PRIVACY IN THE TIME OF TERRORISM?

"Be kind, you are being watched"

On the way back to work, I noticed this intriguing statement, "*Be kind, you are being watched*" below a CCTV camera at the entrance of my apartment. While I must have passed by a number of such statements and CCTV cameras around the city, none of these bothered me before. However, this time, the words "You are being watched" stayed with me for a while. I had an innate feeling that my personal space was being violated as I was being watched by CCTVs whenever I stepped out of my home. Was I being watched *inside* my home as well? Were my emails being read, my phone being tapped, and my internet activity being monitored? Perhaps. However, given the new global threat of terrorism, does it matter that my individual privacy is being violated? Is individual privacy more significant than the collective security of the State?

In this piece, I argue that the concept of privacy is becoming redundant because:

1) Privacy is an innate feeling that changes from culture to culture, and therefore, it is difficult to define it in precise terms. In absence of a precise meaning, it is hard to enact a legislation providing for the effective protection of it;
2) In the wake of the global threat of terrorism, it has become imperative for privacy to take a step back in the interests of the collective security of the State.

The Concept of Privacy

The need for privacy is inborn and natural to an individual since every individual has certain aspects that the individual would want to remain confidential. Dr. Alexandra Rengel, in her book 'Privacy in the 21st Century', says this need for privacy amongst individuals is evolutionary, equating it with an animal's instinct for territoriality. She says that just as animals maintain social distance in order to court, mate, and rear offspring, and thus, can differentiate between the public and private sphere of life, the need for privacy might be ingrained in the human behavior through its foundations of animal instinct.

Philosophers have tried to explain the concept of privacy by making distinctions between the private and the public sphere of human life. Aristotle, John Stuart Mill, and Locke, all three of them differentiate between a person's private sphere, where he is with his family within the bounds of relationships of inequality and dependence; where he regulates himself; and is away from the

State's exercise of arbitrary power, to a person's public sphere, where he strives together with others towards the common good and is regulated by the State.

However, since privacy is innate, and intuitions vary from culture to culture and person to person, it has been difficult to define privacy in conclusive terms. Robert Post conveys his doubts about whether privacy can ever be conveniently tended to since it is so engorged with different and particular implications. The word privacy consists of different conceptions, and these conceptions are quite distinct from each other, and thus, incapable of a single definition.

Some scholars try to define privacy on the basis of intuition alone; the 'twinges of indignation' that suggest a breach of social norms. Others have defined it as a general "right to be left alone" and a generic term encompassing various rights, which are inherent in the concept of liberty. Some scholars have also argued that the need for privacy is not required just for the good of the individual but also as a collective good of the society.

Daniel Solove, in Understanding Privacy, has ordered the different conceptions of privacy into six general sorts: (1) the right to be let alone; (2) constrained access to the self – the capacity to shield oneself from undesirable access by others; (3) secrecy – the concealment of certain matters from others; (4) control over individual data – the capacity to control data around oneself; (5) personhood – the assurance of one's identity, uniqueness, and poise; and (6) closeness – control over, or restricted access to, one's cozy connections or parts of life.

The above conceptions of privacy, though overlapping, more or less cover the different conceptions of privacy thus far. However, not all of these conceptions are recognized as a *legal right* in every jurisdiction. The recognition of these conceptions varies from culture to culture. In fact, the culture of a particular region has a very significant role to play in determining the importance of individual privacy. James Whitman in his work 'Two Western Cultures of Privacy: Dignity Versus Liberty', in this regard, writes that privacy is innate. However, the territories of privacy that we esteem may vary depending on our social qualities or culture.

The significance of culture in privacy has also been written by Margaret Mead in 'Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation'. She says social standards will impact a general public's privacy traditions, and in some primitive social orders, where group survival is more critical than individual privacy, there is less of an accentuation on individual space.

There has also been a transformation in which individuals have come to perceive the notion of privacy. With the advent of technology, the notions of privacy are rapidly changing. Individuals willingly give out details of their personal lives on social media. E-commerce has made it nearly impossible for individuals to retain their data with themselves. Personal data on the World Wide Web has also made it easier for hackers to steal and misuse it. Can one then say the concept of privacy has just been reduced to privacy in the confines of one's home?

The difficulties in defining privacy is one of the bigger obstacles to make a case for preventing the State from carrying out its mass surveillance activities to curb terrorism and criminal activities.

Shift in privacy policy of States given the recent global threat of terrorism

The law of privacy has been disseminated from jurisdictions to jurisdictions. It can be traced as far back as 1361, when the Justices of the Peace Act in England accommodated the capture of peeping toms and meddlers.

The modern privacy benchmark has been set by international law through the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Convention on Migrant Workers etc., all of which provide for protection of privacy rights in one way or the other.

However, there has been a significant shift in the way States have incorporated the principles of international law on privacy in their domestic legislations.

The modern day privacy rights have changed in the United States after enactment of the Patriot Act in the wake of 9/11 attacks. The Foreign Intelligence Surveillance Act, 1978, (FISA) now empowers the Foreign Intelligence Surveillance Court in the United States to grant orders approving surveillance by intelligence agencies for "obtaining foreign intelligence information". This term includes information pertaining to activities, which involve or may involve a violation of the criminal statutes of the Unites States so long as the information suggests evidence of crimes or probability of commitment of crimes such as espionage, terrorism, or sabotage. The Act empowers the intelligence agencies to employ wide surveillance techniques, approvals of which are granted to them on relatively lower thresholds of, among other things, foreign intelligence standard of

probable cause. Further, the protection of privacy under the US law is only available to its citizens and not foreign nationals.

In the United Kingdom, firstly, the James Malone Case of 1984 somewhat marked the replacement of the Maxwell-Fyfe Directive on intelligence agencies and gave broad mandates to MI5, MI6, and the Government Communications Headquarters through legislations. It granted them immunity from liability for entry on or interference with property or with wireless telegraphy, through a system of warrants, and for acts committed outside the British islands.

Secondly, the incorporation of European Convention on Human Rights into domestic law paved the way for the enactment of the Regulation of Investigatory Powers Act, 2000, (RIPA) which thereby expanded state's powers to surveil including the interception of the content of telephone, internet, and postal communications.

Recently, on 04 November 2015, the United Kingdom published its draft legislation on surveillance in response to the Snowden disclosures about *Tempora* and Mass Surveillance. Termed as Snooper's Charter, the bill evoked the following response from Snowden, "By my read, #SnoopersCharter legitimizes mass surveillance. It is the most intrusive and least accountable surveillance regime in the West."

In India, the Privacy (Protection) Bill of 2013, bars mass surveillance and interception of communication. However, it specifically provides for such surveillance and interception if it is needed for protection of national security, among other things.

Thus, in the wake of the global threat of terrorism, it is obvious that no State would want its legislations to restrict itself from intruding into an individual's privacy to prevent acts of subversion, that too, for a concept of privacy, the meaning of which, is ambiguous and changes from time to time.