

CITIZEN'S RIGHT TO PRIVACY: REFLECTION IN THE INTERNATIONAL INSTRUMENTS AND NATIONAL LAWS

Md. Ershadul Karim*

1. Introduction

Privacy is an important area of civil liberties. It underpins human dignity and other values such as freedom of association and freedom of speech. It is essential for the development and maintenance both of a free society and of a mature and stable personality. It has become one of the most important human rights of the modern age. Privacy is recognized around the world in diverse regions and cultures. It is protected in the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966 and in many other international and regional human rights treaties. But this concept is relatively new in this Indian subcontinent, more specifically in Bangladesh. In recent past, the people of this subcontinent were so overwhelmed with struggling for their independence they might have overlooked this vital aspect of their right.

This concept of protection of privacy came into force in 1890 in the modern sense. After 1890 till 1971, the fate of the people of Bangladesh was not capable of being determined. So, the issue, "right to privacy", was never considered seriously. But in this age of information technology this right of people is seriously invaded. Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'.

The right to privacy or the right to be let alone is implicit in the right to life and liberty. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can violate this right by publication in form of media or otherwise.¹

2. Development of the concept

The concept, "right to privacy", is not totally of modern origin. This right is present in the Holy books of different religions. The existence of

* Md. Ershadul Karim, Senior Lecturer, Faculty of Law, Eastern University, Dhaka.

¹ *Rajgopal vs. T.N.*, AIR (1995) SC, at p. 264.

the concept, 'privacy', is long rooted in the history. The right to privacy is recognized in the Holy Quran and also in the Hadith of the Prophet Muhammad (SM).² The provisions of the Holy Quran suggest that it will not be fair to instrument the privacy of another person without taking the prior permission of that person. In Sura *An- Noor*, it is laid down-

"O you who believe! Do not enter houses other than your own houses until you have asked permission and saluted their inmates; this is better for you, that you may be mindful. But if you do not find any one therein, then do not enter there until permission is given to you; and if it is said to you: Go back, then go back; this is purer for you; and Allah is Cognizant of what you do." Sura *An-Noor* 24:27-28 (Shakir³).

Again, spying on each other behind their backs is considered as eating the flesh of a dead brother. In Sura *Al-Hujraat* it is also laid down-

*"O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it...But fear Allah: For Allah is Oft Returning, Most Merciful. Sura *Al-Hujraat* 49:12 (Yusufali⁴).*

The Bible has numerous references relating to privacy.⁵ Jewish law also recognized the concept of being free from being watched.⁶ There were also protections against interruption of privacy in classical Greece and ancient China. Apart from the sacred books, legal protections against invasion of right to privacy have existed in Western countries for hundreds of years. The issue was treated seriously in Common Law. In Common Law, to emphasize the importance of this issue there developed a good number of Common Law maxims relating to privacy, such as "every home is a castle; though the winds of heaven blow through it, officers of the State cannot enter" and "there is nothing more sacred, more inviolate, than the house of every citizen". The Justices of the Peace Act, 1361 of England kept

² Volume 1, Book 10, Number 509 (*Sahih Bukhari*); Book 020, Number 4727 (*Sahih Muslim*); Book 31, Number 4003 (*Sunan Abu Dawud*).

³ M.H. Shakir's translation of the *Holy Qur'an*, as published by *Tahrike Tarsile Qur'an, Inc.*, P.O. Box 1115, Elmhurst, New York 11373.

⁴ Yusuf Ali's English text is based on the 1938 book, *The Holy Qur-an, Text, Translation and Commentary*, (published in Lahore, Cairo and Riyadh).

⁵ Hixson, Richard, *Privacy in a Public Society: Human Rights in Conflict*, (1987), New York: Oxford University Press, at p. 3.

⁶ See Rosen, Jeffrey; *The Unwanted Gaze*, Random House, 2000, ISBN: 0679445463.

provisions for the arrest of peeping toms and eavesdroppers.⁷ In 1799, to meet the expenses of war with France, William Pitt, the Father of modern income tax of England introduced the income tax system in its modern form. Though the intention was noble but the system was not so popular. One of the two reasons was unnecessary disclosure of the names of taxpayers. When the names of the taxpayers were disclosed, the people felt insecure from wicked people.

Various countries developed specific provisions in their legal systems for the protection of privacy in the national level. The Swedish and Finish Parliament enacted the Access to Public Records Act in 1776 which provided that all government-held information could be used for legitimate purposes.⁸ France prohibited the publication of private facts and set stiff fines for violators in 1858.⁹ In 1889, the Criminal Code of Norway prohibited the publication of information relating to “personal or domestic affairs”.¹⁰

One synonym of the concept “right to privacy” can be “the right to be let alone”, which was coined by Thomas Cooley in his “Treaties in the Law of Torts”, 1st Edition, 1879, at page 29 under the heading “Personal Immunity”.

The right to privacy in its modern sense was developed in the USA. The right to privacy, one of the newest legal concepts, was not articulated as an important value in the largely rural America of the 18th and 19th century. In the process of urbanization of the USA, editors often played out the lives of the “rich and famous” on the newspapers, permitting their readers to vicariously enjoy wealth, status and celebrity. By being encouraged by Thomas Cooley’s¹¹ expression “the right to be let alone” and existing practice of journalism pushed two Boston lawyers, Samuel D.

⁷ Justices of the Peace Act, 1361 (Eng.), 34 Edw. 3, c. 1.

⁸ See www.rileyis.com/seminars/sept05/DrapeauSep2005.pdf, accessed on 29th December 2005.

⁹ The Rachel *affaire*. Judgment of June 16, 1858, Trib. pr. inst. de la Seine, 1858 D.P. III 62. See Jeanne M. Hauch; “Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris”, 68 (May 1994), *Tulane Law Review*; at p. 1219.

¹⁰ See Bing, Prof. Dr. Juris Jon; *Data Protection in Norway*, (1996), available at http://www.jus.uio.no/iri/forskning/lib/papers/dp_norway/dp_norway.html accessed on August 11, 2005.

¹¹ Colley, Thomas, *A Treaties On Law of Torts Or The Wrongs Which Arise Independence of Contract*, (1888), 2nd ed., at p. 29.

Warren, the scion of a prominent Boston family and Louis D. Brandeis to write an article in 1890 in the *Harvard Law Review* on “The Right to Privacy”, which can legitimately be regarded as the fountain from which the modern law of privacy has flowed.¹² Many writers have suggested that Warren and Brandeis had been offended by the press coverage of the marriage of the daughter of one of them; others believed they were offended by press coverage of the marriage and honeymoon of President Grover Cleveland in 1886. This article did nothing less than add a chapter to American Law.¹³ The journey, which was started by the publication of this article never, stopped. The writers proposed that the courts should recognize the legal right of privacy so that the citizens should be able to go to the court for redress.

3. Defining ‘right to privacy’

Privacy is the most cherished of freedoms in a democratic country.¹⁴ Privacy, an interest of the human personality, protects the inviolate personality, the individual's independence, dignity and integrity.¹⁵ Privacy is a psychological security characterized by an individual being in control of reflection of his or her personality in the minds of others.¹⁶ The Younger Committee (an official inquiry into privacy which reported in 1972: *Report of the Committee on Privacy*, Cmnd. 5012, HMSO, 1972) decided that the word ‘privacy’ could not be defined satisfactorily.

Generally, the phrase ‘right to privacy’ is used to mean that each individual has the right to choose to share or not to share with others information about his or her “private life, habits, acts, and relations”. But it was not an easy task to have an authoritative definition of the concept ‘privacy’. The Calcutt Committee in the United Kingdom faced the same problem of defining the concept “right to privacy” and leaned on to realize that a satisfactory statutory definition of ‘privacy’ is not possible to find out. Subsequently, the Committee defined the concept as the right of the

¹² Warren, Samuel D., and Brandeis, Louis D., “The Right to Privacy”, 4 (1890), *Harvard Law Review*; at p. 220.

¹³ Letter from Roscoe Pound written to Chilton (1916) quoted in Mason, Brandeis; *A Free Man's Life*, (1956), at p. 70.

¹⁴ US SC Justice Louis Brandeis, quoted in Warren, Samuel and Brandeis, Louis; “The Right to Privacy”, 4 (1890) *Harvard Law Review*; pp. 193-220.

¹⁵ Bloustein, Edward, “Privacy as an aspect of Human Dignity”, 39(1964), *New York University Law Review*, at p. 971.

¹⁶ Glancy, Dorothy J., “The Invention of the Right to Privacy”, Vol. 21, No. 1 (1999), *Arizona Law Review*; at p. 2.

individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.¹⁷

Until 1967, it was not possible to have a modern definition of the "right to privacy". In 1967, a modern definition was propounded by Professor Alan Westin, which was also accepted by the U.S. Supreme Court.¹⁸ According to this definition, the right to privacy is the "claim of individual, groups and institutions to determine for themselves when, how and to what extent information about them is communicated to other".¹⁹ The UK Government's Response to the National Heritage Select Committee (*Government Response to the National Heritage Select Committee, Privacy and Media Intrusion*, Cmnd. 2918, HMSO, 1995) says-

"Every individual has a right to privacy comprising:

- (a) a right to be free from harassment and molestation; and
- (b) a right to privacy of personal information, communications, and documents."

The right to a private life as set out in Article 8 of the European Convention on Human Rights, 1950 is now part of UK law as a consequence of the Human Rights Act, 1998. The right includes privacy of communications (telephone calls, correspondence, etc); privacy of the home and office; environmental protection; the protection of physical integrity; and protection from unjustified prosecution and conviction of those engaged in consensual nonviolent sexual activities. The right is a qualified right; as such, the public interest can be used to justify an interference with it providing that this is prescribed by law, designed for a legitimate purpose, and proportionate.

It can be understood that this concept covers broad areas of our relations. Finally, we can say that privacy is the desire by each of us for physical space where we can be free of interruption, intrusion, embarrassment, or accountability and the attempt to control the time and manner of disclosures of personal information about ourselves.

4. Elements of privacy

¹⁷ Report of the Committee on Privacy and Related Matters, Chairman David Calcutt QC, (1990), Cmnd. 1102, London: Her Majesty's Stationery Office (HMSO), at p. 7.

¹⁸ *US Department of Justice vs. Reporters Committee for the Freedom of Press*, (1989), 489, U.S. 749.

¹⁹ Westin, Professor Alan, *Privacy and Freedom*, (1967), New York, Atheneum, at p. 32.

Today, the law of privacy encompasses protection for at least four separate legal wrongs. To prove his case, a plaintiff has to establish that one or more of the four wrongs were committed against him.

Privacy comprises four distinct kinds of invasions, of four different interests of the plaintiff. They are-

- (1) Intrusion upon the plaintiff's seclusion or solitude into his private affairs (e.g. eavesdropping and wire-tapping);
- (2) Public disclosure of embarrassing private facts about the plaintiff (e.g. use of plaintiff's name- in a radio drama of a robbery, of which he had been a victim);
- (3) Publicity, which places the plaintiff in a false light in the public, eyes (e.g. attributing to a famous poet a spurious poem);²⁰
- (4) Appropriation²¹, for the defendant's advantage, of the plaintiff's name or likeness.²²

5. Kinds of privacy

The concept 'privacy' can be discussed under four broad and different headings i.e. personal privacy or physical privacy, privacy of correspondence and other means of communication, privacy of home and other property and information privacy or data protection. If we consider the Constitutions of different countries, we will be able to trace out the following four kinds of privacies:

5.1 Personal privacy

Personal privacy concerns the protection of people's physical selves against invasive procedures such as genetic tests, drug testing and cavity searches. Right to personal privacy is always subject to some restriction imposed by the law of the land. The Constitutions of countries like Kingdom of Belgium, Republic of Chile, Czech Republic, St. Kitts and Nevis, Antigua and Barbuda, Egypt, Federative Republic of Brazil, Kingdom of Netherlands, Kingdom of Norway, Republic of Philippines, Republic of Slovenia, Republic of South Africa, Republic of Turkey contain provisions relating to personal privacy.

²⁰ *Lord Byron Vs. Johnson*, 35 (1816) Eng. Rep. at p. 85.

²¹ Appropriation is defined as taking a person's name, picture, photograph or likeness and using it for commercial gain without taking permission.

²² Prosser, William, "Privacy" 48 (1960), *California Law Rev*; at p. 383.

5.2 Privacy of correspondence and other means of communication

In this age of information technology, this is the main category where the right of a person to privacy is invaded. On the ground of state security the state has to invade the correspondence of the citizens. It covers the security and privacy of mail, telephones, e-mail and other forms of communication. Constitutions of countries like Argentina, Bangladesh, China, Italy, Central African Republic, Republic of Estonia, Greece, Republic of Hungary, Japan, Korea, Republic of Latvia, Republic of Lithuania, Luxembourg, Slovak Republic, Republic of South Africa, and Taiwan keep the provision of privacy of correspondence and other means of communication.

5.3 Privacy of home and other property

Many common law maxims as mentioned earlier developed to protect the privacy of home and other property of a person. If a person possesses any property then legal systems allow him that nobody will infringe his right to privacy over that home or other property. Constitutions of countries like Republic of Finland, Republic of Hungary, Republic of Iceland, Russian Federation, the United States of America under Amendment IV to its Constitution, incorporated the provision of privacy of home and other property. Besides, in all countries, under the 'Civil law', there is an inclusion of laws relating to trespass, where the owner of a property is protected from any sort of unlawful interference over his property.

5.4 Information privacy

It involves the establishment of rules governing the collection and handling of personal data such as credit information, and medical and government records. This type of privacy is also known as "data protection". This is very important as by the invasion of this category a person can face horrible experience in cyber space. Constitutions of countries like Republic of Bulgaria, Kingdom of Denmark, Republic of Estonia, Republic of Hungary, Republic of Poland, Republic of Portugal, Russian Federation, Slovak Republic, Republic of South Africa, Kingdom of Spain, Kingdom of Sweden, included the provisions of information privacy in their constitutions.

6. How privacy can be infringed?

The privacy of a person can be infringed in different ways. However, four main ways that were identified by the Younger Committee of UK in which the privacy of a person can be infringed i.e. unwanted publicity,

misuse of personal information, intrusion in home life and intrusion in business life are discussed below-

6.1 Unwanted publicity

It is by nature human being wants to express himself, cheers if he finds him in press and broadcasting media. But finding oneself in press and media is not always pleasant. Sometimes this may create phobia, which may lead to death also.

6.2 Misuse of personal information

Sometimes the privacy of a person can be infringed due to the misuse of personal information by the banks, employers, educational institutions (student records) who preserves personal information of clients or employees. Receiving unwanted e-mails or Spam is very common to the e-mail users. Again, the privacy can be infringed in the course of administration of criminal law.

6.3 Intrusions on home life

In most of the cases, friends, neighbours and landlords play the key role to infringe the privacy. Celebrities try to maintain strict privacy but even though different medias publish their news, which they get from their friends and neighbours.

6.4 Intrusion in business life

We are now living in a world of huge competition. In all strata of society, various institutions are trying to develop their employees as human resources and train them in a number of ways. It can be happened that an employee after working few days in a business company may knowingly pass off many secret information and skills of that particular company to another Business Company.

7. Constitutional Provisions

The constitution is the supreme law in countries where there are written constitutions. In most of the constitutions there are some civil and political rights, in other words fundamental rights or Bill of Rights, which are guaranteed by the Constitution and these rights are judicially enforceable.

7.1 Provision in Bangladesh Constitution

The Constitution of the People's Republic of Bangladesh, 1972 expressly recognize the right to privacy guaranteeing the protection of home and correspondence and other means of communication as a

fundamental rights in Article 43. Similar provision was not also there in the Indian Constitution, 1949. However, in the case of *Kharak Singh Vs. State of Uttar Pradesh*, 1964, 1 SCR 332, the Supreme Court of India first recognized in 1964 that there is a right of privacy under Article 21 of the Indian Constitution.²³ In this case domiciliary visit at night by police to the house of a suspected person under the Police Regulation was found to be invalid in view of the fundamental right guaranteed by Article 21 of the Indian Constitution. There is a similarity between Article 21 of the Indian Constitution with that of to Article 32 of our Constitution i.e. the Constitution of the People's Republic of Bangladesh, 1972. Therefore, after considering the above decision of the Indian jurisdiction it can be said that right to life includes right to privacy.

7.2 Provisions in other Constitutions

Many countries of the world preserve the right to privacy in their constitutions e.g., Argentina²⁴, Armenia²⁵, Bangladesh²⁶, Barbados²⁷, Belgium²⁸, Brazil²⁹, Bulgaria³⁰, Central African Republic³¹, China³², Chile³³, Czech Republic³⁴, Kingdom of Denmark³⁵, Egypt³⁶, Estonia³⁷, Finland³⁸, Hungary³⁹, Hellenic Republic (Greece)⁴⁰, Iceland⁴¹, Ireland⁴², Israel⁴³,

²³ Article 21: Protection of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law.

²⁴ Articles 18 and 19, *Constitucion de la Nacion Argentina*, 1994.

²⁵ Article 21, *the Constitution of Armenia*, 1978.

²⁶ Article 43, *the Constitution of the People's Republic of Bangladesh*, 1972.

²⁷ Chapter 3, Article 11(B), *the Constitution of Barbados*, 1966.

²⁸ Article 22, *the Constitution of the Kingdom of Belgium*, 1970.

²⁹ Article 5(X), *the Constitution of Brazil*, 1988.

³⁰ Article 32, *the Constitution of Bulgaria*, 1991.

³¹ Article 13, *the Constitution of the Central African Republic*, 2004.

³² Article 40, *the Constitution of China*, 1982.

³³ Article 19, *the Constitution of Chile*, 1980.

³⁴ Articles 7(1), 10, 13, *the Charter of Fundamental Rights and Freedoms*, 1993.

³⁵ Sections 71 and 72, *the Danish Constitution* of 1953.

³⁶ Article 45, *the Constitution of Egypt*, 1980.

³⁷ Articles 42, 43 and 44, *the Constitution of Estonia*, 1992.

³⁸ Section 8 of *the Constitution Act of Finland*, 1995.

³⁹ Article 59, *the Constitution of the Republic of Hungary*, 1949.

⁴⁰ Articles 9 and 19, *the Constitution of Greece*, 1975.

⁴¹ Article 72, *the Constitution of the Kingdom of Iceland*, Adopted: 5 June 1953.

Italy⁴⁴, Japan⁴⁵, Latvia⁴⁶, Lithuania⁴⁷, Luxembourg⁴⁸, Mexico⁴⁹, Netherlands⁵⁰, New Zealand⁵¹, Pakistan⁵², Philippine⁵³, Poland⁵⁴, Portugal⁵⁵, Russia⁵⁶, Slovak Republic⁵⁷, Republic of Slovenia⁵⁸, South Korea⁵⁹, South Africa⁶⁰, Kingdom of Spain⁶¹, Switzerland⁶², St. Kitts and Nevis⁶³, Thailand⁶⁴, Turkey⁶⁵, etc.

On the other hand, there are many developed countries, which do not have any provision relating to right to privacy in their constitutions. As for example, the Commonwealth of Australia does not have any express provision either in the Federal Constitution⁶⁶ or in the Constitutions of the six States⁶⁷. In Canada, there is no explicit right to privacy in the

⁴² Article 45, *the Constitution of Ireland*, 1937.

⁴³ Section 7, the Basic Law: Human Dignity and Freedom, 1992.

⁴⁴ Articles 14 and 15, *the Constitution of Italy*, 1948.

⁴⁵ Article 21, *the Constitution of Japan*, 1946.

⁴⁶ Article 17, the Constitutional Law on Rights and Obligations of a Citizen and a Person, 1991.

⁴⁷ Article 22, *the Constitution of the Republic of Lithuania*, 1992.

⁴⁸ Article 28, *the Constitution of the Grand Duchy of Luxembourg*, 1868.

⁴⁹ Article 16, *Constitucion Politica de los Estados Unidos Mexicanos*, 1917.

⁵⁰ Article 10, the Constitution of the Kingdom of the Netherlands, 1987.

⁵¹ Article 21, the Bill of Rights Act, 1990.

⁵² Article 14, the Constitution of Pakistan, 1973.

⁵³ Article III, the Constitution of the Republic of the Philippines, 1987.

⁵⁴ Article 47, the Constitutional Act, 1997.

⁵⁵ Articles 26 and 35, *the Constitution of the Portuguese Republic*, 1976.

⁵⁶ Chapter 2, Article 23, *the Constitution of the Russian Federation*, 1993.

⁵⁷ Articles 16 and 22, *the Constitution of the Slovak Republic*, 1992.

⁵⁸ Articles 35 and 38, *the Constitution of the Republic of Slovenia*, 1991.

⁵⁹ Articles 16, 17 and 18, *the Constitution of the Republic of Korea*, 1948.

⁶⁰ Section 14, *the Constitution of the Republic of South Africa*, 1996.

⁶¹ Article 18, *the Constitution of Spain*, 1992.

⁶² Article 36(4), *the Constitution of Switzerland*, 1874.

⁶³ Chapter II, Article 3 (c), *the Constitution of St. Kitts and Nevis*, 1983.

⁶⁴ Article 37, *the Constitution of the Kingdom of Thailand*, 1998.

⁶⁵ Section Five, *the Constitution Republic of Turkey*, 1982.

⁶⁶ *The Commonwealth of Australia Constitution Act*, 1900.

⁶⁷ *The Victorian Constitution Act*, 1975.

Constitution⁶⁸ and Charter of Rights and Freedoms.⁶⁹ The right of privacy is not explicitly protected in the French Constitution of 1958 though the tort of privacy was first recognized in France in 1858⁷⁰. Besides, the Constitutions of countries like Austria⁷¹, Federal Republic of Germany⁷², Malaysia⁷³, Norway⁷⁴ and Singapore⁷⁵ do not contain any provision relating to privacy.

8. Right to privacy in International Instruments

The concept 'right to privacy' got considerable attention in a good number of international instruments. The Universal Declaration of Human Rights, 1948 is the first international instrument, which incorporated the provisions relating to 'right to privacy'. Article 12 of the Declaration says that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

International Code of Medical Ethics adopted by the World Medical Association in 1948 says that a physician shall preserve absolute confidentiality on all he knows about his patient even after the patient has died.

Article 17 (1) of the International Covenant on Civil and Political Rights (ICCPR), 1966 says that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. The Covenant also provides that everyone has the right to protection of the law against such interference or attacks.⁷⁶

⁶⁸ *The Constitution Act, 1982.*

⁶⁹ Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982.

⁷⁰ The Rachel affaire. Judgment of June 16, 1858, Trib. pr. inst. de la Seine, 1858 D.P. III 62.

⁷¹ *The Constitution of Austria, 1920.*

⁷² *The Constitution of Germany, 1949* (Known as Basic Law).

⁷³ *The Constitution of Malaysia, 1957.*

⁷⁴ *The Constitution of Norway, 1814.*

⁷⁵ *The Constitution of Singapore, 1959.*

⁷⁶ Article 17 (2), the International Covenant on Civil and Political Rights (ICCPR), 1966.

Article 16 of the United Nations Convention on the Rights of the Child (CRC), 1989⁷⁷ contains the same provision as is mentioned in Article 17 of the ICCPR with special attention to child.⁷⁸ Again, Article 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC), 1990⁷⁹ also contains the same provision with special reference to migrant workers.

9. Provisions in Regional Instruments

Apart from the international instruments, there are a good number of regional human rights instruments in which the right to privacy is discussed with importance.

Article 8 (Right to respect for private and family life) of the European Convention on Human Rights, 1950 provides that everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as 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 7 (Respect for private and family life) of the Charter of Fundamental Rights of the European Union, 2000 says that everyone has the right to respect for his or her private and family life, home and communications. Article 8 (Protection of personal data) of the same Charter⁸⁰ provides that everyone has the right to protection of personal data concerning him or her. This article also provides that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right to access to data, which has been collected concerning him or her, and the right to have it rectified and compliance with these rules shall be subject to control by an independent authority.

Article V of the Inter-American Declaration of the Rights and Duties of Man, 1948 provides that every person has the right to the protection of

⁷⁷ Adopted on 20 November 1989, and entered into force on 2 September 1990.

⁷⁸ Article 16: (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

⁷⁹ Adopted by General Assembly resolution 45/158 of 18 December 1990.

⁸⁰ *The Charter of Fundamental Rights of the European Union*, 2000.

the law against abusive attacks upon his honor, his reputation, and his private and family life. Article 11 of the Inter-American Convention on Human Rights, 1969 contains the same provision as it is mentioned in Article 17 of the ICCPR.

Article 10 of the African Charter on the Rights and Welfare of the Child, 1990 contains the same provision as it is mentioned in Article 17 of the ICCPR and Article 16 of the United Nations Convention on the Rights of the Child, 1989 with special attention to child.

Though at both in international and regional level there are a good number of instruments adopted and many countries of the world ratify the instruments like ICCPR⁸¹, CRC⁸², MWC⁸³, it should be kept in mind that the norms, provisions and standards mentioned in these instruments are not judicially enforceable. So, what should be done? The provision should be incorporated in national law.

In the case of *Hussain Muhammad Ershad Vs. Bangladesh and others*, 21 BLD (AD) 69, Justice Bimalendu Bikash Roy Choudhury held that it is true that the Universal Declaration of Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated in the domestic law, they are enforceable in national courts. The local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not, straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law-makers to such inconsistencies.⁸⁴

10. Right to privacy in Municipal Laws

⁸¹ As of June 2005, 154 member states ratify this Instrument.

⁸² As of June 2005, 95 member states ratify this Instrument.

⁸³ As of June 2005, 31 member states ratify this Instrument.

⁸⁴ *Satwant Singh vs. D. Ramarathnam, Assistant Passport Officer, New Delhi and others*, AIR (1967) (SC) at p. 1836, *Province of Sind vs. Public at Large*, PLD (1988) (SC) at p. 138, *Government of Bangladesh vs. Zeenat Hossain*, 1 (1981) BLD (AD) at p. 89, *State Vs. M.M. Rahmatullah*, 1 MLR (AD), at p. 448.

Experience shows that though there are some countries, which do not incorporate the provisions relating to privacy in their constitutions, but most of the countries of the world enacted special laws relating to privacy and data protection. As for example, though the German Constitution does not recognize the “Right to Privacy”, the first Data Protection Law of the world was enacted in Germany in the Land of Hessen in 1970. Australia enacted its privacy related law i.e. The Privacy Act, 1988. Since 1983, Canada passed two laws on privacy i.e. the Access to Information Act, and the Privacy Act. Article 9 of the French Civil Code⁸⁵ contains provisions relating to privacy.

Where there is an express provision of a right in the constitution, it is the duty of the Government to enact national law to protect that right. As for example, in Argentina, the Senate and the House of Representatives of the Argentine Nation in Congress approved the Personal Data Protection Law, 1996, in accordance with Article 46 of the Constitution. The Act came into force on 4th October 2000. Belgium has a data protection law i.e. acts concerning the Protection of Privacy with regard to the Treatment of Personal Data Files, December 8, 1992. In Republic of Chile, a comprehensive privacy bill was introduced in the House of Deputies in 1996. In Brazil, a Bill relating to the privacy of personal Data was proposed in the Senate in 1996. In Czech Republic, an Act on Protection of Personal Data in Information Systems was adopted in 1992. The central rules on data protection in Denmark are found in two Acts. The Private Registers Act of 1978 governs the private sector. The Public Authorities Registers Act of 1978 governs the public sector. In 2000, Denmark enacted the Act on Processing of Personal Data, 2000⁸⁶ (Act No. 429 of 31 May 2000). The *Riigikogu*, Estonia's Parliament enacted the Personal Data Protection Act in June 1996. In 1999, Finland enacted the Personal Data Act, 1999 (Act No. 523 of 1999). In Greece, the Law on the Protection of Individuals with regard to the Processing of Personal Data was approved in 1997. Hungary has a Data Protection Law.⁸⁷ Interestingly, Iceland enacted laws on Biobank in 2000.⁸⁸ The Irish Data Protection Act of 1988 covers both the

⁸⁵ The Civil Code, Article 9, Statute No. 70-643 of July 17, 1970.

⁸⁶ This Act implements Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal of the European Communities 1995 L. 281, page 31 ff.).

⁸⁷ Act No. LXIII of 1992.

⁸⁸ Act on BioBank, 2000 (Act No. 110 of 2000).

private and public sectors. Israel⁸⁹, Italy⁹⁰ Lithuania enacted its Law on Legal Protection of Personal Data in 1996. Luxembourg's Act Concerning the Use of Nominal Data in Computer Processing was adopted in 1979. In the Netherlands, the upper house of the Dutch Parliament in 1999-2000 Session on July 3rd adopted the Personal Data Protection Act, 2000. In 1993, New Zealand adopted the Privacy Act, 1993, which come into force on the 1st day of July 1993. In Poland, the Act on Personal Data Protection was approved in 1997 and took effect in April 1998. In Slovenia, The Law on Personal Data Protection was enacted in 1990. The Spanish Data Protection Act (LORTAD) was enacted in 1992. Sweden has a data protection law i.e. the Data Act of 1973. In 1998, the United Kingdom enacted the Privacy Act, 1998.

In USA, 13 years after the publication of the article of Warren and Brandies⁹¹, the state of New York first recognized the law of privacy by adopting a law that prohibited the commercial exploitation of an individual and called it a right to privacy. Georgia became the first state to recognize the right to privacy through the common law. The law of privacy grew slowly and sporadically over the next 90 years. All but four states i.e. Minnesota, North Dakota, Vermont and Wyoming today recognize some kind of legal right to privacy.⁹²

During the 1960s and 1970s, the courts of USA expanded this important area of civil liberties i.e. right to privacy. When the court began to take a more activist role in the mid-1950s and 1960s, the idea of a "right to privacy" was revived.

There is also a right of personal privacy in Indian law. Unlawful attacks on the honor and reputation of a person can invite an action in tort and/or criminal law.⁹³ Though section 5(2) of the Indian Telegraph Act, 1885

⁸⁹ The Protection of Privacy Law, 1981.

⁹⁰ The Data Protection Act, 1996.

⁹¹ *Supra*, note 13 at page 3.

⁹² Sanford, Bruce W.; *Libel and Privacy*, 1993, 2nd ed. Englewood Cliffs, N.J.: Prentice-Hall Law & Business.

⁹³ As the civil law pertaining to defamation is not codified, the courts have to apply the corresponding rules of the English Common Law. In 1994 the Indian Supreme Court decided in the *Auto Shankar* case that every citizen has the right to safeguard his or her privacy and that nothing could be published on areas such as the family, marriage and education, "whether truthful or otherwise," without the citizen's consent, but carved an exception to this rule for material based on public records and information

empowered the government to tap telephones, the Indian Supreme Court found telephone-tapping to be a serious invasion of an individual's privacy.⁹⁴

11. Recent Developments

During the passage of time, the personal security of an individual in relation to his honour, home, correspondence has gained considerable attention. At the same time it is the most controversial area of law as information, which is a private issue, can be threatened to state security. If we consider the recent events of militants going on in Bangladesh, we may have logic in favour of such inference. Here, if the Government would honour the privacy of militants that may cause death of many people. Even though the international community has reached at consensus to control the information, which are disparaging to state security, international community adopt many international instruments to respect people's right to privacy.

The General Assembly of the United Nations adopted the Guidelines concerning Computerized Personal Data Files on 14 December 1990. The obligations imposed by this instrument require the State to adopt legislative and other measures to give effect to the prohibition against interference with the computerized personal data files and attacks as well as to the protection of this right.

The Council of Europe adopted a Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data, 1985⁹⁵. In 2001, an additional protocol to this Convention was also adopted.⁹⁶

The Arab Charter on Human Rights, 1994 contains a provision in Article 13 (b) where it says that no medical or scientific experimentation shall be carried out on any person without his free consent.

The European Union adopted some directives on Data Protection. They are the European Union Data Protection Directive, 1995, the Council of Europe Recommendation on the Protection of Medical Data, 1997, the

about public officials' conduct that is "relevant to the discharge of their duties". See, "Failure to Define Law on Privacy Could Cost Society Dear," Times of India, August 26, 2001.

⁹⁴ *People's Union for Civil Liberties vs. India*, AIR 1997 SC 568.

⁹⁵ Convention No. 108.

⁹⁶ Additional Protocol regarding Supervisory Authorities and Transborder Data Flows (2001).

EU 'Telecommunications' Directive Concerning the Processing of Personal Data & the Protection of Privacy in the Telecommunications Sector, 2002.

The Organisation for Economic Cooperation and Development (OECD), working on economic development and not on social issues or civil liberties adopted Guidelines in 1981 on the Protection of Privacy and Transborder Flows of Personal Data.

At Asian regional level, Asia-Pacific Economic Co-operation (APEC)⁹⁷ adopted two Declarations i.e. the Seoul Declaration, on Privacy and Asia Pacific Information Infrastructure (APII), 1995 and the Singapore Declaration on Privacy and E-commerce, 1998. The Seoul Declaration, 1995, identified ten principles and included the importance of ensuring the protection of intellectual property rights, privacy and data security.⁹⁸ The Singapore Declaration, 1998 called for the APEC Telecommunications Working Group (APECTEL), to consider privacy as a key issue.⁹⁹

Therefore, it can be presumed that all over the world or more specifically in most of the regions of the world are trying to respect people right to privacy. In doing so, all the four categories of rights i.e. personal privacy,

12. Provisions in existing Bangladeshi Laws

The legal system of Bangladesh is a mixed one i.e. combination of personal law and Common Law. Since Bangladesh is predominantly a Muslim country, the spirit and flavour of the concept 'privacy' was there in Bangladesh since time immemorial. But the legal history relating to right to privacy in Bangladesh is as old as India. Though we do not have any

⁹⁷ Asia-Pacific Economic Cooperation (APEC), established in 1989, is the premier forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. APEC's 21 Member States (referred as Member Economies) are Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Republic of the Philippines; the Russian Federation; Singapore; Chinese Taipei; Thailand; the United States of America; Viet Nam.

⁹⁸ Principle No. 10, the Seoul Declaration on Privacy and Asia Pacific Information Infrastructure (APII), 1995.

⁹⁹ Clause (C) (Building Confidence and Trust) of Article 17 (A Telephone Electronic Commerce Reference Framework for Action) of Annex A: A Reference Framework for Action on Electronic Commerce of the Singapore Declaration on Privacy and E-Commerce, 1998.

specific law relating to the protection or invasion of privacy, we have some provisions in our existing laws, which deal with the matter.

The right to privacy is placed under Article 43 under Part III of our Constitution, 1972. Article 43(b) of the Constitution of the People's Republic of Bangladesh, 1972 says that every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health . . . to the privacy of his correspondence and other means of communication. The rights enumerated in Part III are not necessarily and in all circumstances mutually supportive, though taken together they weave a fabric of a free and egalitarian society. It is often found that the exercise of a particular right of one person affects a different right of another person. Right to reside and settle anywhere in Bangladesh may be thwarted by a local group freely expressing its views against the persons wanting to settle in the locality of the group. Proper exercise of rights may have implicit in them, certain restrictions. The rights must be harmoniously construed so that they are properly promoted with the minimum of such implied and necessary restrictions.¹⁰⁰ There may be conflict between the fundamental rights claimed by the parties. The right of privacy of one person, which is a part of his right to life, may come in conflict with the right to healthy life of another, which is also a part of the right to life. In such a case, it has been held that only that right which advances public morality or public interest should be enforceable.

In *Dr. Tokugha vs. Apollo Hospital Enterprises Ltd., 1999*¹⁰¹ the appellant, a doctor by profession, whose marriage was proposed to be held on December 12, 1995 with one Ms. Akli, was called off, because of disclosure by the Apollo Hospital, Madras to Ms. Akli that the appellant was HIV (+). The appellant claimed damages from the respondent alleging that his marriage had been called off after the letter disclosed the information about his health to his fiancé, which it was required under medical ethics to be kept secret. The court considered the implication and importance of right of privacy and the doctor's moral duty to maintain confidentiality regarding the disease of the patient, but having regard to the serious communicable disease of the patient and the danger to the life and health of the person seeking to marry the patient, the court held that the right to privacy is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or moral or protection of right and freedoms of others and disclosure of the

¹⁰⁰ *Devendrappa vs. Karnataka SSID Corp., AIR, 1998 SC 1064.*

¹⁰¹ A.I.R. 1999 S.C. 495; 111 (1998) C.P.J. 12 (S.C.).

disease by the doctor would not be violate of the rule of confidentiality or the patient's right of privacy.

12.1 Provisions relating to protection of Privacy

The Constitution is the main document, which provides for rights of citizens. But it is important to note that keeping provisions in the Constitution in not sufficient, rights of the citizen guaranteed by the Constitution must of necessity be upheld. Its adverse effect will lead to loss of confidence in the government.¹⁰² It is not impossible to find out some provisions relating to some element of protection and invasion of privacy under Bangladeshi laws. An inventory is provided in the following paragraphs-

12.1.1 The Penal Code, 1860 (Act No. XLV of 1860)

Passing dishonestly the trade secrets of a business or information is a criminal offence under sections 405, 407, 408 and 409 of the Penal Code, 1860.

12.1.2 The Evidence Act, 1872 (Act No. 1 of 1872)

No person is permitted to disclose any information made to him during marriage by any person to whom he is or has been married without his consent except in suits between married persons.¹⁰³ Where the husband sought to bring in evidence his wife's answer to his inquiry about the love letter sent to her by a third person, the husband was not permitted to disclose such information and it was held that the statement of the husband earlier recorded in this regard in the lower court could not be brought on record.¹⁰⁴

Again, no public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by such disclosure.¹⁰⁵ Hence, privileges can only be claimed by a Government officer.¹⁰⁶

No Advocate, interpreters, clerks or servants of the Advocate is permitted to disclose any communication made to him by his client during the course of the Advocate's employment without the express consent of the client. This obligation of the Advocate continues even after the

¹⁰² *Ragib Ali vs. Bangladesh*, 34 (1982) DLR, at p. 185.

¹⁰³ Section 122, the Evidence Act, 1872 (Act No. I of 1872).

¹⁰⁴ *Ali Newaz Gardezi vs. Lt. Col. Muhammad Yusuf*, PLD (1952), Lah 558.

¹⁰⁵ Section 124, the Evidence Act, 1872 (Act No. I of 1872).

¹⁰⁶ *Feroz-ud-Din*, 6 (1954) DLR (WP) 162, at p. 162, PLD 1954 Baluchistan 1.

cessation of his employment.¹⁰⁷ At the same time, none shall be compelled to disclose to the court any confidential communication, which has taken place between him and his legal professional advisor. But such information can be disclosed if he offers himself as witness and for the explanation of the evidence and not for any other instances.¹⁰⁸

12.1.3 The Code of Criminal Procedure, 1898(Act No. V of 1898) and the Code of Civil Procedure, 1908 (Act No. V of 1908)

In Bangladesh, under the Code of Criminal Procedure, 1898 (Act No. V of 1898) and the Code of Civil Procedure, 1908 (Act No. V of 1908), there are provisions relating to sending Commissions to the *pardanasin* lady and Camera Trial where the Judge, Lawyers and witnesses can present.

Section 47 of Cr. P. C. says that in order to arrest a person, who enters in the house of another person, the police officer is not permitted to enter that house without taking the permission of the owner of that house. If the permission is not received then he can forcefully enter the house. Provided that if a woman, who, according to the custom, does not appear in public, occupies that apartment then the police officer shall give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing and may then break open the apartment and enter into it. In the search of a woman, the search shall be made by another woman with strict regard to decency. The Cr. P. C., 1898 never permits any investigation officer to enter any house after crossing the boundary wall.¹⁰⁹ It will be illegal for any police to enter any house after breaking the back door instead of seeking permission to enter through the front door.¹¹⁰

Order XXVI of the Code of Civil Procedure, 1908, while dealing with Commissions says in Rule 1 that any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it. So, it is clear that persons who are exempted under this Code will be provided special facilities.

Under Section 132 of this Code, a *pardanasbin* lady is exempted from person attendance in the court. Again, section 62(3) of the Code provides

¹⁰⁷ Sections 126 and 127, the Evidence Act, 1872 (Act No. I of 1872).

¹⁰⁸ Section 129, *Ibid.*

¹⁰⁹ AIR 1915 All.

¹¹⁰ AIR 1959 Orissa, 130 (DB).

that while seizing property in dwelling house where a room in actual occupation of a woman who, according to the customs of the country does not appear in the public, the person authorised shall allow the woman to withdraw and after that the person will perform his duty. Besides, Proviso to section 55(1) of the same Code provides that for the purpose of arresting the judgement-debtor, no dwelling house shall be entered after sunset and before sunrise.

Thus, both Code of Criminal Procedure, 1898 (Act No. V of 1898) and the Code of Civil Procedure, 1908 (Act No. V of 1908) contain specific provisions to honour people's right to privacy.

12.1.4 The Official Secrets Act, 1923 (Act XIX of 1923)

Section 3 of the Official Secrets Act, 1923 while dealing with penalty for spying says that if any person for any purpose prejudicial to the safety or interests of the State approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of Bangladesh, the security of the State or friendly relations with foreign States, he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code shall in case of conviction, sentenced to imprisonment for fourteen years and in other cases to three years.

12.1.5 The Town Improvement Act, 1953 (East Bengal Act XIII of 1953)

Section 181 of the Town Improvement Act, 1953 (E. B. Act XIII of 1953) while dealing with the power of entry says that the Chairman of the *Rajdhani Unnayan Kartripakkah* or any person authorised by the Chairman may, in case of necessity, enter into or upon any land in order to make any inspection, survey, measurement, valuation or inquiry or to take levels or to dig or bore into the sub-soil or to set out boundaries and intended lines of work or to mark such levels, boundaries and lines by placing marks, and cutting trenches or to do any other thing. The proviso to this section says

that sufficient notice shall in every instance be given, even when any premises may otherwise be entered without notice, to enable the inmates of any apartment appropriated to females to remove to some part of the premises where their privacy need not be disturbed.

12.1.6 The Bangladesh Banks (Nationalisation) Order, 1972 (President's Order No. 26 of 1972)

Article 18 of the Bangladesh Banks (Nationalisation) Order, 1972 (P. O. No. 26 of 1972) says that every Director shall, before entering upon his office, make a declaration of fidelity and secrecy in such form as may be prescribed.

12.1.7 The Bangladesh Telecommunication Act, 2001 (Act XVIII of 2001)

Perhaps, the single law which directly deals with protection of privacy is the Bangladesh Telecommunication Act, 2001 (Act No. XVIII of 2001). Under this Act, disclosure of any confidential information shall be deemed to be misconduct and the Act provides punishment for that.¹¹¹ If any person does any of the acts mentioned in section 23¹¹² with the intention of unlawfully learning the contents of any message . . . may be punishable with imprisonment for a term, which may extend to one year.¹¹³

According to section 30 (1) (g) of the Bangladesh Telecommunication Act, 2001 (Act No. XVIII of 2001), one of the functions and duties of the Bangladesh Telecommunication Regulatory Commission is to ensure protection of the privacy of telecommunication.

¹¹¹ Section 85(2), the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹¹² Intrusion into signal room, trespass in telegraph office or obstruction.- If any person-

- (a) without permission of competent authority, enters the signal-room of a telegraph office of the Government or of a person licensed under this Act, or
- (b) enters a fenced enclosure round such a telegraph office in contravention of any rule or notice not to do so, or
- (c) refuses to quit such room or enclosure on being requested to do so by any officer or servant employed therein, or
- (d) willfully obstructs or impedes any such officer or servant in the performance of his duty, he shall be punished with fine which may extend to five hundred Taka.

¹¹³ Section 24, the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

Intentional listening to a telephone conversation between two other persons is an offence and for this offence a person shall be liable to be sentenced to imprisonment for a term not exceeding six months or to a fine not exceeding fifty thousand taka.¹¹⁴ If any person aids, instigates or conspires the commission of this offence, he shall be liable to be sentenced to the same penalty prescribed for the commission of that offence.¹¹⁵

No Commissioner, or consultant, officer or employee or any other person employed by the Commission shall knowingly disclose or allow to be disclosed any confidential information to any other person in a manner so that the information may be used to the benefit of that other person or to the detriment of a related person.¹¹⁶

Any person working within the telecommunication administration of Bangladesh is not authorized to disclose any message of a person to any other person. If a person, on reasonable grounds, believes that a message sent or received by him has been or will be unlawfully disclosed can file a civil suit in the court of a Joint District Judge/Assistant Judge against the person doing so, and the court may pass an order of injunction or award compensation or other relief as it considers appropriate in such a suit.¹¹⁷ Filing of such a civil suit shall not affect the exercise of his other rights including his right to seek other remedies.¹¹⁸ But it should be kept in mind that such civil suit shall be filed within three years from the date on which the cause of action for the suit arose.¹¹⁹

Cellular companies of Bangladesh maintain strict rules in delivering information of their clients to others. If any body wants to have any information, then the order of court is necessary.

12.1.8 The *Birod Mimangsha (Pouro Alaka) Board Ain, 2004*¹²⁰ (Act No. XII of 2004):

This Act was enacted to set up a Dispute Resolution Board in a *Paurashava* for the speedy disposal of certain offences mentioned in the

¹¹⁴ Section 71, the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹¹⁵ Section 74, the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹¹⁶ Section 85(2), the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹¹⁷ Section 83(1), the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹¹⁸ Section 83(4), the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹¹⁹ Section 83(3), the Bangladesh Telecommunication Act, 2001 (XVIII of 2001).

¹²⁰ The Conciliation of Disputes (Municipal Areas) Board Act, 2004 (Act No. XII of 2004).

Schedule to this Act.¹²¹ Section 17(2) says that the Board may allow the representative of a *Pardanashin* lady who refuses to give evidence before the Board.

12.1.9 The EPZ Sramik Shongha abong Shilpa Shamparka Ain, 2004¹²² (Act XXIII of 2004).

Section 63 of the EPZ *Sramik Shongha abong Shilpa Shamparka Ain*, 2004 (Act No. XXIII of 2004) says that if any information is obtained from any association or person, unit or company or employer during taking evidence by the executive chairman, conciliator, tribunal, arbitrator or appellate tribunal, and if that any association or person, unit or company or employer requests to keep such information secret, that cannot be published without the written consent of that association or person, unit or company or employer.

12.2 Provisions relating to invasion of Privacy:

Though there are many provisions relating to protection of privacy but there are not enough references regarding the invasion of privacy. Even though many people experienced the problem of invasion of privacy of their personal and professional life on the ground of public interest and state security and also because of insufficiency of national laws. Here is some references of existing Bangladeshi Laws-

12.2.1 The Telegraph Act, 1885

Section 5-(1) (b) of the Telegraph Act, 1885 (Act No. XIII of 1885) says that on the occurrence of any public emergency, or in the interest of the public safety, the Government or any other specially authorized by the Government, may . . . order that any message or class of messages to or from any person or class of persons or relating to any particular subject brought for transmission by, or transmitted or received by, any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an office thereof mentioned in the order. In case of any doubt relating to emergency or public safety, the decision of the Government shall be final.¹²³

¹²¹ Preamble to the *Birod Mimangsha (Pouro Alaka) Board Ain*, 2004 (Act No. XII of 2004).

¹²² The EPZ Labour Union and Industrial Relations Act, 2004 (Act No. XXIII of 2004).

¹²³ Section 5 (2) of the Telegraph Act, 1885 (Act No. XIII of 1885).

Section 19A (1) of the same Act provides that if any person desires to deal in the legal exercise of a right with any property in such manner as is likely to . . . interrupt or interfere with telegraphic communication, shall give a notice at least before a month to any telegraph officer whom the telegraph authority may empower in this behalf. Section 19A (2) provides that a Magistrate of first class or second class may give an order to abstain for one month any person from dealing with such property if he fails to comply with the provisions of sub-section (1).

12.2.2 The Bangladesh Telecommunication Act, 2001

Only in case of public interest, the Communication may, after giving reasonable opportunity of being heard, publish confidential information.¹²⁴

On the basis of the request of the intelligence agencies, the Bangladesh Telecommunication Regulatory Commission tried to propose an amendment in the forth-coming amendment bill so that the members of the intelligence agencies can breach privacy of individuals by tapping phone calls and busting e-mails. Although the intelligence agencies cannot legally eavesdrop on telephone conversations, allegations have long been there that they monitor and tap phone calls illegally.¹²⁵

The Government has introduced an amendment in the Telecommunication Act, 2001. On 11th December the cabinet approved the bill and since the Parliament was not in session, the bill was enacted as law in the form of Ordinance¹²⁶. According to the provisions of the Ordinance, with the authorization of the Government or any other person acting in this behalf, any security or intelligence agency can eavesdrop the conversation of any person using any cellular phone. Though from the part of the Government it was announced that the Ordinance was promulgated as a temporary measure to stop all activities of the recent militant revolution, but the Government did not say anything about the period till when the Ordinance remain effective. The Ordinance is a special one, as it says that notwithstanding anything contained in any other law for the time being in force the provisions of this Ordinance shall prevail on the ground

¹²⁴ Section 85(3), the Bangladesh Telecommunication Act, 2001 (Act No. XVIII of 2001).

¹²⁵ <http://www.thedailystar.net/2003/09/16/d30916011010.htm> accessed on 23rd August 2005.

¹²⁶ See, for details, Article 93 of *the Constitution of the People's Republic of Bangladesh, 1972*.

of state security, public safety and to save people from the threat of terrorism.

On 20 May, Matiur Rahman Chowdhury, editor-in-chief of *Dainik Manabzamin* a daily newspaper, received a one-month jail sentence and a fine Taka 2,000 Takas fine for contempt of court. His wife, the newspaper's publisher were also sentenced to fine of Taka 2,000 each. His case arose from publication of a private conversation between the defendants, President HM Ershad and Justice Mohammad Latifur Rahman, during which President HM Ershad had sought to gain a favourable verdict for his alleged offence. Judge Latifur resigned after the media scandal. However, Chowdhury's verdict had been the first instance of an editor having sentenced to a prison term for a press offence since Bangladesh obtained press freedom in 1990.

Even though the plaintiff's case for compensatory/special damage in an action for trespass to land, which is actionable per se, fails, the plaintiff cannot be denied any damages at all. He is in that event entitled to nominal damages. *Serajul Islam Chowdhury and others vs. Md. Jainal Abedin and others* 49 DLR (AD) 164.

In *Malone Vs. Metropolitan Police Commissioner, 1979, Ch 344*, Megarry VC turned down a complaint against telephone-tapping on the ground of absence of any common law right of privacy, but in Bangladesh such telephone-tapping will be unconstitutional for violation of the privacy of communication unless a law permits it on any of the grounds of restriction mentioned in Art. 43.

13. Defences in privacy cases

It should be kept in mind that in the absence of express provision of law; the defence should be taken on the basis of case laws. It so happens that a piece of interesting news may border on infringement on other's privacy. That time, the second person can file a suit against the first person. In such cases the first person has some defences available. Newsworthiness, truth or absence of malice, consent, act of satire, are the two most generally recognized privacy defenses, but there are others available. They vary with their application to the different torts.

13.1 Newsworthiness

Newsworthiness is the logical defense against publication of embarrassing private facts. The journalists can escape their liability if the issue published is newsworthy. Generally, the courts have been fairly lenient in permitting the media to cover details about the personal affairs of people whose lives have become matters of public interest. The right to

publish has been upheld more often than the right to privacy. This trend is epitomized by a 1975 Georgia case about a young woman who had been raped and murder. To protect its privacy, the family wanted to keep her name out of stories discussing the crime. The news media did not honour the family's request and published gruesome details of the crime naming the victim. The family sued for invasion of privacy, claiming that there was absolutely no need to disclose the name and that Georgia law prohibited of the release of rape victims. The US Supreme Court disagreed and overturned the Georgia law. It held that crime was a matter of public record, making the facts surrounding it of public interest and publishable despite protest by victims and their families.¹²⁷

13.2 Truth or absence of malice

In case of truth events and absence of malice the question of invasion of privacy is not entertained. If any news is published on the basis of true facts, that news will be protected in law even if that news invades the privacy of other people.

13.3 Consent

Consent is an important defence in privacy related cases. With the consent of any person, any information of that person can be disclosed before others. Individuals may lose their right to privacy when they grant interviews to reporters. Once the interview is given the reporters are free to round the story out with observations that were not part of the interview.

13.3.1 When consent cannot work?

1. Though consent is a very good defence in privacy related cases, but it cannot be used as a shield in the following cases-
2. When the consent is not a free consent. Consent is not free when it is obtained by way of undue influence, coercion, fraud and misrepresentation.
3. When consent is given today may not be valid in the distant future, especially if it is gratuitous oral consent.
4. Some persons like minor, lunatic cannot give consent. So, if persons under this category give consent and anybody does anything on the basis of that consent that will be ineffective.
5. Consent to use photograph of a person in an advertisement or on a poster cannot be used as a defence if the photograph is materially altered or changed.

¹²⁷ *Cox Broadcasting Corporation vs. Cohn*, 420 U.S. (1975) 469.

13.4 Victim being a public figure

Many privacy invasion cases involved unauthorised photographs of people in public life. Jacqueline Kennedy Onassis, the widow of President Kennedy, went to Court to sue one particularly obnoxious photographer for taking photographs of her private life. The Court ruled that even though she was no longer the first lady, she remained a public figure. Therefore, pictures could be taken and printed without her consent, the Court however, ordered the photographer to stop harassing her.¹²⁸

13.5 Act of satire

The Supreme Court of USA ruled unanimously in 1988, in a case brought by the Jerry Falwell against Hustler magazine publisher, Larry Flynt, that the work of satirist and cartoonist enjoyed full First Amendment protection.¹²⁹ Falwell's plea for privacy protection and for compensation for emotional injury was denied. In the case of *Barber Vs. Time*, 159 SW 2d 291 (1942), a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a news magazine is an invasion of privacy.

13.6 Security of the State, public order, public morality or public health

On the ground of the security of the State, public order, public morality or public health, the privacy of one person can be infringed and as such the security of the State, public order, public morality or public health can be a very good defence in privacy cases. As for example, the doctors can disclose the presence of any infectious disease in any person who has direct contact with the public. If a patient is suffering from an infectious disease and is employed as cook or waiter in a hotel, as children's nurse etc. he should be persuaded to leave the job until he becomes non-infectious. If the patient refuses to accept this advice the doctor can disclose it to the employer of the patient. In the case of *X Vs. The United Kingdom*¹³⁰, a person had a private and reciprocal homosexual relationship lasting nine months with an 18-years-old male adult, a man he had known all his life.

¹²⁸ *Gallella vs. Onassis*, 1973, 487 F. 2d 986.

¹²⁹ *Hustler vs. Falwell*, No. 86-1278, 1988. See, also Drechsel, Robert E.; "Mass Media Liability for Intentionally Inflicted Emotional Distress" 62 (spring 1985), *Journalism Quarterly*, pp. 95-99.

¹³⁰ Application No 9013/80 and Decision of December 11, 1982. See (1982) 25 Yearbook European Commission Case Law, 124.

The local vicar was told of this personal relationship and as a consequence the police were contacted and charges were brought against the person. It was held that though every person has a right to enjoy privacy of his life, he was liable as his act was an offence under section 12 (1) of the Sexual Offences Act, 1956. Again, in the same way, existence of any conspiracy against the state can be licked out. Again, if anybody gives shelter to a heinous criminal in his house, the members of the law and order enforcement authority can enter that house and arrest that criminal. Here, the privacy of the person who sheltered the criminal will be ignored.

14. Important Issues to be considered before enacting Privacy related Law

Basically four different models are followed all over the world to protect privacy. They are comprehensive laws, sectoral laws, self-regulation and technologies of privacy. Bangladesh is a poor country of the third world where the most important areas of civil liberties are ignored, to enact a new law relating to protection of privacy can be an optimistic idea. But we should keep it in mind that we have stepped into Information Highway and we are now part of the global village. So, we should enact a law relating to protection of privacy. After the above discussion, the Government of Bangladesh should consider the matter seriously and should enact an Act of Parliament, where the following provisions may be considered-

1. The provision of a Data Protection Commissioner can be incorporated so that he can work like Ombudsman in case of Data Protection.
2. There must have provisions relating to Transborder Data Flows and Data Havens.
3. There must have the provisions of accountability of the offices where people use to provide their personal data. Example of such offices can be Bank, Hospital, Internet Service Providers etc.
4. The Act must contain the provision as to why the informations are taken. Simultaneously, if information is taken for one reason it cannot be used for another reason. If that is done, the provision of punishment and compensation should be there.
5. The Act must contain provision regarding consent before using the information of the person.
6. The Act must contain the provision relating to the regular update of his Data.
7. There must be no personal data record-keeping systems whose existence is a secret from the general public.

8. There must have the provisions of some exceptional grounds when the privacy of a person can be infringed.
9. The mediums like electronic or printed media must not abuse the private information they received and for that their accountability must be ensured.

15. Conclusion

A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy . . . Privacy is a key value which underpins human dignity and other key values such as freedom of association and freedom of speech . . . Privacy is a basic human right and the reasonable expectation of every person.¹³¹

The slogan adopted to celebrate the fiftieth anniversary of the Universal Declaration of Human Rights was “All Human Rights for All” and we know that all human rights are aspects of the right to privacy. Though, the issue of “privacy” is not considered seriously in countries like Bangladesh, there is hardly anyone who will not like to have a private life and every or some moments of his life will be the talking issue of other people.

The Governments and rulers of different countries tried to infringe citizens right to privacy on the ground of state security. For that, sometime they had to receive unwanted consequence also. President Richard Nixon of USA, though the President and is also called the most powerful man of the world, had to resign as he tried to spying the office of the opposition party, which is popularly known as “Watergate Conspiracy”. After the terrorist attack in 9/11, US President George Bush did the same thing of spying and secretly monitored the international phone calls made by the foreigners. In Bangladesh, the Government amended the provision of the Bangladesh Telecommunications Act, 2001 to monitor the mobile phone calls made by the citizens so that the members of intelligent agencies can have information about the movement of militants and sources of their funding. The Government has also demonstrated some success also by applying this instrument, even though people from all strata feel worried as they think that the Government may use this method to suppress the activists of opposition and anti-government movement. Civil societies of this country expect that there should have some strict and concrete

¹³¹ Preamble to the Australian Privacy Charter, published by the Australian Privacy Charter Group, Law School, University of New South Wales, Sydney (1994).

guideline about this eavesdropping, otherwise the true value of independence or human rights will be disappeared.

In 1959, the International Commission of Jurists, which is affiliated, to UNESCO convened the Declaration of Delhi on Rule of Law, 1959 with the attendance of 50 countries. The words of the Declaration say that to ensure Rule of Law in a society, five things must be ensured including the citizen who is wronged by the Government should have a remedy. Accordingly we can say that the Government may eavesdrop and tape phone calling but for that Government should pay compensation for any unnecessary harassment. Thus, citizens right to privacy will be protected.