UNIT 3 INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTING PRIVACY

Structure

3.1 INTRODUCTION

The degree of intrusion into the private lives of individuals has been a topic of debate for years and has also featured prominently in literature for years. Kautilya's *Arthashastra*, an Indian epic dating from approximately 300 B.C. places great emphasis on the role of knowledge gleaned from spies, both internally in a nation and outside it and in maintaining a grip on power, the echoes of which can be seen in Machiavelli's *Prince* written hundreds of years later. And as long as surveillance has been a part of human life so probably has opposition to its excesses. Due to the technology available a lot of our daily activities are recorded and either monitored in real time by someone for future reference. When you go to a bank to withdraw money from an ATM, you are being watched or when you go to a shop or a superstore, you come across a sign that reads "This store is under surveillance", so you are forewarned. In Fresno, California, security measures included, for the first time in a United States airport, use of facial recognition technology to scan faces for terrorists as passengers entered security checkpoints. In addition to law enforcement, large companies and businesses use surveillance for a variety of other purposes. They use technology to monitor employee productivity, deter theft and fraud, and ensure safety in the workplace. Having seen the extent of surveillance in our lives it seems to be a given that we need to live with it and this paper explores the ways by which laws of various jurisdictions seek to achieve "the preservation of basic human rights" i.e. Privacy. It must be kept in mind that the statutes and case laws analysed in this paper are indicative and are not exhaustive.

3.2 OBJECTIVES

After studying this unit, you should be able to know:

- the concept of 'privacy' in the legal sense;
- the international legal scenario as it stands today, for protection of privacy;
- legal provisions that provide for protection of privacy in US; and
- legal provisions that provide for protection of privacy in EU and UK.

3.3 THE POSITION IN THE UNITED STATES OF AMERICA

American scholars as far back as the 1800s have debated the existence of the right to privacy. Samuel Warren and Louis Brandeis were pioneers in authoring 'The Right to Privacy', which became the most important article recognising a right of privacy. Subsequently, President Woodrow Wilson appointed Brandeis to the United States Supreme Court in 1916, where he endeavoured to lay a foundation for the future privacy law.

The United States Supreme Court has found a limited "right to privacy" stemming from a combination of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Third Amendment provides: "No soldier shall, in time of peace be quartered in any house, without consent of the owner, nor in time of war, but in a manner to be prescribed by law."

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

The Fifth Amendment provides in relevant part that: "No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

The Ninth Amendment 'retained rights clause' provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In Paul vs. Davis [(1976) 424 U.S. 693], the Court found that no privacy right existed when the police disclosed that the respondent was arrested on a shoplifting charge. The Court found that the activities detailed were very different from ordered liberty matters relating to marriage, procreation, contraception, family relationships, child rearing and education.

The United States Constitution does not provide an explicit right to privacy but it is implied in the Fourth Amendment. That it protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

In weighing these competing interests, American judges have expanded the principles that would guide all three branches of the federal government in the application of the Fourth Amendment to national security electronic surveillance. It has been noted that

national security cases present a particularly prickly situation because of the tremendous governmental interest and the likelihood of both unreasonable invasions of privacy and jeopardy to free speech rights. Although judges have recognised the vital importance of protecting the national security, the primary concern is ensuring the sanctity of political dissent – both public and private – in determining the application of the Fourth Amendment to national security surveillance. The Fourth Amendment is to serve as "an important working part of the machinery of government, operating . . . to check the 'well-intentioned' but mistakenly over-zealous executive officers." This constitutional function can not be guaranteed when domestic security surveillance is left entirely to the discretion of the executive: "Unreviewed executive discretion may yield too readily to pressure of obtaining incriminating evidence and overlook potential invasions of privacy and protected speech". Thus, the Courts reiterated their assertion that some interposition of the judiciary between citizens and law enforcement must exist.

The United States has a large number of narrowly-focused privacy laws consistent with its traditionally increment approach to legislation. This is in contrast to the trans-sectoral approach of Europe.

Whether the whole adds up to sufficiently comprehensive privacy protection in the US is in the eye of the beholder. It is clear that to understand completely US privacy protections, one must look at the various federal pieces, as well as at the matrix of state laws that adds to the national protections.

Federal privacy (and privacy-affecting) laws include the following:

- Federal Trade Commission Act (1914)
- Fair Credit Reporting Act (1970)
- Privacy Act (1974)
- Freedom of Information Act (1974)
- Family Educational Rights and Privacy Act (1974)
- Foreign Intelligence Surveillance Act (1978)
- Right to Financial Privacy Act (1978)
- Privacy Protection Act (1980)
- Cable Communications Policy Act (1984)
- Electronic Communications Privacy Act (1986)
- Video Privacy Protection Act (1988)
- Employee Polygraph Protection Act (1988)
- Telephone Consumer Protection Act (1991)
- Driver's Privacy Protection Act (1994)
- Health Insurance Portability and Accountability Act (1996)
- Telecommunications Act (1996)
- Children's Online Privacy Protection Act (1998)
- Financial Modernization Services Act (1999)
- USA Patriot Act (2001)

It is clear that the United States provides to its citizens an implied right to privacy through the Constitution as well through its various legislations. The concept of the rational test basis would imply that a balance would have to be struck between the rights of the individual on one hand and societal needs on the other.

Please answer the following Self Assessment Question.

Self Assessment Question 1 *Spend 3 Min.*

Is the 'right to privacy' an explicit right in the USA? What is the test to determine the same?

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3.4 THE POSITION IN THE UNITED KINGDOM AND THE EUROPEAN UNION

The European Convention on Human Right, 1950 (Convention) addresses the issue of privacy as under:

"8(1). Everyone has the right to respect for his private and family life, his home and his correspondence.

8(2). There shall be no interference by a public authority with the exercise of this right except if it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 8 provides a right to respect for private and family life, subject to the qualification in Art.8 (2) that interference may occur where it is "in accordance with the law and is necessary in a democratic society in the interests of", the prevention of disorder or crime. The interrelationship between Arts.8 (1) and (2) is not one of balancing the legitimate interference against the right; the Art.8 (2) qualifications clearly represent exceptions to Art.8 (1). Article 13 of the Convention provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." In the face of considerable opposition, this provision was not incorporated in the Human Rights Act. In Convention terms, Art.13 requires an "effective remedy" whenever there is a breach of Art.8. Logically, the effectiveness of the available remedy must lie in its ability to secure the protection offered by the Article – in this context a respect for privacy. The fact that the Human Rights Act does not incorporate Art.13 does not negate domestic obligations to provide an effective remedy because the Convention must always be read as a whole. In the United Kingdom, until the passage of the Human Rights Act 1998 the concept of privacy was one that neither Parliament nor the courts had taken the initiative to develop. In 1996, in R. v Brown [(1996) 1 All E.R. 545 at 556] Lord Hoffman stated that, "English common law does not know a general right of privacy and Parliament has been reluctant to enact one". The House of Lords later that year in a case concerning covert police surveillance commented upon the "continuing

widespread concern at this apparent failure of the law" [R. v Khan (1997) A.C. 558 at 582]. Such a reluctance to develop the law has partly been a result of the inherent difficulties in defining such a nebulous concept. However, though "privacy" as a domestic legal term in England might be lacking clear parameters, the right to respect for private life under Art.8 of the Convention brings with it decades of developing jurisprudence. The European Court's jurisprudence lays down a minimum set of values that must be respected in signatory states, and, even prior to the Human Rights Act, this had impacted UK law and practice indirectly. The Human Rights Act has brought about the development of a coherent and comprehensive system to ensure that all police action that might interfere with Art.8 is a Convention compliant. It has also ensured that the courts must address directly the question of when a particular action interferes with the right to respect for private life. A number of general principles have derived from the interpretation of the exceptions to the general right. First, if the primary right is engaged in a particular case, then the restriction upon that right must be "in accordance with the law". Regardless of the end to be achieved, no right guaranteed by the Convention should be interfered with, unless a citizen knows the basis for the interference through an ascertainable national law. That, law should be sufficiently clear and accessible to ensure that people can adequately determine with some degree of certainty when and how their rights might be affected. Secondly, any interference with the primary right must be directed towards a legitimate aim as stated in Art.8 (2). The restrictions on the primary right are numerous and widely drawn and it could be argued that it is not overly burdensome to require State conduct to remain within such boundaries. However, the list is intended to be exhaustive and there should be no capacity for the State to add to those grounds.In addition to being lawful, and for one of the prescribed purposes, the restriction must also be "necessary in a democratic society". 'Necessity', though not defined in the Convention itself, has been interpreted by the European Court as not synonymous with 'indispensable' but not as flexible as 'ordinary, useful, reasonable' or 'desirable'. Instead, what is required is that the interference with the primary right should be in response to 'a pressing social need'. The Human Rights Act has brought the concept of proportionality directly into play in the United Kingdom. In the context of qualified rights, such as Art.8, proportionality has a special relevance. In Brown v Stott [(2001) 2 W.L.R. 817], Lord Steyn commented: "*... The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of (other) individuals who also have rights*." Proportionality is a vital factor that attempts to find a balance between the interests of the individual and the interest of the wider community. Despite not explicitly appearing within the text of the Convention itself, it is said to be a defining characteristic of the way in which the courts seeks to protect human rights. It is, according to the Court, "inherent in the whole of the Convention" [Soering v United Kingdom (1989) 11 E.H.R.R. 439 at para 89]. There are numerous factors to be taken into account when considering the issue of proportionality. For example, if a measure, which restricts a right, does so in such a way as to impair the very essence of the right it will almost certainly be disproportionate. Furthermore, the need to have relevant and sufficient reasons provided in support of the particular measure has been emphasized: "*The Court will look at the interference complained of in light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued."* [Jersild v Denmark (1995)

19 E.H.R.R. 1 at para 31]. It should also be considered if there is a less restrictive alternative. A balancing exercise takes place that requires a consideration of whether the interference with the right is greater than it is necessary to achieve the aim. This is not an exercise in balancing the right against the interference, but instead balancing the nature and extent of the interference against the reasons for interfering.A further factor in the proportionality equation is to assess the adequacy of procedural fairness in the decision making process. Where a public body has exercised a discretion that restricts an individual's Convention rights, the rights of the affected individual should have been taken into account. For example, the policy should not be arbitrary but should be based on relevant considerations. The guarantee against arbitrariness is one that lies at the heart of the Convention provisions. Proportionality can be more easily established where it could be shown that there are sufficient safeguards against abuse in place. This was expressed clearly in Klass vs Germany: "*One of the fundamental principles of a democratic society is the rule of law ... [which] implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control...*"[(1979-80) 2 E.H.R.R. 214 at para 55]. Given that most policing actions will have a basis in law and will invariably satisfy the requirement of being in pursuit of a legitimate objective (principally, the prevention and detection of crime), the crux of a case will often be the proportionality of the action under scrutiny. In Ex p. Kebilene, Lord Hope commented: "*... the Convention should be seen as an expression of fundamental principles rather than a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality*." [R v DPP Ex p. Kebilene (1999) 3 W.L.R. 972 at 994]. The European Court has never sought to give a conclusive definition of privacy, considering it neither necessary nor desirable. However, in Niemietz v Germany the Court stated: " *Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest opportunity of developing relationships with the outside world*." [(1992) 16 E.H.H.R. 97 at para 29].

Please answer the following Self Assessment Question.

Self Assessment Question 2 *Spend 3 Min.*

What are the guiding principles for protection of privacy in the European Union? How has the concept of 'privacy' evolved in the UK?

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3.5 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND OTHER CONVENTIONS

Article17 of ICCPR provides for the 'right of privacy'. Article12 of the Universal Declaration of Human Rights, 1948 (UDHR) is almost in similar terms Article 19(1) and 19(2) of the ICCPR declares that everyone shall have the right to hold opinions without interference, and everyone shall have the right to freedom of expression, and this right shall include freedom to seek, receive and impart information of ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. Similarly, Article 19 of UDHR provides that everyone has the right to freedom of opinion and expression and this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. India is a signatory to the International Covenant on Civil and Political Rights, 1966 (ICCPR). While interpreting the Constitutional provisions dealing with Fundamental Rights, Indian Courts take into consideration the principles embodied in international conventions and instruments and as far as possible give effect to the principles contained in those instruments.

Let us now summarize the points covered in this unit.

3.6 SUMMARY

- Technology is making it increasingly possible to develop physically non-intrusive techniques. The use of satellites and other remote monitoring tools have lessened the need to physically intrude on a persons privacy.
- Technology cuts both ways and jurisprudence needs to keep up with these changes to ensure that the use of technology does not spread unchecked.
- In areas other than national security, a system must be put in place so that the authority that wants to undertake surveillance does not also become the authority that takes a decision on whether the surveillance is permissible or not.
- Periodic reporting requirements to the authority that sanctioned the surveillance could be put in place so that the sanctioning authority is aware of whether the original premise under which the sanction was granted was correct or not.
- In the event a person finds out he/she is the subject of surveillance they need to have recourse to the courts of law if the surveillance is intruding on their privacy.
- The EU,UK and US have already enacted legislations to afford protection to their citizens.
- There is a need to ensure that the checks on the misuse of the system keep pace with change and thereby prevent unjustified intrusions on individuals privacy.

3.7 TERMINAL QUESTIONS

1. What is the legislative position on privacy protection in the U.S.? Give examples of some important legislations which in your opinion are effective.
2. Compare the legislative framework between the U.S. and U.K. and highlight some major differences in their approach.

3.8 ANSWERS AND HINTS

Self Assessment Questions

1. No, it is not. Interpretations would have to be derived from the Constitutional Amendments.
2. The European Convention on Human Rights. Through inference, interpretation of the European Convention and influence of European Courts jurisprudence.

Terminal Questions

1. Refer to section 3.3 of the unit.
2. Refer to sections 3.3 and 3.4 of the unit.

3.9 REFERENCES AND SUGGESTED READINGS

1. Carole A. Lane. Naked in Cyberspace: How to find personal information online. University of Michigan, 2002.
2. Commonwealth Secretariat. Law in Cyberspace. Commonwealth Secretariat, 2001.
3. Guins De Angelis. Cyber Crimes. Chelsea House Publishers, 1999.
4. Serge Gutwirth. Privacy and the information age. Trans. Raf Casert. Rowman and Littlefield, 2002.