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Right to Privacy in Developed Countries

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ABSTRACT

The present paper proffers the status of Right to Privacy at global level .The researcher honestly attempts to explore the historical roots of right to privacy. Evolution of this right at different countries is discussed shortly .As most of us reaffirm the fact that Britain is the mother of democracy. Here, too, primary prominence of the United Kingdom is evident as it is the country laying the foundation of right to privacy. United States again appears to succeed UK in invigorating right to privacy. People's quest for practising democratic values in common walks of life projected them to open the doors of privacy. There is no constitutional right to privacy in Australia, but there are some pieces of legislation which afford certain protection guards. Privacy is recognised as a fundamental right in Canada. The Canadian Charter of Rights and Freedoms, along with the federal Privacy Act, reaffirm the faith of Canadian masses in right to privacy.

Keywords: *Privacy, Constitution, Developed Countries, Freedom of Speech, Government, Property, Dignity, Surveillance, Bill of Rights, Society.*

I. INTRODUCTION

The notion of right to privacy is not a new phenomenon, it has prevailed all through the ages in various forms and substances as well. Milton R. Konvitz quoted that 'privacy has been marked off, hinted at, or grouped for in some of our oldest legal codes and in the most influential philosophical writings and traditions.' By his quotes, Milton refers to the existence of a philosophical and constitutional foundation of the right to privacy long before the United States existed.1 Craving for privacy is as old as any human civilization, however, it was not properly conceptualized during ancient times. In early societies, protection to privacy was practiced through customs and common usages. The concept of individual privacy as a basic human right is of modern origin. However, the right to privacy was practiced under general tort law long before the constitutional foundations were laid.

II. EVOLUTION OF RIGHT TO PRIVACY IN DIFFERENT COUNTRIES

Right to privacy is an important human right. The origin of privacy can be traced back to western society. Though there is no specific law pertaining to privacy, but efforts have been made to

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protect privacy intrusion. In other words, the concept of the right to privacy as an individual right was obscure even in western societies, but the urge for the protection was felt by human beings from ancient times. Undoubtedly, the present status of the right to privacy is of recent development.

The right to privacy as a protective right had its foundation as far back as 1361 in the Justices of Peace Act in England. The Justices of Peace Act deals with matters of tort, injuries to personal property and personal injuries such as, slander, libel, false imprisonment, and malicious prosecution, etc. Moreover, the Act provided for the arrest of peeping and evasdroppers. Under the Act, the justices of the peace operated as police in pursuing and arresting criminals. A Justice of the Peace is often the first and sometimes the only judicial officer that a member of the public will ever meet.

III. Right to privacy in developed countries

1. Right to Privacy in the U.K.

There has been a reluctance to recognize a general law of personal privacy in England. There have been several debates on the need for privacy rights, and numerous objections have been raised. These have included concerns over the effect it would have on the freedom of speech. Thus, the right to privacy vis-a-vis the freedom of the press has remained a debatable subject in the country. It is not that the common notion of privacy was not known. People's private acts were respected and protected. The privacy of correspondence, home, and family is not violated by others. Eavesdropping, peeping into other's property were considered wrong acts. Law of defamation, nuisance, and trespass were there to make a person liable for breach of privacy. But no general right to privacy was recognized under the tort law.

In England, not only the privacy of individuals but the privacy of government action is also protected. The government privacy is very central and not questionable to some extent. Surveillance was more in the country, and in case of the tussle between government power of surveillance and an individual's right to privacy, prior has been protected. The Parliamentary supremacy has hindered the growth of privacy jurisprudence in the country. As the shift of political power from the executive and legislature to the judiciary was not acceptable by the government[3]. Freedom of the press has long restricted the individual right to privacy. It has always argued that if the right to privacy is protected, their freedom to report will be limited.

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[3] Bryce Calyton Newell, Public Places, Private Lives: Balancing of Privacy and Freedom of Expression in the United Kingdom, 77th ASIS&T Annual Meeting, 2014. available at: https://asistdl.onlinelibrary.wiley.com/doi/pdf/10.1002/meet.2014.14505101029

The legal remedies for protecting one's reputation or property rights were not sufficient; instead, they protected privacy incidentally. The courts did not consider the right of peace of mind for awarding damages, and emotional pain was not recognized in cases of loss of reputation, person, or property[4]. Though in the 18th and 19th centuries, the property was expanded, and now it included intangible and incorporeal rights like literary property. In this sense, one aspect of privacy was protected, i.e., personal creations were protected. But the lacuna in-laws could not be fulfilled because of no general recognition of privacy rights.

The legal scholars have also not much emphasized on privacy right in the U.K. as in the U.S.A. In his work, Professor Percy H. Winfield talked about a new tort of the privacy breach, but courts did not positively accept that in England[5]. After examining English authorities, he emphasized that there ought to be a separate test for an offensive invasion of privacy[6]. Later after twelve-year Professor, Glanville Williams urged the courts to introduce a new tort that recognizes the right to privacy[7]. The failure of courts to recognize rights, legal writers looked toward the Parliament to protect the right to privacy.

Regarding maintaining privacy in communication, the Secret Committee of the H.O.C., in its report in 1844, refused to bring legislation in the field. The report stated that though morally person will not open other letters but for the wise administration of the criminal law, such an act is permissible. In the case of phone tapping also despite public interest, no general practice was adopted. The 1957 report concluded that basically, phone tapping arises as an inevitable incident of intercepting any wrongdoer's communications. It does not interfere with one's privacy, and if so, it's minimal, producing no harm[8].

The legal debate on whether the U.K. should recognize privacy as a right (by statute or common law) has been continuing since 1961. In this context, a private member bill, "A Right to Privacy," was introduced by Lord Mancroft in the H.O.L.[9] He stated in the bill that bills object is to protect against invasion of privacy of every individual and that privacy protection is necessary for the maintenance of human dignity[10]. The bill also highlighted a need for codification as encroachment by the press in private life is increasing, which is not desirable.

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[4] T.L. Yang, "A Comparative Study of English and American Law" 15 The International and Comparative Law 176 (1966)
[5] Tolley v. Fry & Sons Ltd., [1931] AC 333
[6] Supra note 365
[7] A. Goodman, "The Reform of the Law by Glanville Williams" 15 The Modern Law Review 880 (1952)
[8] Report of the Committee of Privacy Councillors appointed to inquire into the interception of communications, point 151. available at: https://www.fipr.org/rip/Birkett.htm
[9] Right of Privacy Bill, 1961. available at: https://api.parliament.uk/historic-hansard/lords/1961/jun/15/right-of-privacy-bill-hlast
[10] Ibid

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The first clause of this bill proposed that:

"A person should have a cause of action if any person publishes any material without the consent of that person."

The publication can be by means of cinematography, exhibition, or television or sound broadcasting words relating to his personal affairs or conduct. This resulted in a debate on problems in creating a new legal right of privacy without interfering with proper reporting of the press's matters[11]. The majority of Lords supported the bill, but it was withdrawn as the government did not support it. Again in 1967, 1969, attempts were made in the H.O.C. for the protection of privacy but failed.

2. Right to Privacy in the U.S.A.

During the colonial era, Americans afforded privacy, but as many people live in small crowded towns, everyone knew about other's whereabouts. The escape to physical surveillance was harrowing, and limited legal protection was there in case of privacy. Flaherty has stated that no individual can take off others' physical surveillance unless he resorts to special measures as the population was less[12]. There was a limited legal protection of privacy in the early days of the colonial era, as common law provided sanction for acts like eavesdropping. The maxim "The house is one's castle" was accepted, and action for trespass was available if anyone invaded others' property[13]. During the Revolutionary War, privacy in the form of freedom from unlawful, State intrusion was demanded. Patrick Henry urged provision in the Bill of Rights to restrain the government power with regard to search and seizure to protect one's privacy[14].

Although the U.S. Constitution does not manifestly talk about the right to privacy, but the Bill of Rights safeguarded certain aspects of privacy such as privacy of home, person, beliefs and protection of privacy of personal information. The Bill of Rights tries to enhance the privacy of individuals. Still, it is limited to the specific acts of the government where inference of government is not permissible without lawful authority. In the First Amendment, the notion of privacy is not explicitly stated, and the world private is also used once only. The Fourth and Fifth Amendments also protected privacy right in the certain areas.

The concept of the right to privacy is largely a negative concept for many Americans. The idea of privacy depicts some reasonable norms for determining people's conduct, whose actions are

[11] Ibid

[12] Daneil J. Solove, "A Brief History of Information Privacy Law" GW Law Faculty Publications & other Works 4 (2006).

[13] Irwin R. Kramer, "The Birth of Privacy Law: A Century Since Warren and Brandeis" 39 Catholic University Law Review 705 (1990).

[14] Supra note 420 at 5.

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part of an extremely complicated interdependent society[15]. In the 19th century, people faced a new series of threats to their privacy rights. Like the Census and the government records were publicized illegally, people were asked to disclose their personal details in the census. Letters were opened, and even Congress passed a law on this, but it was disorderly. Even the Supreme Court in Ex parte Jackson[16] prohibited the State officials from opening the sealed mails without a warrant. Telegraph services and new inventions also increased the threat to privacy in the country.

3. Right to Privacy in Australia

Australia has a federal system of government that embodies a number of the structural elements of the US Constitutional system but retains a Constitutional monarchy. It consists of a national government (the Commonwealth), six state governments (New South Wales, Victoria, Tasmania, Queensland, South Australia and Western Australia) as well as two Territories (the Australian Capital Territory and the Northern Territory). Under this system, specific Constitutional powers are conferred on the Commonwealth. Any other powers not specifically conferred on the Commonwealth are retained by the States (and, to a lesser extent, the Territories). There is no general law right to privacy in Australia. Although Australia is a signatory to the International Convention on Civil and Political Rights, the international law right to privacy conferred under Article 17 of the ICCPR has not been enacted into Australia's domestic law.

There is no constitutional right to privacy in Australia, but there are some pieces of legislation which afford certain but incomplete protections. On 1 February 2005, for example, the Waverley Council (a Sydney local council) voted 7:5 to ban cameras from its council-run changing rooms at places like Bondi[17]. While this decision will presumably become enshrined in a local by-law, it illustrates the need for better legal protection of personal privacy for society as a whole.

At state level, there are various laws which have the effect of protecting privacy, particularly criminal laws, but nothing affords a right to privacy per se. For example, the man mentioned above who took photos of women in a fashion store was charged with 'filming for an indecent purpose', not with any invasion of the women's privacy. Likewise, the man who photographed the women on Coogee Beach was charged with 'behaving offensively in a public place'— an offence that could cover a multitude of behaviours. Other laws, such as the Neighbouring Land

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[15] William M. Beaney, "The Right to Privacy and American Law" 31 Law and Contemporary Problem 254 (1966).
[16] 96 U.S. 727 (1877).
[17] 'Beach camera ban fails', The Daily Telegraph, 3 February 2005, p. 3, as corrected on 4 February 2005.

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Act (No. 2) 2000 (NSW), acknowledge the desirability of people living in harmony, but do not confer an absolute right to privacy. on any individual[18].

Certainly, legislation such as the Privacy Act 1988 (Cwlth) and its state counterparts provide a regime for the collection, correction, use and disclosure of personal information. However, such Acts do not always afford sufficient legal protection to prevent the invasion of privacy—although they may in some circumstances. Thus, it may be time for the enactment of legislation addressing such concerns, particularly if recent comments by the High Court of Australia about whether Australians have (or should have) a common law right to privacy are any indication of the direction the law should take[19].

Although the position has not yet been settled in a definitive way, recent Australian cases indicate that Australians may have a common law right to privacy[20].

IV. Privacy

The *Privacy Act 1988*- external site (Privacy Act) is the principal piece of Australian legislation protecting the handling of personal information about individuals. This includes the collection, use, storage and disclosure of personal information in the federal public sector and in the private sector.

Other statutory provisions also affect privacy and separate privacy regimes apply to state and territory public sectors. This department assists the Attorney-General to administer the Privacy Act.

The Privacy Act was significantly amended in 2014 and 2017 to enhance the protection of privacy in Australia.

(A) Right to Privacy in Canada

Privacy has long been considered a fundamental right in Canada. The Canadian Charter of Rights and Freedoms, along with the federal Privacy Act, territorial and provincial privacy legislation, work together to protect Canadians with respect to their personal information held by government or private institutions. Recent trends and events have raised new concerns about

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[18] Subsection 16(1) provides that in permitting the owner of adjoining land to have access to his neighbour's land (in order to carry out repairs etc to his own land), the Local Court may impose conditions to avoid/minimise 'inconvenience or loss of privacy' caused to the neighbour. Unless the access causes 'loss, damage or injury, including damage to personal property, financial loss and personal injury', compensation is not payable under section 26 for 'loss of privacy'.

[19] In this regard, it should be noted that privacy has been raised as part of public debates on anti-terrorism and workplace surveillance laws. It is beyond the scope of this paper to deal with those laws here

[20] For a discussion of earlier caselaw and international comparisons, see Dr R. Dean, 'A right to privacy', (2004) 78 ALJ 114.

whether personal information is adequately protected by governments and companies when this information travels outside of Canada's borders. With the increasing flow of computerized data across international borders, particularly to the USA, privacy concerns and the rights of Canadians to safeguard their personal information has provoked numerous discussions and resulted in new guidelines for federal departments from the Office of the Privacy Commissioner of Canada.

V. Conclusion

The right to privacy has become universally recognised as a fundamental human right. In addition to being addressed in the most important international and regional human rights treaties, some aspect of the right to privacy is incorporated into almost every constitution in the world, and into the general laws and jurisprudence of those countries without written constitutions. Countries that have no written constitutions extend privacy protections through their other legal norms such as procedural rules, evidentiary codes, and statutory protections, so that the protection of privacy has become a common component of the laws of nearly every country. Given the recognition of the right to privacy in the most important international treaties, the legal acknowledgment of the right to privacy in the majority of legal systems, and the generalised belief among jurists and scholars of the importance of privacy, it can be concluded that this right has become part and parcel of customary international law. Although the right to privacy is not absolute, and must yield when other societal interests are at stake, a balancing test must take into account the universality of the right and the acts it protects.

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