

Practical and Theoretical Aspects of Privacy in Cyberspace from Internal and International Legal Perspective

Narjes Khaton Mohebpour and Dr. Mehdi Zare

¹PhD student of Private Law at Azad Larestan University, Larestan, Iran

²Assistant Professor and Faculty Member of Azad Larestan University, Larestan, Iran

Received: February 21, 2017

Accepted: April 30, 2017

ABSTRACT

Privacy as a basic human right, is considered one of the most important rights of a person in modern era. It is also approved and supported both by Islam religious perspective and law of countries and international documents. The right of every individual in having solitude and privacy without surveillance or illegal and arbitrary intervention is one of the basic and fundamental rights which does not require any reason or justification. Without any doubt violating privacy of a person damages honor, prestige and individual autonomy of that person therefore it is essential to protect privacy of individuals. Unfortunately, in the Islamic Republic of Iran legal system, social rules that support privacy doesn't exist neither in real space or cyberspace. Whereas every kind of information which have private aspect must be protected by law. Nowadays with appearance of new communication and information technologies, appearance and expansion of new media and development of cyberspace, possibility of privacy violation have been facilitated and this has caused serious concerns.

INTRODUCTION

All of us regardless of religious, political and cultural beliefs are familiar with concept of privacy because this concept forms a big and important part of every person's life and of course every human being based on conscience and human nature consider violation of privacy wrong and condemn it, like our Creator that consider violating humans privacy a sin equal with eavesdropping, spying, gossiping and etc. which is worthy of punishment. Curt study of laws of different countries also shows that legislative systems insist on observance of privacy and of course punishing violators and our dear country isn't an exception. For example articles 22, 23 and 25 of Islamic Republic of Iran constitution forbid any kind of invasion to honor, life, property, right, house, job, beliefs and private information.

1- General topics

1-1- Definition of privacy

In simple words, it is reasonable to say privacy is one of those concepts that everyone understand but can't give a comprehensive and general definition for it so as a result in a lot of cases we encounter kind of conflict or even challenge in contexts related to privacy. For example, when installing surveillance cameras in coffee nets were proposed, opposing people consider this in conflict with privacy and others like author of this article consider that unrelated to privacy of people. This opposition sometimes is caused by lack of terminological definition of privacy but in general it is reasonable to say: Privacy means a person has the right to freely hide information related to his/her life affairs in his/her solitude and has control over them and can prevent others to access them and also decide when or how much this information would be shared.

Religious teachings also instruct humans to consider privacy in their lives and avoid exposure of life information. As holy Imam says hide couple things from others: How much fortune you have? Where are you going? What is your disposition of beliefs and thoughts?

2-1- Instances of privacy violation in cyberspace

The other aspect as mentioned is related to violators of privacy in cyberspace. When these criminals enter cyberspace or in other words internet, assume it is their absolute property and they allow themselves to enter and have activities in other people's privacy. In the following we point out some of the instances of privacy violation in cyberspace which are considered a crime in computer crimes law.

- Illegal access to communication and computer data such as hacking an email or an account
- Illegal spying on content of transitional data in communication and computer systems such as usage of key loggers and internet chatting spying software and etc.
- Illegal access to confidential transitional data in communication and computer systems or data carriers or gathering and eavesdropping them.
- Making confidential transitional data in communication and computer systems or data carriers accessible to unqualified people
- Violation of computer systems security measures in order to access confidential transitional data in communication and computer systems or data carriers
- Illegally deleting, destroying, damaging or making data belonging to another person unreadable in communication or computer systems or data carriers
- Illegally disabling or disrupting communication or computer systems such as disabling web database and preventing access to personal websites
- Illegally preventing qualified people to access data or communication or computer systems
- Illegally stealing data belonging to another person
- Defaming another person through disseminating distorted audio or video in communication or computer systems
- Disseminating falsehoods through communication or computer systems in order to inflict another person or disturbing public opinion
- Selling or disseminating or sharing passwords or any information which can give illegal access to data or computer systems or communication systems that belongs to another party
- Teaching how to commit computer crimes such as illegal access, illegal eavesdropping, computer spying, damaging and disrupting data or communication or computer systems
- Privacy violators in cyberspace because of reasons such as depression, anger, jealousy, revenge, hatred, amusement, entertainment, inferiority complex, scorn, competitiveness, lack of attention to ethics and society values qualify their selves to enter victim's privacy and irreparably damage people's honor, property or even lives.

1-5- Idiomatic concept of cyberspace

1-5-1- Idiomatic definition

Cyberspace is an expression that is heard a lot in internet, media and communications.

The word "cyber" is derivative of a Greek word "Kybernete" which means steersman or guide. The first time this expression was used by a mathematician named Norbert Wiener in the book titled Cybernetic and control over communication between machines and animals in 948 AH. Cybernetic is a science of studying and controlling mechanisms in humans, machines and computer systems.

Cyber is a prefix for describing a person, an object, an idea or a space that is related to computer and informational world.

William Gibson, a sci-fi author, for the first time used the word cyberspace in the book titled Neuromancer in 984 AH. Cyberspace in meaning refers to a sets of internal communications between humans through computer and communication aspects without considering physical locations.

An online system or a cellphone or an ATM is an example of cyber that users can communicate to each other through it. Contrary to real space, in cyberspace there is no need for physical movement and all of interactions only happen with pressing a key or clicking the mouse.

This absence of physical movement, prompted researchers to study some similarities of cyberspace with unconscious states, especially mental states that appear in dreams.

2-1- Importance of privacy

Protection of privacy is actually protection of important humans' goals. Some believe privacy conserves safe and protected shelter that shelter people from careful and criticizing inspections of themselves. A safe range in other hand is privacy of a person that he/she manage his/her life conditions and way of living as he/she like. In other word, the person can direct his/her personal information and his/her presence in society and be supported by the law against any violation of his/her privacy.

We encounter privacy in society, in different ways. For example privacy in relationship between lawyer and client or privacy in business secrets.

In article 30 of attorney law approved in 1315 AH, it is provided that: “lawyer must keep secrets that he/she gained from the client through consulting and he/she also have to keep secrets related to prestige, honor and credits of the client.”

In article 4 of professional conduct of Canadian justice lawyers is also provided that:

Lawyer has the duty to keep all of the information related to the job and affairs of the client which are gained through professional relationship, confidential and he/she must not reveal these information unless the client give permission explicitly or implicitly, or this law permit the revealing.

If a law or a qualified court demand revealing, the lawyer should be careful not to reveal more information than it is demanded. Electronical data have the same condition. Words and data transitioned between lawyer and client are consider confidential. Emails, encrypted data, internet, browser and cellphones created a new situation so it is necessary that both sides be aware of necessities and rules of new technology. Nowadays emails have facilitated communications between lawyers and clients so it require that justice attorneys take reasonable precautions for keeping data confidential because it is their duty as a lawyer.

“Based on the article 60 of electronical business, electronical business secrets are data messages which include information, equations, patterns, software and applications, techniques and processes, detailed compilations, business techniques, trade techniques, plans and financial information, clients contacts and business projects and cases like these that each one separately has economical value and hasn’t been made public and also there were reasonable efforts to secure it. Based on business law of America, business secret is: “information that include equations, patterns, compilation of plans, instruments, methods, techniques or processes that have separate economical and scientific values, and their values is because of being secret and they can’t be easily compared with normal values; As a result it requires reasonable efforts to keep these secrets and in contrast with production licenses and business logos, the only way to access these secrets is to have a warrant.” Nowadays in contracts keeping business secrets are considered as duties of the opposite party. Principles of business contracts provides that:

“Whenever one of the parties during negotiations, share confidential information with other party, that party is bound to avoid disclosure or misuse of that information for its own purposes. Even if the contract wouldn’t be approved; in case of misuse or disclosure, compensation of damages caused by this can include paying estimated profit gained from the confidential information.”

Violation of confidential matters or disclosure is a liability. The amount of compensation for damage differs depending on whether the parties agreed on keeping information confidential or not, even if damaged party take no actual damage, they have the right to demand the profit which offending party gained from disclosure or misuse of the information for its own purposes. For example, if necessary even when the information haven’t been disclosed or have been partially disclosed, the offended party based on governing law can get an immediate order from the court for preventing disclosure.”

2-2- Territory of privacy

“Maybe we can picture privacy as three circles with one dot as a center of all the circles; then the center would be the subject and surroundings exist both in near and far from subject. The first circle (self) which is brighter than others exist of absolute existence, fundamental characteristics for example beliefs, thoughts and values that he/she believes in. The second circle which surely is wide, spreads among two environments from his/her external characteristics to his/her basic social life that in any case include other people which in the first step are family members and friends. This is a private territory that requires a definitive protection because this territory is more fragile than others and often is a place for alien invasion.

The third circle (or second ring) is a territory that is less marked and is an external life aspect. This zone include interactions that subject has with other people (sometimes not directly) for managing private life in the first and the second circles. As a result he/she for maintaining his/her private life needs to be present in public. In this situation, his/her presence in public, the activities that he/she has, the picture and the face that he/she has and all of these that belong to private life will be placed outside of second circle, but privacy doesn’t disappear (at least not all of it). In the third circle, we encounter with elements of privacy that exist in public places and require support of privacy. Therefore regardless of matrix-like centrality of human nature, privacy has two dimensions: First dimension exist of the person and his/her nearest social life. This dimension without a doubt is the private and personal life of the person and requires isolation and it is necessary to defend it from alien invasion. But it isn’t possible to completely separate it from its outer dimension. Second dimension is involved in some external relationships, in general it is involved with some public relationships but not totally public, just to a certain extent so that it can organize private life with external environment to the extent required. They are just external instruments of private life but they stay closely to it.

As a result, the right of privacy requires internal dimension of private life to maintain close to qualified people as long as they would be asked or permitted to enter. In the other hand external dimension guarantee that the rest of people see and know everything that is ought to be seen and known but it forbid disseminating that information in large scale unless the person agrees to it or at least tolerate it.

In French law, article 9 of civil law elegantly clarifies this inherent duality. In the first paragraph the idea that every person have the right to want his/her privacy to be respected without any prying is stated, but it would only be enforced when based on paragraph 2 of this article confidentiality of private life has been violated.”

2-3- Different areas of privacy

It is possible to study privacy in four different but related areas:

2-3-1- Territorial privacy

This area of privacy include one of the most fundamental and traditional rights of individuals that held on the need of houses being respected and immune to invasion. Concerning privacy of people in houses and places that they own, there is no significant disagreement between scholars. This right is rooted in fundamental rights of individuals and also in human rights and it is one of the branches of the general principle of freedom in choosing house and immunity from any invasion. The basis of this right is: “House of individuals “and consequently any other similar place” is his/her most hidden hideout and if there is a right for keeping private aspects of life and secrets confidential (which there is actually), there is no better place than house for applying this right, but of course this right like every other kind of rights is only approved as a principle; and influence and validity of it has no conflict with considering some special and legal exceptions. Among these exceptions it is possible to mention search with a warrant from a judge or a qualified authority, inspection for tax and health purposes and also cases that involve evident crimes or matters similar to this.

2-3-2- Information privacy

This area of privacy that in some of judicial systems is referred to as data protection, include the rules governing data and information processing that are related to people. The processing refers to any kind of obtaining, keeping, organizing, saving, hacking or editing, replacing, usage, disclosure, transition, dissemination and any similar action. According to these definitions, it is clear that contrary to popular opinion, principle of this area is in fact not related to the emergence of information and communication technologies, and formerly it was possible to strongly and even presently violate this right but with emergence of these technologies, this violation became facilitated and epidemic in an unbelievable rate. Therefore today’s society worries more than ever about possible misuse of people’s private information.

It is also essential to know that the private information in this topic doesn’t necessarily refers to secret information that have confidential nature but it also include any information related to people like interests, tastes and financial and income information, information related to personal needs, beliefs, personal characteristics, ethnic affiliations, cultural identity and in general any kind of information that can be used against subject or at least be beneficial to other people.

2-3-3- Communication privacy

This area of privacy consists of people’s right in keeping all contents of every kind of correspondence and communication safe and confidential. This branch of privacy based on relative history of post and communication is better accepted rather than the area related to information privacy. But of course nowadays with emergence of new forms of correspondence like emails, satellite connections, mobiles and similar things, the right of privacy has encountered new problems and also it has expanded greatly. Among expressible topics, this area in addition to protecting mails and postal packages from searching and inspection, protects phone calls from spying, maintains confidentiality of bills, phone bills (which shows call reports), maintains safety of correspondence in digital networks including internet and networks, and also determines displaying or not displaying name and phone number of the person in contact lists and protects against unwanted phone calls and emails.”

Nowadays with the help of technology, enormous economical and production institutes can gain invaluable information regarding tastes of consumers in different parts of global village and needs of the market. Modern economy and trade in today’s sense without these information isn’t able to maintain competition. For example, among instruments that are used for achieving these purposes, there is “internet bait”. Websites request brief information from users when they offer services like giving access to articles existing in the site or giving free email accounts. Gathering these information allow the owner of it to sell these information with a high price to beneficial commercial institutes (this benefit can be in an unwanted advertisement to a related person that is chosen based on

his/her interests, tastes and characteristics). Nowadays it is proposed that gathering and offering these personal information without owner's permission is illegal and violating this has legal liability. About this area of privacy in internal law despite lack of any general rule specially concerning electronic and internet communications, the principle of this right, specially concerning confidentiality of mails and important phone calls, is expressly mentioned in article 25 of constitution and also in common law (article 104 of public and revolutionary court hearing laws in criminal matters). However, like other areas mentioned, adoption of a general law that resolves legal challenges caused by emergence of new technologies is an undeniable necessity."

2-3-4- Physical privacy

"This kind of privacy is about protection of physical integrity and information concerning health condition. Given that existence and physical integrity of every person is the first and most obvious belongings of him/her and due to the fact that in the case of making decision in this area, he/she is prior to others, any kind of inspection, body search, examining, medical testing or any similar action and also disclosure of information gained from these actions based on basic principle is only allowed with permission from the person. Violating this has legal liability. Recognizing this right, considering importance of information about physical (or mental) characteristics for humans, is essential otherwise in case of disclosure, person's health can even be endangered. Of course like other forms of privacy, this right is not absolute and in some cases like legal matters or matters concerning public health and also discovery of crimes and security matters according to legal instructions, it is possible to limit this right.

Regarding legal duties and obligations of institutes and centers which keep information gained from diagnosing, treating and also about matters like types of data and methods of collecting them, it is obligatory to give the related person necessary information before examining and collecting data. Guaranteeing the right of accessing information related to the person and also security of data and possibility of transitioning them to a third party (including government authorities) is to be studied and pondered. Invasion to physical integrity of people is caused by this but it doesn't mean that there isn't any new topic in this area. Because in one hand subjects and instances of this right has mainly changed because in the past, information related to body and health were never considered in today's form and in the other hand expansion of information and communication technologies led to facilitation of possibility of misuse and dramatically increased moral and material damages caused by obtaining, processing and dissemination of such information.

3-1- Existing Criminal laws related to the protection of privacy in cyberspace

3-1-1- Informational criminal Law

This field emerged in the last two decades and like other new fields of criminal law, it is caused by modern technology. Fields like environmental criminal law or administrative criminal law are challenged just in few areas and 70 per cent classic topics combined with 30 per cent of new topics and conversed to a new field or doctrine but computer crimes from beginning were studied and discussed in the field and doctrine of economical criminal law or the so-called economic crimes and immediately after IT developments, it conversed to a doctrine with criminal topics, which is a very rare event.

2-1-3- Islamic penal law

The followings determine some cases of privacy violation:

Article 570: Any authority or governmental officer that violates personal freedom of citizens of country without legal permission or deprives them from considered rights in Islamic law, in addition to dismissing from service and suspension from obtaining any governmental position for three to five years, there would be imprisonment for six month to three years."

Article 580: "Any judicial or non-judicial servant or officer or anybody who has been referred to public services, if without jurisdiction enter someone's dwelling without permission or consent of owner would be sentenced to one month to one year's imprisonment unless he/she can prove one of his/her superiors who had authority ordered the action and he/she was obliged to obey the order, which in this case the mentioned punishment would apply to the person who ordered the illegal invasion and If he/she also has caused or committed other crimes, he/she would be punished for them too and if this action has happened in night, perpetrator or the one who ordered invasion would face the maximum penalty prescribed."

Article 582: "Any governmental servant or officer who opens, detains, destroys, inspects, records or eavesdrops correspondence, communications or phone calls of people or disseminates their context without their owner's permission except having legal jurisdiction would be sentenced to one to three years' imprisonment or a fine of six million to seventeen million Rials."

Article 641: “Whenever someone harasses another person by telephone or communications devices in addition to executing specific provisions of Telecom, the perpetrator would be sentenced to one to six months’ imprisonment.”

Article 669: “Whenever someone in any kind, threatens another one to murder, physical, honor or financial losses or dissemination of a secret concerning him/her or his/her relatives regardless of demanding payment, property or doing or not doing something, would be sentenced to whip up to 74 impact or two months to two years’ imprisonment.”

4-1- Challenges of criminal law in privacy in cyberspace

The branches and the fields of criminal law topics that had been challenged and as a result conversed to a doctrine are as follows:

Substantive Criminal Law: This section relates to the general criminal principles and issues such as the definition of the crime, intentional or unintentional, the responsibility of those involved in the crime, frequencies of occurrence, penalties and etc., also principles of specific criminal law such as crimes against persons, crimes against property, crimes against security and public peace, crimes against public chastity and family obligations and etc.. In discussing the type of action, liability and crime all the classics criminal topics have changed.

1-4-1- Substantive and procedural criminal law

Procedural criminal law or criminal procedure in the form or extent of the preliminary investigation and evidence without any doubt has changed, because all literature in the fields of law, regulations and doctrines related to the objects and purposes are tangible and physical, but in cyberspace discussion is about data, information, computer systems, computer software, telecommunications and etc. and naturally regulations applicable to the physical environment and its implications cannot be used for non-physical space. Countries have adopted different approaches in this field.

Some, like Germany have amended the procedural criminal law and in addition to the regulations governing the physical environment, the preliminary and specialized investigation and electronic and computer evidences also were added to the existing regulations and some countries based on their ancient legal traditions like England and America, have determined the necessary regulations separately which sometimes include many regulations. In discussing the evidence, although the general principles governing criminal evidence still exists, but a dramatic transformation and change caused by cyberspace is in coordinating different national rules for the creation, preparation and use of similar cyber evidence that is respected by the proposed procedures and it is uniform in bilateral or multilateral or international agreements.

In discussing qualification important, yet interesting topics have been raised. These issues are striking both in the civil and the criminal dimension. Regarding the scientific discovery of crimes or crime detection in physical environment is depending on physical objectives and objects but these objectives and objects does not have physical shape in cyberspace, although they have external appearances therefore we encounter scientific cybercrime police which has its own independent regulations.

2-4-1- International Criminal Law and Criminal Sciences

Created challenges for the branch or the field of international criminal law or according to some authentic works in the field of cybercrimes, challenges of international issues ranging from territorial jurisdiction or extra-territorial jurisdiction are very interesting and important, in a way that both the civil and criminal aspects of international law nowadays have a phenomenon known as cyber jurisdiction and of course jurisdictional rules faced many problems.

Conclusion

Although the emergence and development of information and communication technologies provided us with possibilities including quick access to information, processing and dissemination of data as well as sending emails, receiving services, education and business computers connected via networks, like the Internet at the same time misuse of this valuable tool risks and causes serious consequences in various fields - such as violation of “privacy”. Development of information and communication technology and ease of use of these facilities has caused growth of the invasion of privacy. Therefore, this type of technologies, rather than being used to serve the needs of humanity and provide a means of comfort, has become a serious threat against them. Nowadays, unfortunately it is observed that many people are victims of improper use of technology and occasionally their honor and dignity are fooled around. Films disseminated on the Internet, CDs, Bluetooth files and things like these are those who display the most personal relationships and even can end up in collapse of victim’s family. Concerns of humans about violation of privacy and access of others to their personal information or monitoring their every actions and their thoughts causes discomfort, and disturb their peace and safety. Because violation of others’ privacy, is in fact an

action considered offensive to human dignity and entering private life of people, destroys personal honor and integrity of them. Therefore in the present era with the help of modern technology, it is possible to crumble others' privacy and safe shelter by stealing and disclosure of personal information, eavesdropping and interception of telephone conversations, investigating, reviewing and detaining emails and Internet communication, dissemination of obscene films and images, displaying indecent scenes and collecting information with covert and fraudulent methods.

Suggestions

In this section, in accordance with the contents described, author states some suggestions:

. The prevalence of defamation in cyberspace implies the need for the immediate adoption of computer crimes legislation.

. But it should be noted that the amount of incidence of this crime and its dangerous consequences requires beyond immediate adoption of legislation and increasing the penalties for such crimes on the one hand and on the other hand anticipating compensation for moral damages is essential.

. And in addition to these two, immediate adoption of privacy protection project is the best supplements to support a thorough protection of privacy.

REFERENCES

1. Aghababaei, H, Abbasi M, 2010. Scientific and promotional Journal, Crime Prevention Studies, Issue seventeenth.
2. Aghaei, B, 2001. International law in Communication and Information, collection of important documents, Ganj Danesh.
3. Ansari, B. 2007. privacy rights, Samt publisher, Tehran.
4. Ansari, VA. 2001. The rights of criminal investigation, Tehran, Samt publisher.
5. Ardebili, MA. 2004. Basic Criminal Law, vol. 1, Tehran, Mizan.
6. Bastani, B. 2004. Computer crimes and novel aspects of cybercrime, Behnami Publications.
7. Parvizy, R, 2003. The pursuit of computer crimes, Deputy of intelligence police.
8. Poorbafrani, H, 2011. International Criminal Law, Tehran, Javdaneh.
9. Hassan Beigi, E, 2005. Law and security in cyberspace, Abrar Cultural Institute of International Contemporary Studies, Tehran.
10. Khodaghali, Z, 2005. Computer Crime, Tehran, Ariane.
11. horramAbadi, AS, 1995. The Proceedings of legal aspects of Information Technology Conference, Tehran, Salsabil.
12. Zeybar, U, 2009. Computer Crimes, translated by Mohammad Ali Nouri and Reza Nakhjavani, Soroush Mizan publisher.
13. Shams, F, VesaliNasehM, 2004. Electronic Commerce Law as well as rules and regulations, Tehran, Afarinesh.
14. Faeli, SR 2009. In virtual time, Proceedings, Besat publisher, Tehran.
15. Katouzian, N, 2003. Civil rights, compulsory liability, civil responsibility, Dekhoda.
16. Goldozyan, I, 2003. Specific criminal law: crimes against physical integrity, moral injury, property and ownership, public safety, Mizan publisher.
17. Nouri, MA 2003. Electronical commerce law, Ganjedansh.
18. Nakhjavani, R, 2004. The data protection rights, in cooperation with the presidential Committee of Technology Law Study, Tehran, Gnjdansh library.
19. Gina De Angelis, Cyber Crime, Chelsea House Publisher. 2000
20. Imani, A, protection of the human right to privacy in the information era, Journal of Legal Studies, Institute of Studies and Research of Danesh publisher, Issue 2, 82-1381, p. 23
21. Khoramabadi, AS, 2004. IT crimes, PhD Thesis, University of Law and Political Sciences of Tehran University.
22. ICT News (<http://www.iritn.com>)
23. Data protection, legal protection of persons' privacy in Cyberspace (2002), the secretariat of the High Council of Informatics.