relatively short period following its publication. However, the impact of Warren and Brandeis' article was not the sole basis for the development of a legally protected right to privacy in the US.

Concern about privacy is concern about conditions of life and it is so in the law as it is elsewhere. Without difficulty we regularly recognize those situations in which a violation of privacy is threatened or accomplished, yet stumble when trying to make clear what privacy is. In such a quandary we feel that we know how to use a word but have difficulty setting straight those who misuse it. A synoptic view discloses at one end privacy of personality: First the very attributes by which a person is recognized –name, likeness, perhaps voice; then the intimate facts of one's life. The first is the opinion of Supreme Court in the *Grisworld* v. *Connecticut 7,* which seems to be a notable and regrettable exercise in the use of this ambiguity, and indeed a malformation of constitutional law that thrives because of the conceptual vacuum surrounding the legal notion of privacy.

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6. Ibid
7. 381 U.S. 479, 484-86 (1965) (right to privacy includes right of married couple to use contraceptives.)

Privacy is a state of affairs, the condition of human life in which acquaintance with a person or with affairs of his life that are personal to him is limited. An interest in privacy exists when preservation of privacy might concern someone affected by such privacy, and a legal interest exists when there is legal recognition of that concern.

It is true in some instances the law itself is the social practice used to create privacy-for example, restrictions upon further disclosure of personal information obtained by the Government. More often, the law is only a back-up protection for privacy, resorted to when other means to insure privacy have been frustrated. In neither case, however, is privacy, just whatever the law says it is. The law does not determine what privacy is but only what situations of privacy will be afforded legal protection, or will be made private by virtue of legal protection. Privacy, no less than good reputation or physical safety, is a creature of life in a human community and not the contrivance of a legal system concerned with its protection. Privacy in these contexts does not exist because of such recognition, but depends only upon habits of life. Interference with privacy may be accomplished by acts of two different sorts. Firstly the transgressor may himself become acquainted with a private matter, or he may acquaint others with something which is still private even though it is known to him. The first sort of interference we describe as an intrusion, while the second kind we speak of as disclosure or publicity, depending upon whether or not the intended recipients of the communication are individually identifiable.

We sometimes speak of such things as planning a family, deciding about our children's education or about church affiliation or where to live, as private matters. Anyone, who would venture to determine the conduct of these affairs for us, would, we might say, be encroaching upon our privacy. Privacy in this sense refers to our autonomy.

There are here four kinds of situations in which psychological associations on occasions of word-use affect usage. First, privacy, in a given situation, may depend upon physical solitude, or mental repose, or physical exclusiveness or autonomy. When, for example, we observe that the Marquis de Sade secured his privacy by occupying a castle, we are noticing physical solitude and physical exclusiveness as necessary for privacy. Second, these other states of affairs may depend upon privacy for their existence .8 Thus, privacy is said to be a requirement for autonomy when we remark that success in a criminal enterprise requires avoidance of police surveillance.

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8. Ibid

thing. In this regard a closed door may be the *sine qua non* of privacy or of any of the others. A sign on the door- "Private," Do Not Enter, No Trespassing, Do Not Disturb, Authorized Personnel Only, would define the situation. Permissible conduct – eavesdropping, knocking, entering, occupying, and so on- would vary with the different signs, and so would indicate the states sought to be protected by the sign. But without such a sign, the door confronts us as a common physical requirement for all of them. Fourth, although not related one as a requirement for the other, or by a requirement common to both, privacy and the others may often accompany one another. For example, privacy is taken to be concomitant with autonomy when we reflect that people are more likely to indulge eccentric whims in their own homes than elsewhere.

There can be no doubt that makers of our Constitution wanted to ensure conditions favorable to the pursuit of happiness. There can be no doubt that privacy- dignity claims deserve to be examined with care and to be defined only when an important countervailing interest is shown to the superior. If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be compelling as well as a permissible state interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance.

Individually autonomy perhaps the central concern of any system of limited government is protected in part under our Constitution by explicit constitutional guarantees. "In the application of the Constitution our contemplation cannot only be of what has been but what may be." Time works changes brings into existence new conditions. Too broad a definition of privacy raises questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advance of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy in the state of being alone, it was not synonymous with privacy. An unqualified right of this kind would be an unrealistic concept, incompatible with the concept of society, which implies willingness not to be let entirely alone and recognition that other people may be interested and consequently concerned about us.

PRIVACY: A ZERO-RELATIONSHIP

Privacy is a "zero relationship" between two persons or two groups or between a group and a

person.It is a “zero-relationship” in the sense that it is constituted by the absence of interaction or communication or perception within contexts in which such interaction, communication or perception with contexts in which such interaction, communication or perception is practicable-i.e. within a common ecological situation such as that arising from spatial contiguity, or membership in a single embracing collectively such as that a family, a working group, and ultimately a whole society. Privacy may be the privacy of a single individual, it may be the privacy of the individuals, or it may be the privacy of three or more numerous individuals. But it is always the privacy of those persons, single or plural, *vis a vis* other persons.9

The phenomenon of privacy exists only in contexts in which interaction, communication or perception is physically practicable and within the range of what can be expected of human beings. The situation must, therefore be one in which the abrogation of privacy by intrusion from the outside or by renunciation from the inside is practically possible. Privacy presupposes the prior existence of a system of interaction among persons in a common space, it might be face-to-face interaction within a household, a neighborhood, or village, or a unit within a unit in a corporate body such as a firm, an army or a congregation, the presupposed system of interaction might be one in which there is ordinarily no face-to-face interaction between authority and subject within a corporate body like a large church, a large firm, a large firm, a large army, or the state, and in which the interaction or perception is initiated by an agent of authority with the intention of intruding on the privacy of the subject**.**

The concept of data protection has thus gained critical importance to ensure that personal data is not processed in a manner that is likely to infringe or invade personal integrity and privacy. The concept of protecting data, though in its early stages of practice, promises on one hand, rapid growth over the coming years to secure for every individual, whatever the nationality or residence, respect for such individual’s rights and fundamental freedoms, and in particular the right to privacy, with regard to the automatic processing of personal data relating to such individual. However, on the other hand, to be able to ensure that the right to privacy and the protection of personal data in particular, are respected in the electronic superhighways capable of transferring a vast amount of personal information worldwide in real time at very high speed shall be a pertinent challenge. Data protection has thus become a topical subject, with an ever-increasing number of evolving practical questions getting attached to it.10

9.Edward Shils, "*Privacy: Its Constitution and Vicissitudes*", 2 Law and Contemporary Problems 31 (Spring 1966).

10. Blume. P, 'The Citizens' Data Protection', *The Journal of Information, Law and Technology (JILT)* 1(1998) available at the link: http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/blume/> as last visited on 12.03.2016.

MEANING OF DATA:-

The Oxford English Dictionary defines the term "data[11]" to connote things given or granted; things known or assumed as facts and made the basis of reasoning or calculation; facts collected together for reference or information; quantities, characters or symbols on which operations are performed by computers and other automatic equipment, and which may be stored and transmitted in the form of electrical signals, records on magnetic, optical or mechanical recording media, etc.

Further, the term "data" has been defined in a number of legislations worldwide[12], which signifies its importance in today's day and age. It may be relevant to look at some of these definitions. The United Kingdom Data Protection Act, 1998 (UK Act) defines data[13] as information which:

1. is being processed by means of equipment operating automatically in response to instructions given for that purpose,
2. is recorded with the intention that it should be processed by means of such equipment,
3. is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
4. does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68.

The UK Act further defines "personal data[14]" as data, which relates to a living individual who can be identified:

1. from the data, or
2. from the data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
3. and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

In view of the information revolution, which has resulted from the coupling of computer techniques, telecommunications, multimedia and the lightning development of the Internet, the legislations have also therefore laid stress and emphasis on the computer-processed and

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11.The Oxford English reference Dictionary, Judy Pearsall and Bill Trumble (edited by them), 2nd Edition, 1996, Oxford University Press.
12.Section 1(a) of the Data Protection Act, 1988(UK Act), Section 2(o) of the Information Technology Act, 2000
13.Section 1(a) of the Data Protection Act, 1988.

14.Section 1(e) of the Data Protection Act, 1998.

computer stored forms of data.[15]

NEED REGULATION OF DATA PROTECTION:-

It is well understood that the free flow of information has contributed to the globalization and virtualization of society and thus had raised concerns about security, respect of fundamental rights and privacy.

The keeping of records on individuals for various purposes and the risks of infringement of privacy, by both public and private sectors, have never been easier than today, through the use of new technologies and the convergence of their application. One example of such infringement of privacy is often reflected in a number of unidentified calls received by consumers today by number of companies selling its products on telephone and e-mails on the basis of the data collected by them through sources that are not disclosed to consumers. Therefore, an active policy and awareness by and on behalf of citizens is constantly a necessity. The privacy of an individual's home or routine conduct of business in an organization is now interrupted by telephone calls from tele marketing executives on behalf of the banks, financial institutions, mobile phone companies etc. with various offers. Clearly there is a violation of personal privacy by such calls. Recently a recipient filed a public interest writ[16] petition before the Supreme Court against several banks and mobile phone service providers alleging, inter alia, that the respondents were in violation of petitioner's privacy. A core problem in this respect concerns what forms of regulation actually benefits citizens and how their interests can be determined. Further, as data protection is in the interest of the citizen this regulation must, as a starting point is acceptable. However, there are several conflicting interests that are active within this field and it is a constant battle to ensure that these interests are balanced and that those of citizens are sufficiently protected. In view of this, it is further important to look at the efforts made for regulation and protection of data internationally.

15.Note: Legislations laying stress and emphasis on the computer processed and computer stored forms of data, Data Protection Act, 1988, Information Technology Act, 2000, OECD guidelines on data protection (1980.)
16.Source Link: www.manupatra.com/downloads/2005-data/TelePIL.pdf.