

LEGAL AND TECHNO-LEGAL ISSUES IN PRIVACY AND DATA PROTECTION IN e-COMMERCE

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Abstract: The concept of privacy has evolved over the years. Our Forefathers abhorred privacy. They abhorred seclusion and for them security meant living together in huge groups. In ancient times i.e. before the dawn of internet, human beings lived very closely with each other to safeguard themselves from the wild animals. The era of internet slowly changed the lives of people and the concept of privacy and data in toto. Talking about privacy would be incomplete without acknowledging the importance of data of individual's which have gained huge importance with the advancement of internet and intruders.

With the inevitable role and popularity of e-Commerce in India our legal arrangement is overburdened with legal and techno-legal issues of privacy and data protection. Despite of having Information Technology (Amendment) Act, 2008 India is still legally handicap and poor in addressing the contours of privacy and data protection issues revolving around e-Commerce. The legal and regulatory issue of privacy and data protection is not only limited within the Country. It has mushroomed across the globe. Will our laws in hand protect the privacy and data of an individual's in events of its infringement? We do not have any comprehensive law in India which defines "Privacy" and "Data Privacy". Another real question and concern is what will our law do if our sensitive personal data will travel in different untraceable jurisdiction across the globe.

With regard to the concept and concern stated above, of many issues this article will try to analyze the legal issues of defining privacy, Constitutional journey of privacy through various landmark judgements and will also focus on the techno-legal part which covers issues like tracking activities of Consumers by using cookies and issue of Confidentiality.

Keywords: Privacy, Data, Constitution, I.T. (Amendment) Act, 2008, e-Commerce.

Introduction

The Right to privacy is central in e-Commerce and it is interconnected with security and trust and poses a critical problem for e-users in e-Commerce. Over the years, the privacy protection for e-users transactions has turned out to be very vital. Legal Issues relating to e-Commerce transaction includes, difficulty in defining 'privacy', 'data privacy', whereas techno-legal comprises of issues like Confidentiality, tracking activities of Consumers by using cookies, Data theft, risk of security and uninterrupted login over the internet, logic bomb/computer Viruses/Hacking/web Bugs, telephone tapping and CCTV involving issue of monitoring.

Privacy is related to individual while Cyber security on the other hand is more complex and includes the entire ecosystem. Over the years thinkers, research scholars and people at large are over burdened with the issues pertaining to Privacy and Data Protection in the internet world, in spite of several amendments which has modified as well as has included new or additional sections in order to provide a comprehensive law governing e-Commerce, it has miserably failed to give a precise and universally accepted definition of the term 'Privacy' and 'Data Privacy' and as such, has generated a concern and need for having a comprehensive law for providing a set of definitions of the term 'Privacy' and 'Data Privacy'. To address new arising threats to privacy and data protection in e-Commerce, comprehensive law is the only expected relief for curbing the legal, techno- legal and regulatory issues.

The right to privacy is infringed by many factors¹ and there is no single definition of the term "privacy" and as many other terms are connected with it, and in order to expound it, it becomes necessary to provide the definitions of various terms in nexus with the parent term "privacy", Talking about Data Protection there are numerous questions which are unheard and unaddressed. To list some, it includes questions like What types of data are regulated? What types of activity over the Internet are regulated? Are Internet Service Providers, controllers and users of websites classed as data users or computer bureau operators? What are the obligations of registration for Internet data users and computer bureau operators both in India and abroad in the absence of Law on Data Protection? With the Internet often lacking security, what are the principles for adequate data security over the Internet? How to protect data which travels within India and those data which flows overseas?

¹ The right to privacy is infringed by many factors –

- (i) Utilizing private data already collected for a purpose other than that for which it was collected;
- (ii) Sending of unsolicited emails or spamming or spam;
- (iii) Spimming;
- (iv) Adware and Spyware;
- (v) Phishing;
- (vi) Unauthorized reading of emails of others.

Definition

Privacy is simply a concept of 'right to be let alone' and to enjoy a personal space free from interference and scrutiny.² Privacy is also defined as the right to selective disclosure and one person's loss of privacy is another's gain in intimacy³. Privacy also forms part of the personal liberty and is a prerequisite for an individual to exercise personal liberty and similarly privacy is also an essential feature for dignified life. The trio of liberty, dignity and privacy is said to form an integral core of an individual's existence.⁴ Legal protection for privacy existed in western countries for hundreds of years⁵ and so it did in India. In view of Justice Sanjay Kishan Kaul, privacy is a fundamental right which guards the individual from intrusion from outsiders and helps to lead an independent life.⁶ Despite of the fact that it is not at all easy to define the term 'Privacy', many attempts has been made to give a well-defined concept to the term. Advocates of privacy like Justice Louis Brandeis⁷ and Alan F. Westin⁸ spoke about the concept of privacy as desire to be alone and about having control over one's information and desire to share to the extent one wishes to without any compulsion. The concept of Privacy also holds place in the Preamble of the Australian Privacy Charter which states that right to privacy is an integral part of human beings. They have the right to cut themselves out from the scrutiny of other people. Even though human beings are inevitable in a society, right from interference must be evitable. Such right of seclusion must be respected by the state as well as Private Organisations.⁹ And now it is prima facie that almost all the Constitution in the world had made an attempt to provide a place for privacy rights of an individual and aimed to protect the same against intruders. Right to privacy is debated to be a fundamental right by many western countries and country like India has though denied it to be fundamental right has given it a constitutional recognition.¹⁰ Right to privacy has been delicately carved by the courts by a creative interpretation of the Article 19 (1) (a) and 21 of the Constitution and after a close analysis of the development of privacy laws in India, it is established that this laws evolved basically from torts and Constitution.¹¹ Though both the law sought to protect privacy they do differ in their approaches in protecting the same. Damages for violating one's private space are found in common law and reasonable restriction for the intrusion of the same comes under Article 21.¹² No doubt the right to privacy has been recognized and accepted the world wide over as an essential human right and it is trite modern law that privacy is an important component of human personality. Human rights are codified in international law by means of international and regional conventions. Privacy finds a prominent place in each of these regimes. The growth of Indian law has often been guided by international conventions to which India is a signatory. Therefore, these principles occupy an important place in the evolution of rights in India.¹³ Privacy is also termed as a fundamental human right. Looking back to the history it has been evident that an immense effort has been put on to advance laws on privacy and still there is no such comprehensive law to deal with the legal and techno-legal issues of protecting privacy and data privacy in e-Commerce¹⁴

Legal issue

Technology affected personal privacy and is repeatedly influencing our understanding of the privacy's notion.¹⁵ The concept of privacy differs from person to person and by considering the taxonomy of privacy in relations to numerous forms, we could get through the haziness surrounding the concept of 'privacy'. One of the most important developments attained by human beings is the creation of internet. Most important impact has been in the transmission of information. As there exist multiplayer's in the locale of the internet. It is, therefore, sometimes described as the 'information technology communications anarchy'¹⁶. Many scholars are of the view that onus of proving right to privacy falls under those who objects it.¹⁷

² Rehana Parveen "Protection of Privacy in India: Law and Juridical Concerns" (2010) available at http://shodhganga.inflibnet.ac.in/bitstream/10603/52364/1/01_title.pdf (Visited on October 1, 2018) (at 4:05 pm).

³ Gavin Phillipson and Heklen Fenwick "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" *Modern Law Review* (p. 662) (2000) (Vol.63) (No.1) (Jan-Nov.) (Published for the Modern Law Review limited by publishers).

⁴ Abhinav Gupta "PRIVACY: WHETHER A FUNDAMENTAL RIGHT?" 14 (Prof (Dr.) R. Venkata Rao & Prof (Dr.) T.V. Subba Rao (eds.) "A Public Discourse on Privacy-An Analysis of Justice K.S. Puttaswami v Union of India" (2018).

⁵ Supra Note at 8 Raman Mittal & Neelotpal Deka, "Cyber Privacy", "LEGAL DIMENSIONS OF CYBERSPACE" (S.K. Verma & Raman Mittal, Eds.), INDIAN LAW INSTITUTE, (p. 199).

⁶ *S. Puttaswami (Retd.) and Ors. v. Union of India and Ors* (2015)8 SCC 735.

⁷ *ibid.*

⁸ Raman Mittal & Neelotpal Deka, "Cyber Privacy", 198 LEGAL DIMENSIONS OF CYBERSPACE (S.K. Verma & Raman Mittal (eds.), INDIAN LAW INSTITUTE.

⁹ *ibid.*

¹⁰ Supra Note at 8, Raman Mittal & Neelotpal Deka, "Cyber Privacy", 202.

¹¹ *ibid.*

¹² *ibid.*

¹³ Supra Note at 14, Rishika Taneja & Sidhant Kumar, PRIVACY LAW (p. 7).

¹⁴ Supra Note 8, Raman Mittal & Neelotpal Deka, "Cyber Privacy", 202.

¹⁵ Rahul Matthan, "PRIVACY 3.0 UNLOCKING OUR DATA-DRIVEN FUTURE" 15 (HarperCollins Publisher) (2018).

¹⁶ Kavita "Copyright in the Digital Age: Internet Issue" (2015) available at http://shodhganga.inflibnet.ac.in/bitstream/10603/100920/1/01_title.pdf (Visited on October 1, 2018) (at 4:18 pm).

¹⁷ *ibid.*

Human rights are codified in international law by means of international and regional conventions. Privacy finds a prominent place in each of these regimes. The growth of Indian law has often been guided by international conventions to which India is a signatory. Therefore, these principles occupy an important place in the evolution of rights in India.¹⁸

Right to privacy is debated to be a fundamental right by many western countries and country like India has though denied it to be fundamental right has given it a constitutional recognition.¹⁹ As the definition of privacy varies from person to person it is not easy to describe privacy in a water-tight compartment. With the advancement in technology the concept of privacy is changing and is not limited to the word 'privacy' only. The undeniable domains of privacy and data are guiding in finding and knowing the harm and associated problems in protecting the same.²⁰

The undeniable domains of 'privacy' and 'data' will aid to have an insight into the ongoing issues of privacy and data protection in the perils of e-Commerce. The concept of Information Privacy²¹ or Personal Data has always been a topic of discussion. Territorial Privacy is a form of privacy that restricts interference in the lives of individual whether it is in office, market or open space. Genetic Privacy mainly refers to the right which is related to personal information relating to private life of an individual on which one will have full control against any third party.²²

When it comes to Online Privacy, it's not an easy subject in a country like India. Cyber space privacy of personal information refers to the right of the data subjects to enjoy the peace in the network's private life along with its protection in accordance with law. It should not be infringed, known, collected, copied, disclosed or utilized without the free consent of the data subject. Internet Privacy/Online Privacy & Cyber Privacy is often used interchangeably. It includes the main elements: personal data, private information, and individual field.²³ It refers to the security level of personal data available in the internet. It comprises of variety of factors, techniques and technologies which is used in protecting sensitive and private data, communications and preferences.²⁴ Hijacking, spyware and adware are some examples of Privacy-invasive software that overlook user's privacy and are circulated with a commercial intention.²⁵ According to Wikipedia 'Data Privacy' or 'Information Privacy' is the collection and dissemination of data.²⁶

Indian Constitution and Privacy:

After a decade of struggle in defining the hazy definition of the term 'privacy' finally a relief came in the judgment of Puttaswami case²⁷. This journey was not easy as number of landmark cases had to go through a critical scrutiny before the 'right to privacy' found its place as one of the fundamental right. We were not done with praising the judicial pronouncement brought in the Puttaswami case that to our utter dismay, on 28th July 2018, TRAI Chairman RS Sharma published his Aadhar no. online,

¹⁸ Supra Note at 14, Rishika Taneja & Sidhant Kumar, PRIVACY LAW (p. 7).

¹⁹ Raman Mittal & Neelotpal Deka, "Cyber Privacy", 202 LEGAL DIMENSIONS OF CYBERSPACE (S.K. Verma & Raman Mittal (eds.), INDIAN LAW INSTITUTE.

²⁰ *ibid.*

²¹ In a broader term 'information privacy' is said to protect some right to control and condition the revelation of personal information to other entities. While some argues that this right does not infer a privilege to control how one is treated or perceived by those to whom one divulges the information. The data subjects are often referred as the "observed", whereas Governments, other people, private companies and employers as the collector as collecting and searching agents. In some of the cases, collector and searcher can be the same person. The only difference to draw is that of the speed of networks and the global nature of the internet. Earlier it was only a theory, now it has found place in the sphere of legislative activity. Assemblage of private data and other such personal records which are accessible in the electronic medium or otherwise is part of 'information privacy'. It is one of the most important part of the whole gamut of the concept of privacy. According to Wikipedia Information Privacy/ Data Privacy (or Data Protection) involves collection and dissemination of the collected data. And the challenge lies in bringing up a balance between utilization of those collected data and protection of data subjects. Since laws relating to Privacy and Data protection is unstable and because India does not have Laws of Data protection it becomes important to keep updated with the unstable law.

²² Genetic Privacy, *available at*

<https://en.wikipedia.org/w/index.php?search=Genetic+privacy&title=Special:Search&profile=default&fulltext=1&searchToken=5lecq6ozrmlbw3mg6i103jj1r> (Visited on July 23, 2018) (at 13:52 pm).

²³ Sumeet Kumar Singh, "SPAMMING: IS IT INFRINGEMENT OF PRIVACY" (p. 28) (January- March) (2011 Cri LJ 1) [All India Reporter (Pvt. Ltd).

²⁴ The Amendments brought in 2011 in the I.T. Act requires an organisations processing personal information to get permission from the owner of data in writing.

²⁵ Privacy Invasive, *available at* https://en.wikipedia.org/wiki/Privacy-invasive_software (Visited on July 23, 2018) (at 15:41 PM).

²⁶ Data Privacy, *available at*

<https://en.wikipedia.org/w/index.php?search=Data+privacy&title=Special:Search&profile=default&fulltext=1&searchToken=7r2p9ktjwll6izasy5225ec86> (Visited on July 23, 2018) (13:57 PM).

²⁷ *S. Puttaswami (Retd.) and Ors. v. Union of India and Ors* (2015)8 SCC 735.

challenging any one to do any harm to him. Challenge was accepted by the so called “ethical hackers”, who all in less than a day was shockingly and embarrassingly successful in taking out personal information²⁸ of the TRAI chairman²⁹.

The historical journey of ‘privacy’ begins with the landmark case of *Kesavananda Bharati*³⁰, which evolved the **Doctrine of Basic Structure**, limiting the amending power of the Parliament with respect to Constitution. As a matter of fact, *MP Sharma Chandra v Satish Sharma*³¹ is the first case in Indian history to have discussed the issue of ‘privacy’, contending provision of search and seizure as provided under the Criminal Procedure Code, 1973 to be unconstitutional and violative of Fundamental Right. Another light in privacy came in one of the important case³², which upheld privacy as a legal Right and denied giving it a Fundamental Status. In this case, Court further stated that privacy with respect to home is limited only within the sphere of Personal Liberty but with respect to surveillance at public place, there exist no such right.³³ The slogan for privacy further got momentum with the cases like *ADM Jabalpur*³⁴ and *NAZ foundation*³⁵. *ADM Jabalpur* is marked as ‘black judgment’ in the career of judicial pronouncement like other former cases; it too rejected privacy to be a fundamental right. Then came the case of *NAZ Foundation* where the court pronounced dignity and privacy to be the part and parcel of the same right, thereby beautifully denying it to be a part of the Fundamental Right. The Indian court was flooded by other cases like *I.R. Coelho v State of Tamil Nadu*³⁶ which like *Puttaswami* case, speaks about *ADM Jabalpur* to be unwarranted. Earlier Fundamental Right was construed to be isolated and in water-tight compartments and was supported by the judgments made in *R.C. Cooper v. Union of India*³⁷. The theory that Fundamental Rights are under water-tight compartments was discarded in *Maneka Gandhi v. Union of India*³⁸.

After the perusal of the facts laid down in *Puttaswami* case and reprising the fortune it brought in the judicial history by taking in arms ‘privacy’ as part of our Fundamental Right, it is not possible to deny the criticism it holds in not recognizing and declaring guidelines for data/ information privacy. Will it take another couple of years to brand data/ informational privacy as belonging to the same family of ‘privacy’? Another issue in India today is the use of Aadhar Card for availing the basic human needs, ranging from taking out a new SIM card to LPG connections. With the introduction of technology there has been an unprecedented emphasis on data and information. An increased human interaction in an online platform has paved way for privacy protection and therefore is of a grave prime concern. Generation of huge amount of data online and its vulnerability to misuse creates a new challenge for legal and regulatory framework and coupled with the presence of considerable amounts of data on the internet further triggers the issues of violations of privacy. Therefore, in these circumstances the need for the protection of privacy can hardly be overstated.³⁹ In a society as people has become busy bodied greater consciousness in favour of the protection of the right of privacy has been yielded. In a contemporary society, information technology has attained prominence in everyone’s daily life. With the generation of sensitive personal data in a bulky amount by the conscious or unconscious activities of people in everyday life the lives of people have attracted more vulnerability.⁴⁰ The concept of Right to privacy has formed a face of many domestic laws for decades and even centuries. The classical legal definition of privacy is attributed to a United States judge, Judge Cooley, who opined that it consists of ‘the right to be left alone’⁴¹.

Almost certainly the best-known description of privacy is the ‘right to be left alone’. This by itself is well thought-out to be an insufficient statement of the right. A privacy law is thus considered to be consisting of two elements. Firstly, a definition of the circumstances in which third parties have the right to collect, use and disseminate personal information about others and Secondly, a mechanism for preventing collection, use and dissemination outside those limits. The first of these is largely culturally determined, with nation states taking very different views of what information should be treated as private. The second also reflects cultural differences, and the national view as to what role the state should play in protecting privacy.”⁴² Going back to the history dated 1980, it is to be noted that threat to privacy was recognized by two Boston attorneys in the article captioned “The Right of Privacy”,

²⁸ Voter ID number, telecom operator, phone model was made public on Twitter. Not just that, Twitter user Anivar Aravind (along with a few others) even manage to send Re 1 to RS Sharma's bank account via electronic bank transfer. This is after some of the hackers claimed to access to Sharma's bank account number and IFSC code for several banks. The ethical hacker claimed to send Mr. Sharma the princely sum of Re 1 in the hope the Aadhar system implemented "better engineering to protect user privacy."

²⁹ Aadhar, available at <https://www.indiatimes.com/technology/news/after-aadhaar-leak-hacker-deposits-rs-1-in-trai-chairman-s-account-to-improve-system-s-privacy-350316.html> (Visited on July 31, 2018) (at 13:15 pm).

³⁰ *Kesavananda Bharati, Sripadagalvaru v State of Kerala and Anr.*, AIR 1973 SC 1461.

³¹ (1954) 1 SCR 1077.

³² *Kharak Singh v State of Uttar Pradesh* (1964) 1 SCR 332.

³³ Abhinav Gupta, “PRIVACY: WHETHER A FUNDAMENTAL RIGHT?” 3 (Foreword by Prof. Dr. S. Rajendra Babu), “A Public Discourse on Privacy-An Analysis of Justice K.S. Puttaswami v Union of India” (Dr. R. Venkata Rao & Dr. T.V. Subba Rao Edtrs.).

³⁴ *ADM Jabalpur v Shivkant Shukla* (1976)2 SCC 521.

³⁵ *NAZ Foundation v. Government of NCT* (2014) 1 SCC 1.

³⁶ (2007) 2SCC 1.

³⁷ AIR 1950 SC 27

³⁸ 1978 SCR (2) 621.

³⁹ Rishika Taneja & Sidhant Kumar, “PRIVACY LAW, Principles, Injunctions and Compensation” 231 (EBC Publishing (p) Ltd., Lucknow) (1st Edn. 2014).

⁴⁰ *ibid.*

⁴¹ Ian J. Lloyd, “Information Technology Law” 17 (Published by, Oxford University Press 198 Madison Avenue, New York, United States of America) (7th Edition, 2014).

⁴² Chris Reed, “Internet Law” 262-263 (Published by, universal Law Publishing Co. Pvt. Ltd) (2nd Edn.2010).

published in the Harvard Law Review.⁴³ The Right to privacy is central in e-Commerce and it is interconnected with security and trust and poses a critical problem for e-users in e-Commerce. Over the years, the privacy protection for e-users transactions has turned out to be very vital in e-Commerce.

Indian Constitution do not explicitly assures a right to privacy, however through various judgments over the years the Judges of the Nation have interpreted other rights in the Constitution to be giving rise to a right to privacy-primarily through Article 21- the right to life and liberty.⁴⁴ Different genre of privacy has been from time and again witnessed and decided by the Apex court of India in different case laws. Earlier right to privacy was not directly considered to be one of the Fundamental Right. One such instances can be drawn from the case of *Kharak Singh*, it only laid down that it forms an essential ingredient of Article 21.⁴⁵ *R. Rajagopal* is another case where it has been stated by the Supreme Court that right to privacy falls under the purview of Article 21 and there is a nexus between Article 19 (1) (a) and 21 which guarantees privacy in one or the other. Further the Apex Court focused on the concept of seclusion, where one has/ought to have control over one's information about marriage, pregnancy, family, education etc. And publication of such information without prior consent and knowledge would constitute violation of Privacy as indirectly been guaranteed under Article 19 (1) (a) and 21.⁴⁶

Regarding the relevancy of International Privacy jurisprudence in India in *Vishaka v. State of Rajasthan*, the position was established that the fundamental rights in the absence of a domestic legislation on the subject must be interpreted in line with the provisions of international treaties and conventions to which India is a party. The position emerges that international legal instruments are an important part of municipal jurisprudence in India. The principles of international human rights law provide significant direction to domestic law as well. Therefore, determinations based on these instruments can serve as the basis of the growth of privacy law in India. The Supreme Court while dealing with the first case concerning privacy did accord recognition to privacy as a human right. However, the majority did not elevate privacy to a constitutional status.⁴⁷ The same approach was undertaken by the court in *Gobind v. State of M.P.*⁴⁸ while it cited with approval from *Kharak Singh v State of U.P.*,⁴⁹ while ruling in favour of a qualified right to Privacy. The Supreme Court of India undertook a detailed consideration of privacy as a right in *R. Rajagopal v. State of T.N.*⁵⁰ accepted the "right to be let alone" under the ambit of Article 21 whilst citing privacy as a prominent human right concern. Provisions of ECHR and ICCPR also confirm to strengthen the contention that privacy is one of the basic human rights. This right is not contrary to municipal law and is rightly interpreted from the phraseology of Article 21.⁵¹ The principles contained in the ECHR, UDHR and the ICCPR are, therefore, by virtue of the law declared by the Supreme Court are parts of the Indian law on privacy.⁵²

In the first claim for a right to privacy the Supreme Court declined to impute a constitutional element of privacy in *M.P. v. Satish Chandra*.⁵³ The right to privacy has acquired the legal sanctity of a fundamental right. However, it is essential to keep in mind that barring a few exceptions, fundamental rights secured to the individual are limitations only on State action. Thus, such an interpretation will not protect an individual against the actions of private parties, as enunciated in *P.D. Shamdasani v. Central Bank of India Ltd.*⁵⁴. The Supreme Court in *Auto Shanker case*⁵⁵ recognized privacy as a right which is capable of claiming damages⁵⁶ when encroached without consent and knowledge⁵⁷.

Information Technology (Amendment) Act, 2008:

In the present-day scenario data mining is also influenced by the law of privacy and social ethics.⁵⁸ Traditionally Data Bases is regarded to be a one of literally work, including computer programs, tables and compilations, including computer databases. However, recognition of databases in matters of protection of copyrights needs recognition and a separate treatment under the I.T Act.⁵⁹ I.T. Act, 2008 under Section 2(1) (o) defines the word 'data', Section 2 (1) (v) defines 'information' and 'electronic record'

⁴³ Roger L. Sadler, "Electronic Media Law" 175(Published by, Sage Publications, Inc) (2005).

⁴⁴ The Right to Privacy in India, (2016) available at https://privacyinternational.org/sites/default/files/UPR27_india.pdf (Visited on June 22, 2017) (at 5:41 PM).

⁴⁵ *Kharak Singh v. State of Uttar Pradesh, Govind v. State of Madhya Pradesh, R. Rajagopal v. State of Tamil Nadu, Gobind v. State of M.P., Kharak Singh v State of U.P., Vishaka v. State of Rajasthan, People's Union for Civil Liberties v. Union of India, M.P. v. Satish Chandra.*

⁴⁶Right to Privacy in India, (2007) available at <http://www.indialawjournal.org/archives/volume7/issue-2/article3.html> (Visited on July 22, 2017) (at 3:50 PM).

⁴⁷ *Kharak Singh v State of U.P.*, AIR 1963 SC 1295: (1964) I SCR 332.

⁴⁸ (1975)2 SCC 148:1975 SCC (Cri) 568: AIR 1975 SC 1378.

⁴⁹ AIR 1963 SC 1295: (1964) I SCR 332.

⁵⁰ (1994) 6 SCC 632: AIR 1995 SC 264.

⁵¹ Supra at Note 14, Rishika Taneja & Sidhant Kumar, PRIVACY LAW (p. 10-11).

⁵² *ibid.*

⁵³ AIR 1954 SC 300:1954 SCR 1077.

⁵⁴ AIR 1952 SC 59:1952 SCR 597.

⁵⁵ (1994) 6SCC 632.

⁵⁶ Supra at Note at 14, Rishika Taneja & Sidhant Kumar, PRIVACY LAW (p.31).

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ T. RAMAPPA, *LEGAL ISSUES IN ELECTRONIC COMMERCE* 179 (1st Published 2003) (Published by Rajiv Beri for Macmillan India Ltd.)

under Section 2(1) (t). The year 2009 can be said to be a progressive year as amendment in the form of Section 43 A was brought up by the I.T. (Amendment) Act, 2009 which was much needed for the protection of privacy in matters of personal data. And gaining statutory recognition and making the intruder liable in the form of Compensation for failure to protect data was another hit step.⁶⁰ Today people are incurring financial loss with mere prevalence of identity theft and the shocking fact is they don't even realize and experience identity theft.⁶¹ 'Sensitive Personal Data' is one of the important issues that need to be addressed. This type of data belongs to individual who owns sensitive information about their personal life⁶² or information which is per say personal information.⁶³ With the advancement in technology many cybercrimes including cyber squatting, cyber bullying, hacking etc. have come into scene causing damages to the economic and personal interest of e-users. One of the most famous of them is 'Internet Phishing' which is considered as a criminally wrong course causing the fake websites to prompt the users to disclose their personal information on the con of authenticity or security through an electronic communication with a webpage like that of a legitimate one.⁶⁴ Access to personal information has gained momentum after the emergence of social networking sites and in the absence of security indicators, visual deception text, images making underlying text, windows making underlying windows and lack of precautionary guidelines for the users phishers exploit to gather personal information. Phishers obtain sensitive information of customers during online payment services and harms the interest of the net users by causing economic and personal interest.⁶⁵ Internet Phishing is a menace which needs a serious attention and monitoring to protect the end users. The issue of cyber security is global and far reaching and this issue does not only attract legal hurdles but also do consider technical and institutional challenges⁶⁶ which needs a comprehensive approach and coherent strategy.

Techno-Legal Issue

Security involves dimensions like, Integrity which means prevention against unauthorized data Modification, Non-repudiation referring prevention against any one party from reneging on an agreement after the fact, Authenticity i.e., authentication of data source, Confidentiality is the protection against unauthorized data Disclosure, Privacy relates to provision of data control and disclosure and Availability includes prevention against data delays or removal. Privacy is related to individual while Cyber security on the other hand is more complex and includes the entire ecosystem. Other issues akin to e-Commerce include tracking activities of consumers by using web cookies and Breach of Confidentiality.

Issues of tracking activities of consumers by using web cookies

A cookie is a tiny readable machine text file on computer. Cookie contains some identifier (ID Number, name) along with other information which allows the extractor both to personalize treatment of the user and to collect information about that user's behavior on the site. Cookies not only confer benefits to the users but also the collecting agent. Cookies help the extractor to personalize user experience and to collect certain data about user behavior. First party usually places a cookie on a user's computer. Third parties like advertisers may also do that. Another thing is such information may or may not be collected anonymously. Third party cookies⁶⁷ associate the information with unique but anonymous, identifier and do not contain personally identifiable information.⁶⁸ 'A cookie is just an identification number like a bar code that a collecting agent writes to a user's computer'.⁶⁹ The moment individuals share their information on internet, it is no more private,⁷⁰ as this information are just one click away from others and is easily available through search engines to other users as well as to internet service providers and service providers

⁶⁰ Aparna Viswanatha, *CYBER LAW, INDIAN & INTERNATIONAL PERSPECTIVES* 31 (Published by LexisNexis Butterworths Wadhwa Nagpur).

⁶¹ Individual's risk to identity theft is accelerated by online posting of SSNs (Social Security Number) making it an attraction to thieves. The physical harm caused by websites operator and data brokers to data subjects is often referred to physical injuries resulting from failure of a landlord to secure their property. Data brokers and website operator exercise control over and secure information as much as landlords do for their building common areas.

⁶² Sensitive information includes Password; Financial information such as Bank account or credit card or debit card or other payment instrument details; Physical, physiological and mental health condition; Sexual orientation; Medical records and history; Biometric information; Any detail relating to the above clauses as provided to body corporate for providing services. Provided that, any information that is freely available or accessible in public domain or furnished under the Right to Information Act 2005 or any other law for the time being in force shall not be regarded as sensitive personal data or information for the purposes of these rules.

⁶³ Section 43A of the I.T Act 2000 defines the term "personal information".

⁶⁴ E.N. Murthy *Internet Phishing: Techno-Legal Approach* 5, GRK Murthy & C Sri Krishna (eds.) (Vol. IX, Nos. 1& 2) *ICFAI JOURNAL OF CYBER LAW* (February and May 2010) (IUP Publications) (Printed at M/S ICIT Software Centre Pvt. Ltd.).

⁶⁵ *ibid.*

⁶⁶ Prashant Mali *CYBER LAW & CYBER CRIMES* 2, Information Technology Act, 2000 With New IT Rules, 2011

⁶⁷ Each collecting agent sets its own cookie, so it is very difficult for any single agent to amass comprehensive web-wide profiles of user web surfing patterns. "A client does not serve up cookies simply to anyone who asks In other words, not all servers have access to all cookies. Each cookie, when initially set, circumscribes the range of servers to whom the cookie may be subsequently given". In this regard, Lee Kovarsky has stated the view of Professor Lawrence Lessig who extensively discussed the relationship between privacy and the costs associated with monitoring and search. For him no one has used these concepts to construct an analytically precise means of classifying different privacy concerns. It has been suggested, however, that one could think about privacy in terms of the individuals about whom data is being gathered or in terms of who is gathering".

⁶⁸ Lee Kovarsky, "TOLLS ON THE INFORMATON SUPEERHIGHWAY: ENTITLEMENT DEaults FOR CLICKSTRAEM DATA" (RYAN STORES et al editor) (*VIRGINA LAW REVIEW*) (Vol. 89:1037) (No. 5) (4-6) (1046-1047) (2003).

⁶⁹ *ibid* (1049).

⁷⁰ Karnika Seth, *COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS* 281, A Comprehensive work with a special focus on developments in India, (1st Edn.).

who owns various websites⁷¹. The advent of technology has led to an unprecedented emphasis on data and information⁷² and Web sites dealing with e-business have become technologically smarter consequently facilitating the tracking of the activities of a consumers using a Web page supported by a stunning feat called “cookies”⁷³ and therefore records the user’s Web site, e-mail address, buying behavior and all other data including customizable information.⁷⁴ “Cookies” are portrayed as a small file of letters and numbers that acts as an identifier which are often used in counting the number of hits on websites and it also plays as a key part of the way most on-line shopping baskets work containing details of the website server which had planted the cookie, along with date and time as well as life time of a cookie with additional information’s.⁷⁵ As human interactions increasingly go online, privacy protection is a primary concern. The amount of data we generate online and its vulnerability to misuse creates a new challenge for legal and regulatory framework.⁷⁶ The use of cookies, which are installed on hard drive of a user is popular in behavioural advertising and though cookies can be detected and can be removed from a system with the help of web browser and software products, still some data of sensitive nature are being reported to have been passed by cookies which have then been used by various Advertising Agencies without prior permission from the concerned members from social networking sites like Facebook⁷⁷, thereby taking a place of serious concern for International Organisations which deals with privacy laws and for this reason it has been criticized for selling personal data for unrelated commercial gains without any permission.⁷⁸ In general, a cookie usually aids the Web sites to serve users better and in no way their existence is concealed from them as the user can easily disallow access to cookie information⁷⁹, the problem arises when the Web sites stores the information one is unaware of and it is where a cookie becomes a threat and is considered to be a spyware.⁸⁰ Consent of the users while tracking activities with cookies is another issue in e-Commerce.⁸¹ Misuse of cookies regards to its flexibility⁸² and it also lacks security. The term ‘cookie’ is referred to information which a Website place on e-users hard disk with a motive to retain information about that user for future use. To be more specific, a cookie records one’s personal preferences over the websites thereby using the Web’s Hypertext Transfer Protocol (HTTP) and each request made on the web page is independent of all other requests and hence record of visited pages and anything related to the search cannot be traced.⁸³ To sum up a cookie acts like a device and facilitates a server to store information of a user on user’s own computer and in that way the user can view the cookies that have been so stored.⁸⁴ A Cookie is a small file placed by a Web page on a computer visiting that page. Cookies generally contain information about the visited computer. They can store information such as passwords and preferences or pages previously viewed. Cookies collect information about web browsing by individual users and because they remain on a computer for long after a page is visited, they can raise security and privacy concerns. Cookies can be used in conjunction with adware and spyware to track a user’s online and offline computer use, it can also track Web pages viewed and documents opened, and the adware or spyware can then transmit that information to some third party.⁸⁵ Cookies even track⁸⁶ people and get information as users leave a footprint of personal choices and preferences leaving a profound impact on privacy of Web site visitors.⁸⁷ A cookie no doubt is beneficial to both the users and Web providers, but on the other side it is also accompanied with vulnerability of being misused as many users don’t know beyond its existence.⁸⁸ The I.T. Act does not deal with issues of cookies directly⁸⁹ but has made an attempt to cover it under the purview of section 43(A). Whereas, there are

⁷¹ *ibid.*

⁷² Supra Note at 1, Rishika Taneja & Sidhant Kumar, *PRIVACY LAW* (231).

⁷³ Raman Mittal & Neelotpal Deka, *Cyber Privacy*” “*LEGAL DIMENSIONS OF CYBERSPACE* 214 (S.K. Verma & Raman Mittal (eds.), (Published by Prof. (MS) S.K. Verma for INDIAN LAW INSTITUTE).

⁷⁴ *ibid.*

⁷⁵ Richard Morgan & Ruth Boardman, *DATA PROTECTION STRATEGY, IMPLEMENTING DATA PROTECTION COMPLIANCE* 90 (Published by, Sweet & Maxwell, 2003, London NW3 3PF) (2003).

⁷⁶ Supra Note at 1, Rishika Taneja & Sidhant Kumar, *PRIVACY LAW* (231).

⁷⁷ Karnika Seth, *COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS*, 281 A Comprehensive work with a special focus on developments in India, (1st Edn.), LexisNexis.

⁷⁸ *ibid.*

⁷⁹ Raman Mittal & Neelotpal Deka, *Cyber Privacy, LEGAL DIMENSIONS OF CYBERSPACE* 215 (S.K. Verma & Raman Mittal (eds.), (Published by Prof. (MS) S.K. Verma for INDIAN LAW INSTITUTE).

⁸⁰ *ibid.*

⁸¹ Paul A. Watters, “*Taming the Cookie Monster*” (2012), available at <http://www.canberra.edu.au/cis/storage/Taming%20the%20cookie%20monster-%20FINAL.pdf> (Visited on June 22, 2017) (1:42 PM).

⁸² Emil Sit & Kevin Fu, “*Web Cookies: Not Just a Privacy Risk*”, (September 2001/Vol. 44, No. 9), available at <https://courses.cs.washington.edu/courses/cse484/14au/reading/cookies-risk.pdf>, (Visited on July 4, 2017) (4:13 PM).

⁸³ Raman Mittal & Neelotpal Deka, *Cyber Privacy*” “*LEGAL DIMENSIONS OF CYBERSPACE* 214 S.K. Verma & Raman Mittal (eds.), (Published by Prof. (MS) S.K. Verma for INDIAN LAW INSTITUTE).

⁸⁴ *ibid.*

⁸⁵ Information Technology Law, Ian J. Lloyd (7th Edition, 2014) (p. 53).

⁸⁶ Raman Mittal & Neelotpal Deka, *Cyber Privacy*” “*LEGAL DIMENSIONS OF CYBERSPACE* 215 (S.K. Verma & Raman Mittal (eds.), (Published by Prof. (MS) S.K. Verma for INDIAN LAW INSTITUTE).

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

directives in European Parliament on Electronic Communications⁹⁰; implemented by the Privacy and Electronic Communications Regulations⁹¹, which contains specific rules on the use of cookies and similar devices. As per the Electronic Communications (EU Directive) Regulations 2003 (made on September 18, 2003) an Organisations using 'cookies' call for inclusion of additional information in their fair obtaining notices to get compilation with the said EU Directives.⁹² Apart from these guidelines, attention is given on the 'tracking of the activities' by the tracking technology such as 'cookies' in considering the online privacy by the Guidance given by the Article 29 Data Protection Working Party⁹³, which emphasize on alerting an individual regarding this information during the time of collection of personal data and further points out the importance of including cookies in a privacy statements.⁹⁴

Issue of Confidentiality

Section 72, 72 A of the I.T. Act, 2000 prescribes penal provisions for breach of Confidentiality thereby empowering an aggrieved person to file a suit for compensation before the Adjudicating Authority appointed under Section 46 of I.T. Act, 2000 in a case where a body corporate fails to ensure adoption of reasonable security practices to protect personal data of individuals.

The term 'Confidentiality' is related with the prevention of unauthorized information disclosure and its breach on the internet is not difficult and it is the most common issue in e-Commerce.⁹⁵ The term confidentiality has also been defined by the British Medical Association. It mainly dealt with securing the information secure in a secret way from outsiders. Information shared by an individual during his/her career has to be kept secret. Data Protection Act (1998), deals with the legal aspect of preserving confidentiality of UK's citizen. Regulatory duty is that of processing of information ('data') which is identifiable.⁹⁶ Internet can no more be considered to be the realm⁹⁷ of only computer specialists, as the technology has made it available everywhere and for every individuals. The term 'Confidentiality' is related with the prevention of unauthorized information disclosure and its breach on the internet is not difficult and it is the most common issue in e-Commerce⁹⁸ and by virtue of section 69⁹⁹ of the I.T Act 2000, breach of confidentiality has been made punishable.¹⁰⁰ Sensitive personal information, confidential information, or even trade secrets are most often unauthorizedly collected on the internet leading to its breach and draws awareness from the perspective of invasion of privacy. Generally, all sensitive personal information is regarded to be confidential in nature, but all confidential information may not be regarded only as personal sensitive information as some of them may be of commercial value or interest.¹⁰¹

In India the I.T. Act 2000, prescribes punishments with regard to breach of confidentiality under the light of set of Sections whereas, Section 3 of the IT (Reasonable Security Practices and Procedures) Rules 2011 describes the meaning of what sensitive personal information means. As per this Rule of 2011, Sensitive personal information relates to that information consisting of 'one's personal information which often consists of sensitive nature and which every individual desires to keep safe. Such information by and large includes password of Bank ATM, Mobile phone etc. and covers details of financial status in bank account and credit card. In

⁹⁰ [Directive 2002/58/EC of the European Parliament under the Council of July 12, 2002, published in the official journal on 31, 2002].

⁹¹ Regulations 61(1) and (2) provides (1) Subject to paragraph (4), a person shall not use an electronic communications network [i.e. the internet] matters relating to information storage and unlawful use of those saved information. Such information relates to a subscriber or user unless the requirements of paragraph (2) are met. (2) The requirements are that the subscriber or user of that terminal equipment-

a. is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and b. is given the opportunity to refuse the storage of or access to that information."

⁹² Richard Morgan & Ruth Boardman, *DATA PROTECTION STRATEGY, IMPLEMENTING DATA PROTECTION COMPLIANCE* 90-91(2003), (Published by, Sweet & Maxwell, 2003, London NW3 3PF) .

⁹³ (Recommendation 2/2001 on certain minimum requirements for collecting personal data on-line in the European Union May 17, 2001, (6).

⁹⁴ Supra at Note 65, Richard Morgan & Ruth Boardman, "DATA PROTECTION STRATEGY, IMPLEMENTING DATA PROTECTION COMPLIANCE (2003), (91-92).

⁹⁵ A SENGUPTA et al, e-Commerce security- A life cycle approach , (Vol.30, parts 2 & 3, April/June 2005, p. 119-140), available at <http://www.ias.ac.in/article/fulltext/sadh/030/02-03/0119-0140> (Visited on June 22, 2017) (at 1:19 PM).

⁹⁶ Grant Kelly and Bruce McKenzie, Security, privacy, and confidentiality issues on the Internet (2002) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1761937/> (Visited on November 18, 17) (15:42 PM).

⁹⁷ Na. Vijayashankar, *Cyber Laws, for every Netizen in India with Information Technology Bill 99* 149, (1st Edn. 1999, December), (Publishers, Ujvala Consultants Pvt. Ltd, Bangalore-560050. India.).

⁹⁸ A SENGUPTA et al, "e-Commerce security- A life cycle approach", (Vol.30, parts 2 & 3, April/June 2005, pp. 119-140), available at <http://www.ias.ac.in/article/fulltext/sadh/030/02-03/0119-0140> (Visited on June 22, 2017) (1:19 PM).

⁹⁹ Section 69 of the I.T. (Amended) Act, 2008 prescribes power to issue directions for interception or monitoring or decryption or any information through any computer resources.

¹⁰⁰ Na. Vijayashankar, *Cyber Laws, for every Netizen in India with Information Technology Bill 99* 149, (1st Edn. 1999, December), (Publishers, Ujvala Consultants Pvt. Ltd, Bangalore-560050. India.).

¹⁰¹ Karnika Seth, *COMPUTERS, INTERNET AND NEW TECHNOLOGY LAWS* 287-288, A Comprehensive work with a special focus on developments in India, (1st Edn.), LexisNexis.

hospitals personal sensitive information includes one's condition of mental health, records etc., and others relates to sexual desires/orientation and information in the form of biometric, which are stored for rendering services by either lawfully or otherwise.¹⁰² Breach of Confidentiality is covered by Sections 72 and 72A, and 43 A of Information Technology Act, 2000¹⁰³, where Section 72 of the said Act clearly provides for a statutory right to privacy and confidentiality. It is a significant recognition of a legal framework for Privacy protection. It seeks to punish the non-consensual disclosure to any person of confidential information or such disclosure that compromises the privacy of a data subject. However, this is solely applicable to persons authorised under the Act to secure access to a computer resources. Substantially this section renders greater credence to the law of confidence, route of protection of privacy. It recognizes contractual relations that are based on the overreaching object of confidentiality.

Therefore, the breach of such confidence can be construed as privacy invasion. However, there is no definition provided under the regime for personal information in the Act. Even though the section does criminalize the act of breach of confidentiality, it does not offer any form of compensation to the victim of such breach. In the context of invasion of privacy, that is probably the most important remedy. Therefore, these provisions are not effective means of recourse against intrusion of privacy. By virtue of Section 46 of the I.T. Act 2000, an affected person can sue for compensation before the Adjudicating Authority and remedy is also available in case a body corporate fails to adopt reasonable security practices in protection of personal data of individuals as per Section 43 A of the I.T. Act.

Conclusion

Different genres of Privacy and Data Protection issues have been tracked down in this Article. This paper focused on the two different issues in e-Commerce i.e. Legal and Techno-legal issues of privacy and data protection. The advancement in technology and online platform beyond one's control and unlimited nature of jurisdiction made a gateway to unstoppable cyber crimes which are difficult to curb down in the absence of effective laws. Even though a new beam of hope is drawn by the Data Protection Bill and Consumer Protection Bill, 2018, Consumers, legal and regulatory authorities are still praying to see the actual light. Our laws have proven again and again to be inefficient in front of the giant technology which is targeting consumer's data and privacy at an alarming speed. Consumers are victims of technological advancement and online transactions which takes place at anytime and anywhere. In the absence of laws on Data Protection, it becomes very suffocating to safeguard one's privacy and data. The problem is more severe when data is transferred from one jurisdiction to another without obtaining prior permission or knowledge of data subjects.

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