CHAPTER 1

RIGHT TO PRIVACY: CONCEPTUAL PERSPECTIVES

1.1. Prologue

Privacy is a concept of historical significance. The value of Privacy cannot be understood without discussing its relationship with Past, Present and Future Society. It has both material as well as philosophical aspects. Material Perspectives of Privacy is denoted by the material world of human beings where absolute consumerism prevails. Ultimate satisfaction of goods and services of one's own choice without outside interference is the goal of modern consumer world. Consequent to this, the concept of Consumer Privacy has been emerged.

Material object of Privacy came into being from the term "Matter". "Matter" is the physical part of the Universe consisting of solids, liquids and gases. It includes, within it, substance or goods. In fact, no part of the physical world can remain vacuum and as such every part or area is occupied either by some material object or by some animate or inanimate object. The Law of Nature substantiates this phenomenon. Man is a rational being having both animate and inanimate features. Animate features represent material world and inanimate features, the philosophical world. As an animate object Man always tries to occupy its own 'Space' in the material world. The concept of 'Space' gradually has been turned into 'Private Space' and as such, Man is intended to occupy his or her 'Private Space' in the material or physical world.

'Private Space' is an area or space occupied by an individual for his or her personal purpose where public interference is unwarranted. It may be a place, group, sphere, periphery, relationship or otherwise, but it should be 'Private' or 'Special' for an individual beyond outside or State control. Acquisition of 'Private Space' is essentially an important characteristic of Man being an animate or material creature. The concept of 'Private Space' gradually enlarges its scope and ambit to grasp various spheres of human life, like domestic space, family relationship, friend circle, professional group etc. Practically Man requires 'Private Space' in these kinds of Private and Personal relationships.

The term 'Private Space' has given birth to the concept of 'Privacy' with the passage of time. 'Privacy' is a state of affairs where individual needs seclusion from outside interference. When it talks about 'Material Privacy' or 'Physical Privacy', it confines itself within the personal affairs and choice of goods or services. 'Material Privacy'is applicable to matters, like domestic privacy, group privacy (e.g. group of friends), office privacy or professional privacy etc. These are certain kinds of relationships where an individual requires reserveness, wants freedom from unauthorised outside interference and forbids intervention of those who have no interest into the matters.

On the other hand, 'Philosophical Privacy' originates in the Philosophical world. It is an abstract world consisting of feelings, senses and thinkings, rather than material objects or consumer goods. 'Philosophy' is the study or creation of theories about basic things, such as the nature of existence, knowledge and thought, or about how people should live. As such, Philosophical world is concerned with nature of existence, inner feelings and thought processes of human beings. Man, by virtue of its inanimate objects or characteristics become a part of this world.

The concept of 'Private Space' is not only associated with Material World, but philosophical world also. One needs 'Private Space' for one's thinking or inner feelings, because in many cases, interference by others is unwelcome, while developing habits, choices, behaviours, creating scholarly or artistic works, developing Psychological behaviours etc. The need for 'Private Space' in developing and maintaining philosophical or psychological behaviour of human beings gradually turns into the urge of getting 'Philosophical or Abstract Privacy'.

Hence, the term 'Privacy' is largely associated with human behaviour and existence of human beings in social stratification. As social conditions may change from time to time, idea of Privacy may also vary with the change of society and passage of time. It is a relative concept and as such, is not easy to define properly. Attempts have been made to give a clear meaning and definition of Right to Privacy, brief analysis of which is necessary to give the concept, a proper shape.

1.2. Privacy : The Meaning and Concept

Privacy is not an abstract concept absolutely. It is emphasized only in relation to a national culture of a particular political system and also a specific period of time. It has become an issue in modern democratic societies, characterised by large scale sophisticated bureaucratic structures and Technological advancements

in information and communication systems. Technological development has been evolved in modern societies without due regard for its impact on our democratic political system. Hence, ongoing social revolution threatens to make privacy impossible.[1]

The term "Privacy" has been described as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession."[2]

Privacy is a culturally limited concept. It varies with the times, the historical context, the state of culture and the prevailing judicial philosophy.[3]

Accordingly, "Privacy" is treated as a Customary Right which is peculiar to a particular situation. It greatly differs from culture to culture and society to society. It is therefore, not an easy concept to define and has remained a problem for those who have made attempts to define it. Hence, a few scholars have left their efforts to define Privacy. In fact, " 'Privacy' in its broad sense, covers a number of aspects, like, non-disclosure of information about oneself, his sexual affairs, privacy of business secrets and non-observance by others, etc."[4]

Right to Privacy means, a right to be let alone. It is the right of an individual which guarantees freedom from unauthorised outside interference by the general public in matters which are not exclusively of public interest. It also prohibits unwarranted publicity of private matters. The term "Right to Privacy" is a generic term encompassing various rights recognised as inherent in the concept ordered liberty and such a right prevents governmental interference in intimate personal relationships or activities. It includes freedom of the individual to make fundamental choices involving himself, his family and his relationships with others.[5]

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[1] S. K. Sharma, *Privacy Law : A Comparative Study*, Atlantic Publishers & Distributors, New Delhi, 1994, p.1.

[2] Dr. Sanjib Kumar Tiwari, "*Right to Privacy : The Role of Indian Judiciary*", JCC Law Review, Vol.III(1), 2012, pp. 10-20 at p.10.

[3] Hyman Gross, *Privacy – Its Legal Protection*, 1976; Alan F. Westin, *Privacy & Freedom*, 1970, p.7; William L. Prosser, "*Privacy*", California Law Review, Vol.48, 1960, pp.383-423; Chandra Pal,"*Right to Privacy-Emerging As a Constitutional Right*,"Civil and Military Law Journal, Vol.18,1982,p.42.

[4] Kiran Deshta,*Right to Privacy under Indian Law*, New Delhi, 2011, p.16.

[5] *Id* at p.17.

The Law of Privacy, irrespective of any country, in general, prohibits an invasion of individual right to be let alone (e.g., not to be photographed in public) and restricts access to personal information (e.g., income tax returns, credit reports etc.). Such a law also forbids overhearing of private communications (e.g., electronic surveillance)[6]

The Right to Privacy, simply put, is merely the right to live as one chooses.[7]

Right to Privacy is an absolute and intimate right to an individual, which is a matter of grave concern for everybody in the contemporary social scenario. But, very few persons have the knowledge that, it is not a right of recent origin, rather it has a great historical background and can be traced back since the very old past. Right to Privacy, at the very outset may mean, the leading of an isolated life, but specifically it denotes the freedom from unauthorised and unwarranted interference into one's private life.[8]

The value of Right to Privacy as an inherent human right was realised since time immemorial, rather since the times of ancient human civilizations. This right acts as a catalyst in promoting and developing personality, integrity, dignity, reserveness, intimacy, anonymity, solitude and freedom of individual persons. It is recognised as a valuable human right due to its working towards the furtherance of basic human relationships of love, friendship, respect, parentage, sonship, conjugal relationship etc. Privacy is not only a good technique for furthering these fundamental human relations, but also without privacy, these are simply unthinkable. In fact, all these fundamental human relations require a context or the possibility of privacy for their existence. Therefore, privacy is considered as a factor forming the basis of our personal and social relationships and every individual enjoys this right as a part of his or her personal liberty.[9]

The foundation of the concept of Right to Privacy was created by Justice Cooley in 1888 by using the words, "the right to be let alone."[10] It was followed by

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[6] *Ibid*.

[7] Pravin Anand & Gitanjali Duggal , "*Privacy*", in Michael Henry (ed.), International Privacy, Publicity and Personality Laws, 2001, p.233.

[8] Sangeeta Chatterjee & Dr.Rathin Bandyopadhyay, "*Confidentiality of Information as Right to Privacy : A comparative Analysis of Indian, U.S. and British Laws*", India International Journal of Juridical Sciences, Vol.1(1),March 2012, pp.1-16 at p.3.

[9] E.J.Jathin, "*Human Genome Project : Emerging challenges of Right to Privacy vis-à-vis Insurer's Right to Know*," Cochin University Law Review, Vol.XXXI (2007), pp.1-28 at p.3.

[10] Shrnivas Gupta & Dr.Preeti Misra, "*Right to Privacy – An analysis of Developmental Process in India,America and Europe*," Central India Law Quarterly, Vol.18(2005), pp.524-552 at p.524.

Louis Brandeis and Samuel Warren in 1890 in the Harvard Law Review, in their article, "The Right to Privacy",[11] which is known as the famous Warren-Brandeis view.[12]

Privacy is a variable concept and varies with societal or cultural variance. Different insights regarding Privacy is found in different societies with opposite cultural heritage, like Indian Society and Western Society. Such cultural contradistinction of Privacy is clearly evident from the words of Dr.Vany Adithan. Accordingly, Dr.Adithan said:-

> *"A foreigner visiting an Indian village for the first time will have a feeling that there is absolutely no privacy in India, because Indian village life is always alive with people all the time and in all the places. Everyone is related to every other person as uncle and aunt and anybody will enter anybody's house at any time. Guest unannounced will invade houses. To him it may be invasion of his privacy. But to the villagers it is their culture to see their guests are taken care of even when not requested.*
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> *An Indian visiting for the first time a western country would shocked by their culture and freedom in all matters.*
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> *Definition of Privacy varies according to context and environment. It is different in different cultures, also differs from place to place. Privacy protection is frequently seen, as a way of drawing the line at how far society can intrude into a person's affairs.*
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> *There is respect for privacy in all cultures as how the people living there expect it. For Europeans, their correspondence and their papers may be more sacred and secret than their own families. An English man may allow one or two women to share his compartment but not his confidential papers. But in Indian marriage, family and home are more sacred than individual rights. It is not the individual Privacy that is protected. Inviolability of home is acknowledged even to the extent of denying rights to some of the members of the family. Many of the fundamental rights such as right to equality and certain other freedoms are denied to women because family and marriage are more sacred than individual rights and freedoms."*[13]

Apart from cultural variance regarding the concept of Privacy, Dr.Adithan has also tried to summarize the concept of Privacy. In this connection, Dr.Adithan said:-

> *"Right to Privacy arises out of an individual's right over his thoughts, sentiments and emotions. Dissemination of information about one's thoughts, sentiments and emotions is the freedom of expression. It is within the right of the individual to choose freely*

[11] 4 Harvard Law Review 193 (1890).
[12] *Supra* Note 8 at p.4.
[13] Dr.Vany Adithan,"*Right to Privacy under Art.21-B*," Madras Law Journal, Vol.II(2003), pp.28-32 at p.29.

> *under what circumstances and to what extent he may allow other to have access to those information. Until then he may maintain secrecy, anonymity and solitude."*[14]

According to Oxford Dictionary of Law (Indian Edition), 'Privacy' means the right to be left alone. It is the right to a private life as set out in Article 8 of the European Convention on Human Rights, 1950, which is now part of U.K.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 (including freedom from excessive noise: Hatton, V. U.K. [2003] 37 EHRR 611); the protection of physical integrity and protection from unjustified prosecution and conviction of those engaged in consensual non-violent sexual activities. This 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. Public authorities have a limited buy positive duty to protect privacy from interference by third parties.[15]

Mitra's Legal & Commercial Dictionary provides various meanings of Privacy, like Confidentiality; confidentialness; seclusion; solitariness; solitude. According to that Dictionary, "Privacy" primarily concerns with the individual. It therefore, relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of such right. [Govind v. State of M.P., AIR 1975 SC 1378][16]

The Dictionary also provides the meaning of 'Right to Privacy'. It means, the right to be let alone; the right of a person to be free from unwarranted publicity; the right of an individual to withhold himself and his property from public scrutiny, if he so chooses. It says, the term "Right of Privacy" is a generic term encompassing various rights recognised to be inherent in concept of ordered liberty and such right prevents governmental interference in intimate personal relationships or activities, freedoms of individual to make fundamental choices involving himself, his family, and his relationship with others. [Industrial Foundation of the South v. Texus Indus Acc. Bd. Tex.540 SW 2d 688,679][17]

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[14] *Id* at pp.29-30.
[15] Elizabeth A. Martin & Jonathan Law (ed.), Oxford Dictionary of Law (Indian Edition), Oxford University Press Publications, New York, U.S.A., 1st. Indian Edition ,2008, p.410.
[16] Tapas Gan Chowdhury, Mitra's Legal & Commercial Dictionary, Eastern Law House Pvt.Ltd. Publication, Kolkata, 6th Edn.,2006, p.686.
[17] *Ibid*.

It is pertinent to mention that, while dealing with the subject of privacy William Cohen and John Kaplan have touched the genesis of the concept of privacy, i.e. the coreself or the basic element of Privacy, without the discussion of which any explanation of the 'Meaning of Privacy' would be incomplete. Hence, the views of Cohen and Kaplan are stated below:-

> *"Once a civilization has made a distinction between the 'outer' and 'inner' man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and profane, between the realm of God and the realm of Caesar, between the Church and the State, between rights inherent and inalienable and the rights that are in the power of government to give and take away, between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called – the idea of a private space in which man may become and remain himself."*[18]

Therefore, 'Privacy' is solitude, confidentiality and enjoying freedom from unauthorised outside interference. Every human being has two identities – the 'outer' and the 'inner' man. The 'outer' man enjoys company of others while maintaining social relationships. But, the 'inner' man always wants privacy, secrecy and confidentiality. Though man is a social being and needs to maintain social relationships, but at a certain point of time he or she needs privacy and freedom from outside interference for maintaining some special kind of relationships. In this sense, inspite of the 'outer' man, there is 'inner' man in every man and woman and for fulfilment of desire of 'inner' man, every man or woman needs 'Privacy'.

1.3. Privacy : The Definition

There has been a controversy among various authors on the point of prescribing a precise definition of 'Privacy' since long past. Jurists of the Western World have defined Right to Privacy in their own way, for them 'Privacy' is basically a right under the Law of Tort. Later on, American Jurists and the U.S. Constitution have stressed on recognising Right to Privacy as a Constitutional Right. Since then, long time controversy is prevailing over the concept of Right to Privacy regarding recognition of it as a Public Right or Private Right. Right to Privacy, if considered as a Constitutional right, then it would, definitely, be a Public Right. But, if it is considered as a Right under the Law of Tort, then it would be a Private Right. Before the making of Modern Constitutions all over the world, protection of Right to

[18] William Cohen and John Kaplan, *Constitutional Law-Civil Liberty and Individual Rights*, 1982, p.516.

Privacy was available only under Law of Torts, but afterwards, when it was recognised as a Constitutional Right, its periphery became broader and Constitutional guarantee became possible.

Unlike Western World, Right to Privacy in India was not considered a right under Law of Tort, rather it was a customary Right and was recognised as a part of easement right. It was available in the construction of houses and maintenance of Privacy among the women. It can be traced back since the ancient period in the 'Grihya – Sutras' and continued in the 'Parda' system of Muslim women in the Medieval Period. Though there was well-developed Right to Privacy in India in the ancient and medieval period, but it was largely deteriorated in the modern period, which again has been revived after independence and passing of Indian Constitution. In the absence of any express statutory provision, it is enriched by judicial discussions in the modern contemporary India.

As already stated, the Western and Indian Jurists are having difference in their opinions while defining Privacy. Again, the Western Scholars can also be divided for giving earlier definitions and later definitions of Privacy. Next part of the study shall dwell on this issue.

1.3.1. Privacy : The Earlier Definitions by Western Scholars

Right to Privacy is a variable concept and it varies according to societal as well as cultural variance. It generally means, secrecy or confidentiality. It includes freedom from unauthorised outside interference into one's private life. It means, the right to live a life as one chooses. It denotes, non-disclosure of information about one's private life. Right to Privacy is a right to determine public disclosure of various facts about one's private life.

In this sense, Clinton Rossiter has observed that :-

> *"Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society.... It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgements entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts."*[19]

[19] Clinton Rossiter, "*The Pattern of Liberty*," quoted by Alan F. Westin, Privacy and Freedom, 1970, p.34.

This definition of 'Privacy' given by Clinton Rossiter has stressed upon personal autonomy against all the outside pressures of modern world. Second part of the definition is highly appreciable where Rossiter has given importance on the concept of private man, who has no compulsion to share everything, even with the loved ones and trustworthy persons.

Prof. Govind Mishra, in his book "Right to Privacy in India," [20] has stated as follows :-

> *"Describing the conceptual vacuum surrounding the notion of privacy, Parker has rightly observed that currently, there is no consensus in the legal and philosophical literature on a definition of privacy.*[21] *For some, privacy is a psychological state, a condition of 'being-apart-from-others' closely related to alienation.*[22] *For others, privacy is a form of power 'the control we have over information about ourselves,'*[23] *or 'the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it,'*[24] *or 'the individual's ability to control the circulation of information relating to him.'*[25] *Another noted author defines it as 'the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others.'*[26] *For still others, an important aspect of privacy is the freedom not to participate in the activities of others, a freedom which is lost when we are forced to hear the roar of automobile traffic or breathe polluted air."*[27]

Hence, according to Prof. Govind Mishra, there is no unanimity among various authors, while defining Right to Privacy. Authors have never been talked on a single aspect of Privacy, rather they have highlighted upon various aspects of the right. In this sense, it is not easy to give a precise logical definition of Right to Privacy. But, different important definitions given by different scholars as well as jurists, need specific mention to know the concept of Privacy as a whole.

The oldest definition of Privacy in the Western world is given by Thomas M. Cooley. Next came the definition of Samuel D. Warren and Louis D. Brandeis. Practically, these two definitions are called the Earlier Definitions of Privacy in the western world. Those apart, the other definitions are called the Later Definitions of

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[20] G. Mishra, *Right to Privacy in India*, Preeti Publications, New Delhi, 1st. Edn., 1994,p.20.
[21] Richard B. Parker, "*A Definition of Privacy*", Rutgers Law Review, Vol.27, 1974, p.275.
[22] Michael A. Weinstein, "*The Uses of Privacy in the Good Life*," Privacy Nomos XIII, 1971, p.94.
[23] Charles Fried, *An Autonomy of values*, 1970, p.140.
[24] Hyman Gross, *Privacy and Autonomy*, Privacy Nomos XIII, 1971, p.169.
[25] Arthur R. Miller, *The Assault on Privacy*, 1972, p.40.
[26] Alan F. Westin, *Privacy and Freedom*, 1970, p.7.
[27] Earnest Van Den Haag, *On Privacy*, Privacy Nomos XIII, 1971, p.160.

Privacy in the Western World. The reason being that, after the definition of Warren and Brandeis, there is a long gap before proposing the next definition of Privacy, but thereafter, the other definitions came within a short period of time. In this respect, the era of defining Privacy is divided into two parts – one is the era of Earlier Definitions and the other is the era of Later Definitions. The Earlier Definitions are stated hereunder.

1.3.1.1. Definition of Thomas M. Cooley

The concept of Right to Privacy was defined for the first time by Justice Thomas Cooley in 1888. According to him, 'Privacy' in general terms means, "the right to be let alone." He also said that:-

"Privacy is synonymous with the right to be let alone."[28]

1.3.1.2. Definition of Warren and Brandeis : Privacy as Protection of Inviolate Personality

Later, in 1890, Samuel D. Warren and Louis D. Brandeis published their Seminal Article, "The Right to Privacy" in Harvard Law Review, where they advocated for Thomas Cooley's concept of Right to Privacy and elaborated it, broadly by giving their own definition of Right to Privacy. Their view of Right to Privacy is known as famous "Warren – Brandeis view." They have explained the changing legal scenario with the changing society and development of law from right to property to right to privacy in the following manner:-

> *"Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,- the right to be let alone."*[29]

The old English as well as American Law can be traced back from the writing of Warren and Brandeis, which witnesses the existence of property law at the beginning, from where concept of liberty came into being and which gradually gave birth to the concept of "Right to Life". With the expansion of Right to Life,

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[28] Thomas M. Cooley, *A Treatise on the Law of Torts*, 2nd. Edn.,Callagham & Co., Chicago, 1888, p.29.

[29] Samuel D. Warren and Louis D. Brandeis, "*The Right to Privacy*," Harvard Law Review, Vol. IV (5), 1890, pp.193-220 at p.193.

Right to Privacy or 'the right to be let alone' have been emerged. In old law, only remedy which was available for infringement of right to life and property, was the remedy for trespass. It was a remedy under Law of Torts, because at the very beginning, every kind of interference with a right was considered a trespass under the English Law of Torts and no other remedy was available thereunder, except trespass. Gradually, it was proved insufficient for protection of various other violation of legal rights. Consequently, other legal remedies were developed, which marked not only protection against physical violation of rights, but emotional and spiritual violation also. Ultimately, it resulted into emergence of Right to Privacy in the Western World.

1.3.1.2.1. Warren and Brandeis Concept of Privacy

According to Warren and Brandeis, the concept of Right to Privacy can be described as follows:-

> *"These considerations lead to the conclusion that the protection afforded to thoughts, sentiments. And emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognised by the law, there inheres the quality of being owned or possessed – and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality."*[30]

Warren and Brandeis supported the view of Thomas M. Cooley on Right to Privacy. Their concept of 'Privacy' is a broad generalised view, called 'the right to be let alone'. It is a negative right, because it introduces a right which says, one should not be assaulted or imprisoned or maliciously prosecuted or defamed and so on. As a whole, it is a right which protects the sentiments and emotions of human beings from being published. At the time of publication of Warren-Brandeis article, only the law of copyright was available in Common Law System for prevention of unauthorised copying of a published scholarly article. But, no remedy was available

[30] *Id* at p.205.

for protection of an unpublished work and the emotions and sentiments attached to it. Warren and Brandeis were the first proponents of this as the 'Right to Privacy.' According to them, 'Privacy' is a right not only associated with intellects and confidentiality of unpublished scholarly works, but also with any kind of mental sufferings of human beings.

Unlike Roman Law, no remedy was available in Common Law for mental sufferings of human beings resulting from insult, international and unwarranted violation of honour or reputation of others. Warren and Brandeis had first shown the importance of introducing such a right in Common Law for protection of human feelings and sentiments, and they gave the name 'Right to Privacy' to that right. Consequently, Right to Privacy was emerged with the hands of Warren and Brandeis in 1890. As such, 'Privacy' is a right which protects human personality from any kind of violation, which in the words of Warren and Brandeis is called 'inviolate personality.'

1.3.1.2.2. Limitations on Right to Privacy in view of Warren and Brandeis

Warren and Brandeis, in their article, had not only provided the Concept of Privacy, but also stated the Limitations of Right to Privacy. Those are discussed below:-

i) The right to privacy does not prohibit any publication of matter which is of public or general interest.[31]

ii) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.[32]

iii) The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.[33]

iv) The right to privacy ceases upon the publication of the facts by the individual, or with his consent.[34]

v) The truth of the matter published does not afford a defence.[35]

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[31] *Id at p.214,*
[32] *Id at p.216.*
[33] *Id at p.217.*
[34] *Id at p.218.*
[35] *Ibid.*

vi) The absence of "malice" in the publisher does not afford a defence.[36]

1.3.1.2.3. Remedies for violation of Right to Privacy Suggested by Warren-Brandeis

Inspite of the Limitations on the Right to Privacy, Warren and Brandeis proposed the continuation of this right. They had also suggested some remedies for invasion of Right to Privacy, which are stated below:-

i) An action of tort for damages in all cases. Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.[37]

ii) An injunction, in perhaps a very limited class of cases.[38]

Definition of Right to Privacy provided by Warren and Brandeis was the earliest one among the definitions of 'Privacy', which brought this concept at the very beginning. It is a good example of transformation of Privacy Tort into Human Right of Privacy. This definition was supplemented by various definitions given by other jurists in the later period, which gradually helped to develop a well-advanced law of Privacy in U.K. and U.S.A.

1.3.2. Privacy : The Later Definitions by Western Scholars

Next important attempt to define Right to Privacy was made in 1960 by William L. Prosser. Though first initiative was taken by Warren and Brandeis in 1890 to define 'Privacy', but there is a long gap in this process between Warren-Brandeis and William Prosser, became second attempt to define 'Privacy' was made in 1960. During this long interval there are no significant developments in the field of 'Privacy' which are worthy of mentioning in this respect. Since 1960, a new era of defining and re-defining 'Privacy' by various jurists of the Western World was started and continued for long. As there is a long gap between Warren-Brandeis and other jurists towards defining Privacy, therefore, Warren-Brandeis's definition can be called earlier definition and other definitions, the later definitions of Right to Privacy. Some of those definitions are worthwhile to mention in this context.

1.3.2.1. Definition of William L. Prosser : Privacy as Tort

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[36] *Ibid.*
[37] *Id at p.219.*
[38] *Ibid.*

In 1960, William L. Prosser attempted to define 'Privacy'. According to him, Privacy was a Tort. He had analysed various judicial pronouncements and finally decided as follows :-

> *"It is not one tort, but a complex of four. The law of privacy comprises of four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, to be let alone."*[39]

According to Prosser, following are the four different interests and torts :-

i) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.

ii) Public disclosure of embarrassing private facts about the plaintiff.

iii) Publicity which places the plaintiff in a false light in the public eye.

iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[40]

William Prosser's classification of Privacy into four separate torts created a confusion among the thinkers of Privacy regarding definition and concept of Privacy. Prosser's view is contrary to the opinion of Warren-Brandeis, because instead of supporting Warren-Brandeis's single interest, he created four distinct interests of Privacy. Hence, the jurists were divided into their opinions while defining Privacy. It raised a controversial situation that, if Prosser's view was to be supported, then Warren-Brandeis would be a nullity and vice-versa. It also raised a paradoxical situation that, either according to Prosser there was no single concept of Privacy, rather Privacy was a vague, ambiguous and scattered concept, or Privacy was protected under various other disciplines, like Law of Torts, as defined by Prosser as 'Privacy Torts', and as such there was no need to create a single interest of Privacy as a separate right, as stated by Warren-Brandeis. Therefore, William Prosser in 1960 had shaken the concept of Privacy by creating confusion in the Western World, instead of developing it by speaking in line with the concept of Warren-Brandeis.

1.3.2.2. Edward J. Bloustein's Answer to William Prosser : Privacy as Human Dignity

[39] William L. Prosser, "*Privacy*", California Law Review, Vol.48, 1960, p.389.
[40] *Ibid.*

Edward J. Bloustein, in 1964, wrote an article on Privacy as an aspect of Human Dignity, in New York University Law Review, which was an answer, to William Prosser's 'Privacy Torts'. Bloustein tried to resolve the conflict between Warren-Brandeis and William Prosser. He also tried to develop a general theory of individual privacy. He had re-analysed Prosser's classification of 'Privacy Torts' and in the words of David M. O'Brien, "Bloustein attempted to show that, the principle of 'inviolate personality' was still the fundamental interest in privacy cases."[41]

Bloustein considered Privacy as an aspect of human dignity and stated:-

> *"The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered."*[42]

More or less, Bloustein supported the view of Warren-Brandeis and advocated for an intrinsic value of privacy interests like Warren-Brandeis, instead of mere protection of instrumental values, like protection of property, reputation, mental suffering etc.

According to David M. O'Brien, the significance of Bloustein's analysis was threefold :-

1) If privacy is to be respected for its intrinsic value rather than its instrumental value, then it would be irrelevant to consider the actual value of public disclosure of personal information.

2) If the social interest of privacy is to be considered for its intrinsic value, then it would be necessary to give greater representation of the right in policy formulation.

3) It is necessary to reconcile the Constitutional law of privacy, like contraception and abortion with privacy of association, possession of pornography, unreasonable intrusion upon and disclosure of privacy engagements.[43]

Hence, Bloustein's analysis of privacy created a distinction between constitutional right to privacy and privacy tort. According to him, Prosser only classified privacy torts and discussed about privacy torts, which did not cover non-

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[41] David M. O'Brien, *Privacy, Law and Public Policy*, Praeger Publications, New York, U.S.A., 1979, p.8.

[42] Edward J. Bloustein, "*Privacy as an Aspect of Human Dignity : An Answer to Dean Prosser*," New York University Law Review, Vol.39, 1964, pp.962, 1003.

[43] *Supra* Note 41 at pp.8-9.

tort aspects of privacy, which were also equally important for societal perspectives. Constitutional right to privacy was the subject-matter of non-tort privacy, which was brought by Warren-Brandeis to some extent. Such right to privacy was supported and elaborated by Bloustein by giving importance on privacy as an aspect of human dignity. In the eye of Bloustein, Prosser's concept was incomplete due to the absence of non-tort aspects of privacy. As such, Bloustein gave impetus on these aspects considering privacy as part of human dignity.

1.3.2.3. Criticism of Warren-Brandies, William Prosser and Bloustein's Concept of Privacy by the Jurists

Though the concept of Privacy defined by Warren and Brandeis was recognised as earlier one, but it was criticized by different jurists as a broad and imprecise definition. According to some jurists, analytically, there is no interest in arguing about the 'real' meaning of 'privacy' described by Warren and Brandeis.

Prof. Govind Mishra, in his book "Right to Privacy in India," has rightly stated as follows :-

> *"The existence of Prosser-Bloustein controversy is sufficient to suggest, however, that Warren and Brandeis were not clear about the meaning, or that what they, wrote could legitimately be interpreted in more than one way.*[44] *It is further observed that the Warren and Brandeis interpretation of privacy as a 'right to be let alone' that protects man's 'inviolate personality' is unsatisfying. Their definition is too imprecise for judicial construction and principled application, let alone incorporation unto public policy.*[45] *Being first and seminal contribution, Warren and Brandeis' article has generated a lot of controversies in the subsequent juristic thought. Harry Kalven has commented that the impact of the article resides not so much in the power of its argument as in the social status it gave to the tort.*[46] *However, Warren and Brandeis were influenced by their personal grievance against the yellow press and their work was thus some thing of a lawyer's cathersis rather than objective scholarship or judicial craftsmanship.*[47] *Their article has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law.*[48]" [49]

Jurists have not maintained uniformity while criticizing Warren and Brandeis, but they have no doubt on the point that, Warren-Brandeis concept of

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[44] Ruth E. Gavison, *Privacy and Its Legal Protection* (Unpublished thesis submitted to the University of Oxford for Ph.D. in 1975), p.150.
[45] *Supra* Note 41 at p.5.
[46] Harry Kalven, J.R., "*Privacy in Tort Law – were Warren and Brandeis Wrong ?,"* Law and Contemporary Problems, Vol.31, 1966, p.251.
[47] Clark C. Havinghurst, *Law and Contemporary Problems*, Vol.31, 1966, p.251.
[48] *Supra Note 39 at p.383.*
[49] *Supra Note 20 at p.24.*

privacy was vague, ambiguous and doubtful. Their article has defined the term 'privacy' for the first time, but has not clearly explained every aspect of privacy. It only has highlighted the necessity of privacy protection of unpublished works. For some jurists, it is concerned only with the cases of individual privacy violations by the press by overstepping into the private spheres. Consequently, those jurists have talked about Warren-Brandeis' grievance against the press and the journalists. Inspite of all the controversies and doubts, jurists have unanimously opined that, Warren-Brandeis' article has created an elaborate edifice of 'Privacy' for the first time in American legal system.

Next comes the question of William Prossesr's concept of 'Privacy'. Prosser has classified his concept of 'Privacy' into four 'Privacy Torts' and according to him, Privacy is not a single interest as stated by Warren-Brandeis, rather it is a combination of four separate interests, which he has described as "Privacy Torts". Prosser's concept of Privacy created a confusion in the Western legal world and divided the Western jurists into two groups – one was the supporters of Warren-Brandeis and the other, the supporters of William Prosser.

Again, various jurists have criticized William Prosser for his view of 'Privacy'. Among them, two important jurists are – David M. O'Brien and Edward J. Bloustein.

David M. Obrien has clearly stated as follows:-

> *"It has been observed that Prosser's re-examination presents a paradox : either there is no single privacy interest and privacy is inherently ambiguous, or privacy can be adequately protected by other interests in which case protection of privacy per se is redundant."*[50]

In view of O'Brien, Prosser's analysis of Privacy has not created any remarkable development in the legal field, rather it created a paradoxical situation by not supporting Warren-Brandeis and by speaking contrary to Warren-Brandeis. Hence, if Prosser is to be supported, then two things would come out – one, there is no single interest of privacy, rather there are four interests, and two, it is adequately protected by other interests and as such there is no necessity of protecting the same by creating a separate privacy interest. Therefore, in the words of O'Brien, Prosser's analysis, has increased ambiguity, instead of removing doubts, while defining 'Privacy'.

[50] *Supra* Note 41 at p.8.

Edward J. Bloustein, in his article "Privacy as an Aspect of Human Dignity : An Answer to Dean Prosser", published in the New York University Law Review in 1964, has tried to resolve the conflict between Warren-Brandeis and William Prosser by solving the paradox raised by Prosser. He supported the view of Warren-Brandeis and considered 'Privacy' as an aspect of human dignity. To uphold the idea of 'Privacy as an aspect of human dignity ', Bloustein criticized Prosser's thesis and pointed out that, the real nature of complaint in 'intrusion cases' is demeaning to individuality, which is an affront to personal dignity. On this issue, Bloustein observed as under :-

> *"A woman's legal right to bear children without unwanted on-lookers does not turn on the desire to protect her emotional equanimity, but rather on a desire to enhance her individuality and human dignity."*[51]

According to Bloustein, the Western culture defines individuality as including the right to be free from certain types of intrusions. To illustrate this point, Bloustein contended that, a man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, is a man having less human dignity. He who may intrude upon another at will, is the master of the other and in fact, intrusion is a primary weapon of the tyrant.[52]

Hence, Bloustein's concept of Privacy has, more or less disregarded the concept of William Prosser by saying that, though there are various types of intrusions into various spheres of human life, but by all those intrusions ultimately human right to Privacy is violated, which is nothing but the extension of human dignity and human personality. Therefore, Prosser's classification of four 'Privacy Torts' is unnecessary. Also, when the question of violation of human dignity and human personality is considered by Bloustein, ultimately the view of 'inviolate personality' as propounded by Warren-Brandeis, has been supported.

Bloustein's analysis of Privacy has further increased the controversy between Warren-Brandeis and William Prosser instead of resolving the same. Again, various jurists have entered into the field to reconcile the paradoxical situation. In view of those jurists, though Bloustein's article has emphasized that, Prosser's analysis could not be accepted unconditionally, but his definition of privacy is vague and imprecise. In other words, practically he has not defined 'Privacy', Dworkin and

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[51] *Supra Note 42 at p.973.*
[52] *Id at p.974.*

Hyman Gross have criticized Bloustein's analysis, which would help to bring out the elements of Bloustein's thinking.

Dworkin said as follows :-

> *"The problem with Bloustein's analysis is not that his 'explanation is so wide as to be meaningless' but that he does not define and analyse privacy itself. Rather, his approach consists of a broad characterization of the reason privacy is of value at all, namely, that privacy is associated with human freedom and dignity."*[53]

Dworkin's criticism of Bloustein was important and valuable to resolve Prosser-Bloustein controversy. Finally, Hyman Gross came into the field to put an end of the conflict between Prosser and Bloustein. The observations of Hyman Gross on the issue is stated as follows :-

> *"It is clear from a reading of the cases which Dean Prosser and Prof. Blousten examine that what is at stake in all of them is an interest in the state of affairs we have described as privacy. All involve improperly getting to know something personal or making it known to others. Dean Prosser concludes, however, that an assortment of different interests have been improperly packaged together in one tort box labelled 'invasion of privacy'. Prof. Bloustein's answer is that only one interest is involved in all- human dignity. Both notions lead, though by different paths, to a conceptual indeterminacy regarding privacy."*[54]

Therefore, Hyman Gross has tried to sum-up both the concepts of Privacy as stated by William Prosser and Edward Bloustein. But, his conclusion also does not end into a fruitful result, rather it has turned the matter into a conceptual indeterminacy or uncertainty. Hence, the process started by various Western jurists to criticize the Warren-Brandeis, William Prosser and Edward Bloustein's concept of Privacy was continued and resulted into various other definitions propounded by various other jurists. Consequently, many new dimensions of right to privacy has been emerged and gradually the concept has got a new shape.

1.3.2.4. Definition of Charles Fried : Privacy as Control

Charles Fried tried to portray a new picture of 'Privacy' by defining it in his own way. In 1965, he defined 'Privacy' as follows :-

> *"Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves... The person who enjoys privacy is*

[53] Gerald Dworkin, "*The Common Law Protection of Privacy*," University of Tasmania Review, Vol.2, 1967, pp.418, 433.
[54] Hyman Gross, "*The Concept of Privacy*", New York University Law Review, Vol. 42, 1967, p.46.

> *able to grant or deny access to others... Privacy, thus, is control over knowledge about oneself."*[55]

Hence, Fried has created a new dimension of 'Privacy' by defining it in terms of control. According to him, privacy is the choice of an individual to decide when, how and upto what extent information about him or her is known to others. In other words, every individual who enjoys privacy, enjoys control over information about himself or herself.

This definition has opened a new door of Privacy, i.e. privacy and control or information about oneself. Various jurists have defined Privacy in terms of control, among them Hyman Gross, Arthur Miller, Richard. B. Parker and Michael A. Weinstein are prominent, whose contributions are noteworthy in this respect.

1.3.2.5. Definition of Edward Shils : Privacy as Zero-Relationship

When everyone was concerned with the definition of Privacy as control of information as stated by Charles Fried and was busy in defining Privacy in line with Charles Fried, one exception was found in that point of time. The exception was Edward Shils, he was the only jurist, who had started something else.

Edward Shils defined Privacy in 1966, his famous article "Privacy : Its Constitution and Vicissitudes," published in the Journal of Law and Contemporary Problems. His definition runs as follows:-

> *"The existence of a boundary through which information does not flow from the persons who possess it to others. The actions of the former are not reported to, or observed or recorded or otherwise perceived by the latter."*[56]

Shils has considered Privacy as a boundary line between two individuals – one is the possesser of information and the other would like to possess that information. According to Shils, the boundary line is so strong that, it cannot be crossed by the latter one and everything beyond the boundary line remains unknown to him or her.

Shils has also called Privacy as a "Zero-relationship" between two persons or two groups or between a group and a person. In his view, the relationship between two or more persons is termed as "Zero-relationship", because there is no interaction or communication or even perception of senses between them or between a group. To constitute "Zero-relationship" it is essential that, the relationship between

[55] Charles Fried, "*Privacy*", Yale Law Journal, Vol. 77, 1965, pp.482-483.
[56] Edward Shils, "*Privacy : Its Constitution and Vicissitudes*," Law and Contemporary Problems, Vol. 31, 1966, p.282.

individuals or groups should be such that, absence of interaction or communication between them is impracticable, e.g. relationships within a family, working group and ultimately a whole society. The other elements of Edward Shils's Privacy are as under :-

(i) Privacy is a relative concept and it must be counted against other person or persons only.

(ii) In case of breach of boundary, decisive element is the voluntary consent.

(iii) If the latter person discloses information voluntarily, then it should be counted as sharing of privacy and not breach of privacy.[57]

1.3.2.6. Definition of Hyman Gross : Privacy and Control

Hyman Gross is another jurist, who has defined 'Privacy' in terms of control, which has certain similarities with the concept of Charles Fried. His concept of Privacy can be derived from two articles written by him – one in 1967 and the other in 1971.

Gross has divided his concept of Privacy into two parts, to explain it clearly. According to him, Privacy is construed in weak or derivative sense and in strong sense. Privacy in weak sense is used as a synonym for other terms, e.g. mental repose (unwanted telephone calls or to hear what is going on in the next apartment), physical solitude (remaining out of public gaze or glimpse), physical exclusiveness and autonomy (planning a family, deciding about church affiliation). Privacy in strong sense is not defined by Gross with some exact synonym.[58]

Definition of Hyman Gross, in his first article, runs as follows :-

> *"Privacy is the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited."*[59]

In another article on 'Privacy' where Gross has not referred his first article, defines Privacy as follows :-

> *"The condition under which there is control over acquaintance with one's personal affairs by the one enjoying it ..."*[60]

Prof. Govind Mishra has criticized the idea of 'Privacy' as defined by Hyman Gross on the point that, in defining privacy Gross appears to oscillate

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[57] *Id at pp.281-282.*
[58] *Supra Note 54 at p.38.*
[59] *Id at pp.35-36.*
[60] *Supra Note 24 at p.169.*

between defining it as a "condition of life" and as a "form of control,"[61] because in the two definitions of Privacy propounded by Gross, he has conceived the idea of Privacy in these two different ways.

Again, Prof. Mishra has described that, "Gross's analysis of 'control' is open to criticism for he uses two different senses of 'control', viz –

(a) the control an individual has over the flow of information about himself and

(b) the control over the communication of information about oneself by others."[62]

Hence, Hyman Gross's definitions of Privacy are vague, unclear and uncertain. There are various reasons of such ambiguity and uncertainty :-

(i) Gross has given two definitions of Privacy in two places, instead of one, without referring to each other.

(ii) Each definition is conflicting with the other and contrary in meaning to one another, because one is defined as 'condition of life' and the other is defined as 'form of control'.

(iii) Though Gross has talked about control over information, but actually control of information is practically impossible.

(iv) Gross's concept of control by an individual over the flow of information from one person to another is again practically impossible, because the receiver of information may deny the control.

(v) Control over communication of information by others, is also practically impossible, because they may communicate the information beyond the knowledge of the person giving information.

(vi) As a whole, Gross's concept of privacy suffers from duality of senses.

Furthermore, Hyman Gross's concept of Privacy as a control is criticized by various jurists by highlighting the point of absurdity of control of information.

1.3.2.7. Definition of Michael A. Weinstein : Privacy as a Condition of Life

In the era of defining Privacy as a control over information, Michael A. Weinstein has defined privacy as a psychological state of affairs. He has defined privacy in his article published in 1971.

His definition runs as follows:-

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[61] *Supra Note 20 at p.34.*
[62] *Ibid.*

> *"Privacy, like alienation, loneliness, ostracism and isolation, is a condition of being-apart-from-others.*[63] *It is voluntary limitation of communication to or from others for the purpose of undertaking activity in pursuit of a perceived good."*[64]

According to him, privacy is a psychological state of affairs which is compared to other similar state of affairs, like loneliness, ostracism, and isolation. He supported the condition of being apart from others. In his view, privacy is remaining in isolation from others. He also talked about control or limitation of communication to and from others for the purpose of undertaking activity.

This definition of Michael A. Weinstein has been critized by Richard B. Parker with the following comments:-

> *"If privacy is defined as a psychological state, it becomes impossible to describe a person who has had his privacy temporarily invaded without his knowledge, since his psychological state is not affected at all by the loss of privacy. It is interesting and important to study what it is like to experience various gains and losses of privacy. One of the reasons the law protects privacy in certain situations is to protect us as individuals from suffering mental distress. But privacy should not be defined as, for example, freedom from various sorts of mental distress, or as the experience of being apart from others. Such definitions of privacy will be unable to cover those situations where we lose or gain privacy with no corresponding change in our mental state."*[65]

Again, on the comments of Richard B. Parker, Ruth E. Gavison has given the following observations :-

"It is time that Weinstein speaks of privacy as it 'appears in consciousness', but he does not define it as a state of consciousness, but as a condition of life. It seems that Weinstein has not committed the mistake concerning the nature of privacy which Parker accuses him of."[66]

Hence, the definition of Weinstein is negatively critized by Richard Parker and positively commented by Gavison. While Parker calls it a mental state of affairs, which is always not possible to denote and for this privacy violation cannot be counted, Gavison has not supported that idea. As per Gavison, there is no mistake on the part of Weinstein while defining privacy, because he has defined privacy in consciousness and not the consciousness itself. As such, Weinstein's definition of privacy is a condition of life involving certain amount of control.

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[63] *Supra Note 22 at p.88.*
[64] *Id at p.104.*
[65] *Supra Note 21 at pp.278-279.*
[66] *Supra Note 44 at p.33.*

1.3.2.8. Definition of Alan F. Westin : Privacy and Freedom

In the meantime Prof. Alan F. Westin has given his new dimensional definition of Privacy. When everyone, from Charles Fried to Michael Weinstein, was concerned with the definition of Privacy as control and tried to define it in terms of control, Prof. Westin highlighted a new aspect. Prof. Westin defined Privacy as freedom in 1970, in his famous book 'Privacy and Freedom'.

The definition of Prof. Alan F. Westin runs as follows :-

> *"The claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others.... The right of an individual to decide what information about himself should be communicated to others and under what circumstances. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or when among larger groups in a condition of anonymity or reserve."*[67]

According to Prof. Westin, privacy is the claim of individuals, groups or institutions to determine when, how and upto what extent information about them is communicated to others. In this sense, it is a right of every individual to determine the area and extent of communication of information about him or her. It can also be termed as a type of control over information and as such definition of Prof. Westin can also be categorised under the head Privacy as control of information about oneself. In this sense, Prof. Westin is of similar view with Charles Fried, Michael Weinstein and Arthur Miller. But, in the practical sense of the term, Prof. Westin has defined privacy as freedom and therefore, he has compared it with the freedom of every individual to decide the extent of communication of information about oneself. In his opinion, an individual is free to decide his extent of privacy with others.

In the latter part of his definition, Prof. Westin has viewed privacy in terms of relationship of individual with social participation. In this part, he has described privacy as the voluntary and temporary withdrawal of a person from the general society, which in other words, can be termed as freedom or independency of a person in social participation. It can also be explained as independency of a person

[67] *Supra Note 26 at p.7.*

to choose when, how and upto what extent he would participate in the social interaction. It is the right to privacy of a person to decide the issue. This condition of solitude from social participation is termed by Prof. Westin as anonymity or reserve. According to Prof. Westin, privacy is the desire of individuals for solitude, intimacy, anonymity and reserveness. In this sense it is also a psychological state of affairs. But, Prof. Westin has supported both physical and psychological aspects of privacy. In doing so, he always has advocated for equating privacy with freedom.

Prof. Westin's definition was the most influential and widely relied upon definition all over the world. It was cited in the introduction to the Nomos Volume devoted to privacy as an important definition, called Privacy Nomos XIII and XI. Again, it was adopted in the Younger Committee Report in U.K. It was accepted as the starting point in the discussion of privacy in Stein and Shand, Legal Values in Western Society (1974) at page 190. The Australian Law Reform Commission, The Protection of Privacy (Summary of Discussion Paper Nos. 13 and 14, July 1980) relied upon this definition. [68]

Inspite of the positive criticism of Prof. Westin's definition and its wide circulation all over the world, it has been negatively criticized by Prof. Louis Lusky.

Prof. Lusky's observation runs as follows:-

> *"It declares my privacy to be invaded, or at least affected somehow, if my one neighbour tells my second neighbour (without my consent) that I am vegetarian or that I am suffering from spring fever, or that I like oyster. The more troublesome aspect of the Westinian definition is that, it confuses through over simplification. It lumps together two quite different methods of control ... Westin and his disciples offer no useful conceptual basis for distinguishing between these two situations."* [69]

According to Prof. Louis Lusky, Prof. Westin has failed to distinguish between two opposite types of information transfer – one is information hunting by journalists and the other is credit report information. Prof. Lusky has said that, these two opposite matters need opposite methods of control. Hence, Prof. Lusky has redefined Prof. Westin's definition as follows :-

> *"Privacy is the condition enjoyed by one who controls the communication of information about himself."* [70]

[68] Louis Lusky, "*Invasion of Privacy : A Clarification of Concepts*", Columbia Law Review, Vol. 72, 1972, pp.693-695.
[69] *Id at pp.693, 695-697.*
[70] *Id* at p.693.

1.3.2.9. Definition of Adam Carlyle Breckenridge : Privacy as Control over Information

Prof. Adam Carlyle Breckenridge in his book, "The Right to Privacy" (November, 1971) has described right to privacy as "A most comprehensive right". In view of Carlyle, "Privacy is the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others." [71]

Again, Carlyle has defined Privacy in terms of control. According to him, it is the right of an individual to withdraw or to participate as he thinks fit. It is also the individual's right to control dissemination of information about himself and it is his own personal possession. Therefore, this definition of Carlyle goes in line with Hyman Gross, Charles Fried, Arthur Miller and Richard B. Parker, all of whom are followers of the School of Privacy and Control.

1.3.2.10. Definition of Arthur R. Miller : Privacy as the Individual Ability to Control

Arthur R Miller has defined privacy in terms of control again. According to him, privacy is the ability of an individual to control the circulation of information about oneself. He has defined privacy in his book "The Assault on Privacy" in 1972.

His definition runs as follows:

> *"Privacy is the individual's ability to control the circulation of information relating to him – a power that often is essential to maintaining social relationship and personal freedom."* [72]

1.3.2.11. Definition of Richard B. Parker : Privacy as Control over Human Senses

Richard B. Parker has criticized the definitions of privacy in terms of control over information about individuals, as stated by Hyman Gross, Charles Fried, Michael A. Weinstein and Arthur R. Miller. According to Parker, those definitions are overbroad and narrow. His opinion is that, absolute control over every information about an individual is impossible. On the other hand, loss or gain of control every time does not mean loss or gain of privacy. Therefore, privacy and control both are not synonymous with each other.

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[71] Adam Carlyle Breckenridge, *The Right to Privacy*, 1971, p.1.
[72] *Supra* Note 25 at p.40.

The definition of Richard B. Parker runs as follows:-

> *"Privacy is control over when and by whom the various parts of us can be sensed by others."* [73]

According to Parker, ideally a definition of privacy should be as true (fit the data) as beautiful (simple) and as useful (applicable) as possible.[74] By 'data' he means 'our shared intuitions of when privacy is or is not gained or lost.' A third criterion which a definition of privacy should meet is applicability by lawyers and courts.[75] Hence, it can be said that, Parker has suggested various criteria for an ideal definition of Privacy.

Parker further maintains that, there is no necessity of connection between a loss of control over private information and a loss of privacy. Telling someone about the homosexuality of an individual may mean loss of control over private information, but it does not necessarily mean loss of privacy. This distinction led Parker to view the collection of data by government and other institutions, as described by Westin and Miller, not as a loss of privacy per se, but rather a threat to one's privacy.[76]

The definition of Richard B. Parker is a combination of many elements under a single umbrella. Parker has combined the elements of psychological affairs and control in a same definition. His definition is to some extent ambiguous, because it is not clear that, whether he is supporting psychological state of affairs or element of control. Though he has criticized the jurists, who have defined privacy in terms of control, yet he himself has used the term 'control' in his definition. Again, he has denied the existence of psychological factors in the definition of privacy, but he himself has used it in his definition by using the term 'data' which means 'shared intuitions' of the loss or gain of privacy and that is a psychological element. Above all, he has imported a new word 'sensed' in his definition, which includes various types of senses, like 'see, hear, touch, smell and taste'. In his opinion, privacy is the control over the senses of others about us, which is impossible in the practical sense, because it is not possible for an individual to control the situations when others can sense the physical or mental element of that individual. Hence, definition of Privacy

[73] *Supra Note 21 at p.281.*
[74] *Id at p.277.*
[75] *Ibid.*
[76] *Id at p.285.*

provided by Parker, though simple, but is not an exhaustive definition covering every aspect of privacy as a whole.

1.3.2.12. Definition of Ruth E. Gavison : Privacy as a Condition of an Individual

Ruth E. Gavison has defined privacy in terms of a condition of an individual in his unpublished thesis on "Privacy and its Legal Protection" in 1975. He is not at par with the opinion of Richard B. Parker and according to him, a simple definition of privacy can be given only, if there is a common element of privacy.

The definition of Privacy as provided by Ruth E. Gavison runs as follows :-

> *"Privacy is a situation (or a condition) of an individual vis-a-vis others, which is related to the extent to which one is known to others, is physically accessible to others, and is the subject of others 'interest' and attention."* [77]

Gavison's concept of privacy at the first instance, speaks of the necessity of a common criterion for providing a simple definition of privacy. His common criterion of a simple definition, though theoretically correct, but practically is impossible to fix. In this sense, this concept is full of ambiguity. According to him, perfect privacy and total loss of privacy is impossible in a society, which is true in strict sense of the term. In a society, there cannot exist perfect privacy for everyone and as such total loss of privacy is also not possible, because everyone enjoys certain amount of privacy, which cannot be taken away absolutely. Therefore, every individual should concern with the prevention of their loss of privacy, rather than achievement of perfect privacy.

Gavison, in his definition of privacy, has specified it as a condition of an individual in respect of others. In this sense, privacy is a relative concept and its violation is dependent on the relation of an individual with others. Again, his definition is concerned with the physical accessibility of one person to others. According to him, extent of violation of privacy is dependent on the extent of physical accessibility by others. In this sense, Gavison's privacy is imperfect and it is criticized by other jurists. It is imperfect, because on the point of access to others, it brings again the concept of privacy as control and it provides for the necessity of control of access to others for preventing violation of privacy.

[77] *Supra* Note 44 at p.24.

Hence, Gavison's concept of privacy is a combination of both perfect and imperfect elements of privacy. It is correct, when it says absolute privacy is impossible and incorrect, when it brings forth the concept of privacy as control. By bringing again the concept of privacy as control, it creates more problems instead of solving the same. Gavison's definition keeps the area open for further research work.

Since 1960 to 1975, various jurists have defined 'Privacy' in their own words. Again, the definition given by one is criticized by the other. In this process of defining, supporting and criticizing the definitions of privacy, ultimately the concept of privacy has been well-defined by various jurists and it has received a concrete shape in the Western world. In the meantime, different Reports and Conferences came into being, which had taken serious initiatives for defining privacy. The efforts of these Reports and Conferences should be highlighted in this respect.

1.3.2.13. Definitions of Justice Report and Younger Committee Report

Justice Report, 1970 and Younger Committee Report, 1972, enumerated important definitions of Privacy in the United Kingdom, with whom the concept got a new dimension in U.K. in the modern period. Both these Reports pinpointed the problem of finding a precise and logical formula for giving an exhaustive definition of 'Privacy'.

According to Justice Report, Privacy means :-

> *"That area of a man's life which in any given circumstance, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade."* [78]

According to Younger Committee Report, Right to Privacy has two main aspects :-

> *"The first of these is freedom from intrusion upon oneself, one's home, family and relationships. The second is privacy of information, that is the right to determine for oneself how and to what extent information about oneself is communicated to others."*[79]

1.3.2.14. Definition of Nordic Conference of Jurists on Right to Respect for Privacy

The Nordic Conference of Jurists has made a fruitful attempt to give an exhaustive definition of 'Privacy' by covering almost every aspect of Privacy.

[78] Justice Report (*Privacy and the Law*), 1970, p.5.
[79] The Younger Committee Report (*Report of the Committee on Privacy*), 1972, p.10.

Hence, the Nordic Conference of Jurists on the Right to Respect for Privacy, held in May, 1967, finally concluded that, Privacy is not made of one particular interest only. It consists of many interests and as such the right to privacy should be meant as the right of the individual to protect his life against the following encroachments:-

- **(i)** the interference with his private, family and home life;
- **(ii)** the interference with his physical or mental integrity or his moral or intellectual freedom;
- **(iii)** the attacks on his honour or reputation;
- **(iv)** being placed in a false light;
- **(v)** the disclosure of irrelevant, embarrassing facts relating to his private life;
- **(vi)** the use of his name, identity or likeness;
- **(vii)** the interference with his correspondence;
- **(viii)** the spying, prying, watching and besetting;
- **(ix)** misuse of his communication, written or oral; and
- **(x)** the disclosure of information on given or received by him in circumstances of professional confidence.

Though the Justice Report and Younger Committee Report have suggested working definitions of Privacy, but the attempt made by the Nordic Conference of Jurists was considered to be fruitful in defining Privacy. That Conference has offered a comprehensive and widely circulated definition of Privacy, which was supported by almost all the jurists. When most of the Western definitions of Privacy raised controversy against each other and ultimately became fruitless due to their ambiguity or absurdity, then the Nordic Conference brought the rays of hope. In this sense, Nordic Conference has made great efforts for development of Right to Privacy in the Western world. Apart from that, the concept of Privacy was enriched by various judicial pronouncements and statutory enactments in different Western countries, which finally gave it a concrete shape. But, almost all the jurists are unanimous on the point that, the concept of privacy, as it is a variable concept, it varies according to societal and cultural variance. Hence, it is impossible to give a universal definition of 'Privacy'. Therefore, to give a precise and reasonable definition, countries should depend upon their own judicial decisions and statutory enactments relating to right to privacy.

1.3.3. Privacy : The Definitions by Indian Scholars

The concept of Privacy was not a new one in the Indian social structure, rather it has a great historical background and can be traced back since the very old past. Though the Western scholars have tried to define Privacy from various perspectives, but Indian scholars are not lagging far behind them. Apart from that, in India, the origin of Privacy is found in the ancient Hindu Jurisprudence, in the description of houses in Grihya-Sutras, Kautilya's Arthashastra and the epics of Ramayana and Mahabharata. In the medieval period, privacy was found in the habit of observing 'purdah' among Muslim women to prevent public exposure of their faces.

Privacy was not an alien to India and in fact, traces of Privacy can be found in India prior to the Western World. Nuth Mull vs. Zuka-Oollah Beg & Kureem Oollah Beg, 1855 – is an old Indian case, which is the biggest example of having the root of Privacy in India. It was the first Indian case, which was decided by the Sadar Diwani Adalat of the North-Western Provinces in 1855, where the question of Right to Privacy arose. This case shows the evidence that, the Right to Privacy was broadly recognized in India at least half a century before the U.S.A., where the idea came in 1890. It was held by the Court that, construction of a house should not be made in such a way, so that, the others premises may be looked into from the roof of the new house and thereby their Right to Privacy is violated.

But, as regards definitional perspectives, most of the Indian jurists, who have worked on Privacy, preferred to depend upon the Western definitions, instead of defining it in their own way. Among the Indian Jurists, most prominent are Shriniwas Gupta, Pannalal Dhar, Prof. Govind Mishra and of course, Prof. Upendra Baxi.

1.3.3.1. Privacy : The Definition by Shriniwas Gupta

The observations of Shriniwas Gupta regarding the concept of Privacy may be summarised as follows:-

> *"Our ancient law in Dharmashashtras also recognized the concept of privacy. Really, the law of privacy has been well-expounded in the commentaries of the old law. Kautilya in his Arthashastra has prescribed a detailed procedure to ensure right to privacy while ministers were consulted. But neither in ancient law nor in the present law the term 'privacy' has anywhere been*

> *defined nor any judicial pronouncement has so far come to make the position clear."* [80]

1.3.3.2. Privacy : The Definition of Pannalal Dhar

On the other hand, according to Pannalal Dhar, Right to Privacy is a right whose contours still remained undefined. [81]

1.3.3.3. Privacy : The Definition of Govind Mishra

In the words of Prof. Govind Mishra, Privacy means:-

> *"A fundamental right of the citizens to exclude governmental acts, omissions and things which tend to annoy or embarrass them and which affect the promotion and maintenance of their dignity* [82] *... It is not an exhaustive one. It is a culturally limited concept."* [83]

1.3.3.4. Privacy : The Definition of Upendra Baxi

But, the views of Prof. Upendra Baxi is somewhat different from this point of view. He has raised a very basic question to consider Privacy as a value of human relations in India. His observations are stated hereunder:-

> *"But the question arises at a more general level whether privacy is a value of human relations in India. Everyday experience in Indian setting suggests otherwise, Marriage parties and midnight music, wedding processions and morning 'bhajans', unabated curiosity at other people's illness or personal vicissitudes, manifestation of good neighbourliness through constant surveillance by the next door neighbour (large number of Indian houses do not use curtains) are some of the common experiences. A question may arise whether privacy is not after all a value somewhat alien to Indian culture."* [84]

Therefore, the jurists are not unanimous on the issue of existence of Privacy in India. In this sense, the problem of Indian view of Privacy is not only that, it is undefined in India, but also that, on the one side, there is existence of customary right to Privacy in India since the ancient period and on the other side, existence of Privacy is not found in the behaviour or attitude of Indian people in the practical field. Practically, Indians are guest friendly and they are habituated in maintaining close relationship with others. There is value of family relations above individual Privacy in India. Rural Indian people are habituated in looking after one another without asking for the same, visiting others' houses without knocking doors as well

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[80] Shriniwas Gupta, "*Right to Privacy : A Kind of Personal Autonomy*", Lex Et Juris, 1988, p.39.
[81] Pannalal Dhar, *Right to Privacy*, AIR Journal Section (Raj.), 1987, p.145.
[82] Govind Mishra, *Privacy : A fundamental Right under the Indian Constitution*, 8 & 9, Delhi Law Review, p.139.
[83] *Id* at p.138.
[84] K. K. Mathew on *Democracy, Equality and Freedom*, Introduction, lxxiv, note 262.

as having curiosity about their neighbours. All these instances show evidences, which are contrary to the opinion of having customary right to Privacy, as stated in the ancient Hindu Jurisprudence including Kautilya's Arthashashtra, Ramayana and Mahabharata. Hence, the picture of Right to Privacy in India is somewhat unclear, ambiguous and yet to be developed.

1.3.3.5. Privacy : The Definition of P.K.Tripathi

Finally, the observations on Privacy can be summed-up with a discussion of the views of Prof. P. K. Tripathi and Prof. Govind Mishra. Both of them have tried to give a concise and simple definition of Privacy by saying that, actually Right to Privacy is always one right, which revolves around only one idea, but it may be looked like a combination of rights or ideas by different persons at different point of times. The reason behind this is nothing but the angle of thinking or viewings of different persons are different.

In this context, highlighting the central or core notion of Privacy, Prof. P. K. Tripathi has observed as follows:-

> *"The quintessence of privacy lies in the idea of exclusion."* [85]

Supporting the views of Prof. P. K. Tripathi, Prof. Govind Mishra has made the following observations:-

> *"In fact, no one can think of privacy without entertaining the idea of 'exclusion'. It is an essential element of privacy in all its manifestations ... In its regulative aspect (which is influenced by the contemporary cultural values) it has various manifestations which probably led many to believe, although erroneously, that privacy is not one concept but many. In view of the above facts, it is submitted that privacy involves exclusion of others from what according to the contemporary social and cultural value, is termed private."* [86]

Hence, the views of Prof. P. K. Tripathi and Prof. Govind Mishra can be summarised by saying that, privacy is nothing but the exclusion of others from various matters of private interest. In this sense, the core element of privacy is 'exclusion'. When an individual human being would like to remain in Privacy, he or she should definitely have to exclude others from his or her territory. As for example, one would like to exclude others for exercising freedom of choice in matters of religion, education, sex and confidential talks. But, the idea of 'exclusion'

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[85] Professor P. K. Tripathi made this suggestion in the symposium on "*The Right to Privacy*" held on Feb. 17, 1982 in the Campus Law Centre, Faculty of Law, University of Delhi.

[86] *Supra* Note 20 at pp.44-45.

may depend on social and cultural values and may vary from society to society or culture to culture. Generally, social norms are the regulating factors of 'exclusion' for enjoyment of Privacy, which are subjected to legal control also. As the idea of 'exclusion' varies according to cultural variations, it may have different manifestations in different cultures, based on which the idea of 'Privacy' also varies. Practically, this is the reason behind the conception of different ideas of 'Privacy' in different societies. Hence, different jurists have thought, may be erroneously, that, privacy is not one concept, but a combination of many concepts. But, if one has to highlight the idea of 'exclusion' as the regulating factor for 'Privacy', then it can be said that, privacy is nothing but the exclusion of others from the private matters, as defined by contemporary social and cultural values.

The opinion of Prof. Tripathi and Prof. Mishra on 'Privacy' is no doubt perfect in true sense of the term, not only in the context of Indian society, but also of every society. The value of Privacy is dependent upon social structure and it varies with the societal or cultural variations. Hence, it is impossible to define 'Privacy' universally and as such definition of 'Privacy' varies from society to society, culture to culture. The value of Privacy is also dependent upon human relations and actions. In this sense, Privacy is not a single right, rather it is a combination of various rights and as such, the concept of Privacy defined in the Nordic Conference of Jurists, is appropriate. More or less, this is the Western view of Privacy, which finally has supported the idea of Privacy pronounced by the Nordic Conference of Jurists, after which the idea of Privacy has got a concrete shape, though not absolutely, in the Western World. But, the Indian view is somewhat different. According to Indian Jurists, either there is no privacy in India, or if there is privacy, it is only one interest and not a combination of various interests.

1.4. Privacy : The Classification

The quest and need for Privacy is inherent in human, nature. It is a natural need of an individual to establish boundaries surrounding oneself to restrict the entry of others into that area. Human beings want Privacy in various moments of human lives and they do not want intrusion by others upon their private lives. Various private moments, like motherhood, child-bearing, making of sexual relationship, maintenance of family relationship and keeping different confidential relationships, such as, doctor-patient, attorney-client or parent-child relationship require extreme Privacy without outside interference. This demand for Privacy is reasonable and

expected from every human being with dignity in a civilized society, because it is not only a part of right to live with human dignity, but it also creates a difference between human beings and animal beings. Besides, Right to Privacy is part and parcel of individual liberty, the guarantee of which is incomplete without the guarantee of Right to Privacy. Hence, Privacy, human dignity and liberty are synonymous.

Apart from that, different human relations require different types of Privacy for their existence. In this sense, the nature of Privacy varies from relationship to relationship. Human beings share certain information within a family, which are not shared with persons outside family. This type of Privacy is called Family Privacy. Again, certain informations are shared between various intimate relationships, like husband and wife, father and daughter etc., which are not subject to the purview of even other family members. This is called Intimate Privacy. Similarly, Social Privacy is claimed between various social relationships in matters of Financial Privacy, like Tax Recovery, Suppression of one's wealth from the rest of the society etc., in matters of Matrimonial Privacy by using in camera court proceedings in divorce cases and the like. Professional Privacy is claimed in different professional relationships, like doctor-patient, attorney-client, teacher-student, guide-scholar, insurer-insured etc. Due to the peculiar nature of these relationships, sharing of confidential information is obvious between them, which are not subject to disclosure with others. Hence, maintenance of Privacy is essential within these relations.

Based on the above discussion, Privacy can be classified into the following heads:-

1) **Intimate Privacy;**
2) **Family Privacy;**
3) **Social Privacy;**
4) **Individual Privacy.**

1.4.1. Intimate Privacy

'Intimacy' is closeness and 'Intimate Relationship' means close relationship among individuals. It is a kind of relationship that cannot be maintained with everyone, rather it is maintained only with certain family members and other personal relations. Privacy maintained within intimate relationship is called Intimate Privacy. There is no hard and fast rule regarding the definition of Intimate Privacy.

Again, it varies according to Western view and Indian view. Western view says, intimacy is the sharing of those information about an individual's actions, beliefs or emotions, which one does not share with all and which one is not bound to share with anyone. These informations include sexual relations, performance of bodily functions and family relations.

According to Indian view, Intimate Privacy exists among married couples, because marital intimacy is the closest intimacy in the society. But, in respect of Indian society, marriage constitutes the foundation of family and in this sense, Intimate Privacy is also categorised as Family Privacy in India. Hence, there is no water-tight compartments of classification of Privacy. Intimate Privacy is only related to inner and outer mechanisms in the mind of an individual, which one would like to treat as private. It may be confined to close friends, parents and spouses. It is based on the element of trust within the relationships and as such no constitutional or legal measures are required to safeguard it.

1.4.2. Family Privacy

In the words of Smt. Kiran Deshta, Family Privacy is described as follows :-

> *"A concept of family privacy can cover a wide area beginning from the privacy between a married couple, extending to a joint family living together and ending with all the blood relations of the family though they may not be living together. It is often seen that a family secret is assiduously guarded by the members of a family although they might be living in different towns."* [87]

Kiran Deshta has rightly highlighted the concept of Family Privacy in the Indian social structure. In India, family privacy was recognised as an important element since the very old past. Privacy was considered as a customary right in ancient India, traces of which is found in the 'Grihya-Sutras', which specifically elaborates rules relating to construction of houses in ancient India. Those rules show that, family privacy was above all in ancient India and as such privacy was maintained strictly, while houses were constructed. Especially, privacy of female members of a family were protected by using curtains for their rooms or that part of the house which were mostly female occupied. Hence, Privacy within the family was recognized in ancient India, but individual privacy was not considered above family privacy. Visitors were allowed in the family, but restrictions were maintained for visiting female occupied area.

[87] *Supra* Note 4 at p.36.

Joint family system is a typical characteristic of Indian social structure. Since the ancient period, sharing of information within the family was recognized as a customary rule and as such Joint Family Privacy was upheld, but individual privacy of the family members was not recognized, because, everything was decided by the 'Karta' himself. The members of Joint Family were usually maintained the secrets of the family, like keeping of concubine by a family member or any family member having an illegitimate son.

Concept of Family Privacy is a special feature of Indian social structure. In this sense, it is not similar with the Western social structure. In the Western social structure, there is no concept of Joint Family System and individual privacy is upheld above the family privacy, which is just opposite to Indian social structure. Hence, the concept of Intimate Privacy is more popular than the concept of Family Privacy in the Western World. As there are no water-tight compartments of the Classification of Privacy, therefore, what is categorised as Family Privacy in India, that is considered as Intimate Privacy in the Western World.

With the passage of time, Joint Family System was gradually disintegrated in India and along with that, concept of Family Privacy was converted into individual Privacy in the modern India. Modern nuclear family system has emphasized on individual privacy, rather than family privacy and as such the concept of Privacy has got a new shape.

1.4.3. Social Privacy

Social Privacy means, Privacy of various social relationships. Privacy is not only confined to a family or intimate human relationship, but it is characterised with different social relationships. Those social relationships demand confidentiality of information between them due to their very nature. In this sense, Social Privacy can again be classified into the following sub-heads :-

(a) Political or Legal Privacy;

(b) Professional Privacy;

(c) Community Privacy.

1.4.3.a. Political or Legal Privacy

Political or Legal Privacy is concerned with the Political rights in a civilized society and protection of those rights by law. Political Privacy is freedom from any intrusion while participating in a political life. Everyone should have his or her own right to vote without any outside interference in exercising his or her voting right.

Privacy and Confidentiality should also be maintained in respect of one's right to vote. This is called Political Privacy. When this right gets legal protection in a society, then it becomes Legal Privacy. Under this head, Privacy is protected from unreasonable government intrusion. Such intrusions are prevented by legal regulations in the areas of Procedure of search and seizure, Publication of news, Eavesdropping or wire tapping, Taking photographs, Birth Control, National Security, Public Nudity (exposure), Sexual relationship beyond marriage, Privacy of court proceedings (trial in camera), Tax recovery, Media intrusion and Investigative Journalism. All these areas have well advanced laws in U.S.A., but in India, all are governed by Article 21 of the Indian Constitution.

1.4.3.b. Professional Privacy

Professional Privacy is the Privacy of Professional relationships. In a modern technologically advanced society, various types of Professional relationships are found, e.g., Doctor-Patient, Attorney-Client, Teacher-Student, Guide-Scholar, Insurer-Insured, Hospital Authority-Patient etc. All these professional relationships require their own Professional Privacy, because considerable amount of confidential information is shared within these relationships. Sharing of that information is obvious due to the very nature of these relationships. Apart from that, there are also other professionals, like Chartered Accountants, Consultants, Magicians, Astrologers, Journalists, with whom people share confidential personal information for professional purposes. All these professional information demand secrecy and confidentiality in matters of their handling, otherwise Professional Privacy will be violated.

Generally, there are two types of Professional Privacy – one is the Professional Privacy of a Professional and the other is the Professional Privacy of his or her Clients. Moreover, there are also Professional Privacies, like trade secrets, knowhow, confidentiality of an invention relating to product or process etc. If Privacy within these relationships are not safeguarded by law, social existence of human beings will be threatened. Consequently, there may be the cases, like loss of job, defamation of individuals, loss of profit in business and even it may cause serious incidents, like death or suicide of individuals, which are dangerous for a modern democratic society. Therefore, violation of Professional Privacy should be prevented by law, otherwise, right to life and personal liberty will be endangered.

1.4.3.c. Community Privacy

Community Privacy means, Privacy within a Community or Group. A typical Indian society is characterised by a number of religious, cultural, ethnic, social, linguistic, regional or local communities or groups, which share within them, their special habits, customs, rites or rituals, which again vary from one community to other or one group to another. Particular habits existing within a Community are called Community Privacy, e.g. Brahmins prohibit the eating of beef and it is their Community Privacy. Similarly, Muslims and Christians are fond of eating beef, it is their Community Privacy. Likewise, worshipping of different idols in different ways are religious privacy, speaking of different languages are linguistic privacy, performing different cultural programmes are cultural privacy, wearing different types of apparels are ethnic privacy and so on. Practising the art of Voodoo or black magic is again, another type of Community Privacy.

Protection of Community Privacy by law is necessary for the existence of a civilized society. In India, apart from Article 21 of the Constitution, Articles 25 and 26 guarantee religious privacy, Articles 29 and 30 guarantee ethnic and cultural privacy. If the special characteristics of a particular community are not protected properly, then ultimately that particular group or community will be destroyed resulting into the total destruction of the feature, called 'Unity in Diversity' in India.

1.4.4. Individual Privacy

Most important type of Privacy is the Individual Privacy. It means, seclusion of a person from the rest of the world in different matters, which one would like to keep confidential and private from others. It also means, independency of a person in taking his or her own decision without interference by outside world. An individual needs privacy in matters of mental peace, meditation, personal cultivation, choice of food, hobbies, dressing sense, religious practice, decision of marriage, choosing of partner, procreation of children and many more. Individual Privacy is required to be maintained within a family, group, community or society. There should not be any conflict between Individual Privacy and other Privacies. One always needs Individual Privacy, inspite of the fact that, he or she is a member of family, group, community or even society. There are certain matters, which always remain private for oneself and for those, one remains secluded even within a family, those matters need Individual Privacy for their development.

Individual Privacy is not only a part of right to life, but it is part and parcel of individual liberty. If Individual Privacy is not protected by governmental measures, then ultimately the individual liberty will be curtailed. Hence, this area needs specific protection from the intruders, like governments, social scientists, journalists, employers, relatives, priests, community heads and family members.

Apart from the above-stated Classification of Privacy, there may be other Classifications of Privacy depending upon the views of different scholars. The reason behind that, may be the Classification of Privacy is not based on water-tight Compartments of Privacy. Most of the Privacy interests are overlapping with each other and as such, those cannot be separated as water-tight compartments. Hence, various other Classifications of Privacy is allowed and supported for better development of the concept.

Dr. Sanjeev Kumar Tiwari has classified Privacy into Physical Privacy, Informational Privacy and Organizational Privacy. According to him, Physical Privacy could be defined as preventing "intrusions into one's physical space or solitude". Informational Privacy includes Data Privacy, which refers to the evolving relationship between technology and the legal right to, or public expectation of privacy in the collection and sharing of data about one's self. Organizational Privacy means, desire of Government's agencies, corporations and other organizations to keep their activities or secrets from being revealed to other organizations or individuals. [88]

1.5. Privacy : The Nature and Basis

The basic element of Privacy is 'Private Space'. No one can have privacy in his or her life without acquisition of private space. Hence, everyone tries to acquire private space, to some extent, in one's life. An individual may lead a social life and he or she has to maintain public relations with others. Man is a social being and as such, to maintain social relations with others, man has to share certain information with other individual human beings or with the society. But, inspite of that fact, there are certain aspects of human life, which everyone needs to seclude from others. These are called acute private areas, which cannot be shared with anyone, e.g., intimate relations, family relations, sexual relations, parent-child relations etc. More specifically, performing sexual acts and producing child are the two important areas

[88] *Supra* Note 2 at pp.11-12.

of human life, where one needs acute privacy. No one would like to give child-birth in front of everybody. Hence, privacy is needed for this purpose and acquisition of private space is obvious. Apart from that, one needs Privacy for meditation, emotional and intellectual freedom, i.e. development of creative mind and artistic skills and the like. One cannot create literary or artistic works without having some private space. Therefore, the necessity of 'Privacy' and 'Private Space in human life can be easily understood.

Man cannot live in acute privacy always, because man is a social being. Maintenance of social relations is also an important aspect of human life and for this, disclosure of information about oneself is necessary. Hence, privacy and disclosure, both are important for human beings and both are necessary in human lives. Every human being has to maintain social relations as well as private space simultaneously, without the maintenance of which human lives would become incomplete. As privacy and disclosure, both are two important aspects of human lives, it is necessary to maintain a balance between the two. A balanced man means, a man who has the capacity to create a balance between privacy and disclosure. According to different jurists, an ideal society always tries to establish a balance between privacy and disclosure. Various studies have found that, though the core element of Privacy is achievement of 'Private Space', but the environment of absolute privacy is impossible in human society. 'Curiosity' and 'Surveillance' are two other basic elements of human society and 'Privacy' is constantly threatened by individual 'Curiosity' and state 'Surveillance'. In a modern technologically advanced society, these two threats on Privacy have been increased enormously and as such, achievement of acute Privacy is more or less impossible.

In this era of modern science and technology, the idea of Privacy is culminated into the achievement of physical and intellectual freedom from the threats of curiosity and surveillance. As the numbers of interferences are increasing everyday in a modern society, the necessity of 'Privacy' is also increasing simultaneously. Another important issue is that, consequent to increasing number of threats to Privacy, creating of balance between privacy and disclosure is gradually becoming impossible day by day. Apart from the voluntary disclosure of information by individuals for maintaining social relations, there are the cases of forced disclosure of information by data thefts with the help of advanced scientific technology. If these instances are increased, then there is the fear of not only

violation of Privacy, but also the fear of social imbalance. The reason being that, in the absence of a balance between privacy and disclosure, individual citizens are always in danger of defamation and constant threat to violation of human dignity. Consequently, societal peace and tranquillity will be hampered, which ultimately will create societal imbalance and anarchism.

At this juncture, the urgency of privacy protection is understood all the world over and everyone is concerned with the threats on privacy. Various studies are performing to make the ordinary individuals, aware of the necessity of privacy protection. But, any study of privacy would be incomplete without a discussion of nature and basis of Privacy. The idea of Privacy is embedded in its nature and basis. The nature of Privacy is characterised by freedom of individual human beings from any outside interference. Privacy does not only mean, freedom from physical interference, but it includes freedom from emotional and intellectual interference also. Various definitions of Privacy, though have spoken about various areas of Privacy, but all those have highlighted on only one issue, i.e. freedom of an individual from any kind of interference. More specifically, all those definitions have centred around only one idea, i.e. the idea of exclusion. Accordingly, Privacy is nothing but the exclusion of all others from various aspects of the life of an individual human being. Hence, the nature of Privacy is embedded in the ideas of freedom and exclusion.

As regards the basis of Privacy, it can be said that, centuries ago, Warren and Brandeis have clearly identified the basis of privacy as inviolate personality. According to them, 'Privacy' is a right which protects human personality from any kind of violation, which in other words, is called 'inviolate personality'. Therefore, Privacy is nothing but the protection of inviolate personality of human beings. Warren-Brandeis have highlighted that, protection of private property from theft, physical misappropriation or publication in any form, is not the protection of right to property, but actually the protection of right to privacy, which can also be termed as the inviolate personality. Warren-Brandeis have also propounded that, protection of privacy does not only mean, protection of physical privacy, but emotional and intellectual privacy also. There may be various ways of property protection from different kinds of threats or interferences, but actually all those prevent the violation of human personality by any kind of interference. Warren-Brandeis have prescribed that, protection from physical sufferings is not enough, but protection from mental

sufferings is also necessary. For this purpose, they have suggested the protection of 'inviolate human personality' from any kind of interference, which actually gives protection against mental sufferings. Accordingly, the basis of Privacy is protection of human beings from physical as well as emotional and intellectual sufferings.

1.5.1. The Nature of Privacy

The idea of Privacy is age-old and not a new one, though the concern of everyone for privacy is increased now-a-days. The nature of privacy, is therefore, not a new idea. But, the nature of Privacy is not static, but a dynamic idea. As the idea of Privacy grows and changes with the changing time and society, the nature of Privacy also changes. As the primitive and ancient societies were simple, the nature of Privacy was also simpler. At that period, individuals were concerned only with the ideas of family privacy, group privacy, privacy of sexual relations, privacy during child-birth, community privacy and the like. Gradually, with the changing patterns of society, the nature of Privacy has also changed. In the modern complex independent societies, the nature of privacy has become complex and dynamic. It has expanded its scope and ambit to include various new ideas of Privacy, like Data Privacy, Information Privacy, Workplace Privacy, Privacy of Motherhood, Privacy of Intellectual Property Rghts, Professional Privacy, Political Privacy, Privacy in Cyberspace and the like. Hence, to examine the nature of Privacy, it can be divided under the following heads :-

(i) Privacy as the Legal Claims.

(ii) Privacy as the need to reveal and the need to withhold.

(iii) Privacy as the balance between Individual and Social Rights.

1.5.1.1. Privacy as the Legal Claims

Privacy is considered by various jurists as a series of legal claims or rights, some of which are protected by express legal provisions and some are not. It means, certain kinds of desired or unwarranted relationships among individuals or groups, which need legal recognition for the existence of society at large, but some of those are recognised by law and some are still waiting to get legal recognition. As for example, Privacy between husband and wife, i.e. marital privacy is a legal right, recognised by express or implied legal provisions in every society. But, the Right to Privacy of a Prostitute is not a legally recognised right in every society, though it has received certain amount of protection by various case-laws, but yet has not received total protection in the eye of the law.

According to Prof. S. K. Sharma, there are at least three categories of claims which denote the legal concept of Privacy in the present context. In this respect, he has stated that, a right to privacy as a legal concept can be defined as the legally recognised freedom or power of an individual (including group, association or class) to determine the extent to which another individual (including group, class, association or government) may obtain or use his ideas, or obtain or reveal information about himself, or intrude physically or mentally into his life or related matters.[89]

In this sense, the three categories of claims denoting the legal concept of Privacy can be summarised as follows:-

(a) To obtain or make use of one's ideas, writings, means, likeness or other indications of identity.

(b) To obtain or reveal information about one or those for whom one is personally responsible.

(c) To intrude physically or in more subtle ways into one's life, space and one's chosen activities.[90]

The three categories of claims described by Prof. Sharma are the various areas of human life where an individual human being (including group, association or class) can exercise control over the interference by others. The term 'claim' is used here to determine the extent to which one exercises control over one's personal belongings, including one's ideas, creations, information as well as physical or spiritual life, so that the intrusion upon those areas by other individuals (including groups, class or association) may be prevented. More specifically, it is the freedom or power of an individual or other entity to determine outside interference on oneself. The nature of Privacy can be extracted from this idea of Privacy based on three categories of claims. Privacy is nothing but the freedom of an individual or other entity to determine the extent of exposure about oneself towards others. Hence, the nature of Privacy is culminated into the idea of freedom that one enjoys about oneself to determine the exposure towards outside world.

1.5.1.2. Privacy as the Need to Reveal and the Need to Withhold

The first element of nature of Privacy is the legal claims to denote the legal concept of Privacy. This idea reproduces the notion of freedom as the basic nature of

[89] *Supra Note 1 at p.71.*
[90] *Ibid.*

Privacy. The notion of freedom further elaborates the nature of Privacy and from this, the second element of nature of Privacy can be derived. The second element is, Privacy is characterised by the need to reveal and the need to withhold information about oneself. More specifically, feeling of freedom is the core element of any democratic set up. Every individual citizen should enjoy physical, mental, spiritual and emotional freedom in a democracy. If such freedom is not provided, then a democratic system will collapse. Therefore, every individual should enjoy freedom from those ideas and emotions which may trouble them and upset their relationships with others as well as may confuse or damage institutions.

Enjoyment of freedom may be of many types. Likewise, children should have the freedom to express their problems to the teachers and parents, workers should have the freedom to express themselves to one another and to their employers, family members should have the freedom to share their ideas and emotions to each other etc. Hence, the nature of freedom is multidimensional. But, the idea of freedom is not unlimited. One should enjoy the right to freedom, but at the same time, it should also be remembered that, while exercising one's freedom, others' freedom should not be curtailed or violated. For this, purpose, while enjoying freedom, one is under the need to reveal and withhold certain information about oneself simultaneously.

Nature of Privacy is embedded in the idea of freedom. Privacy is nothing but the enjoyment of freedom by oneself in respect of outside exposure of that person. In other words, it is the right to determine the extent to which one would like to expose oneself to the outside world. It is the control of outside exposure by oneself. The term 'outside exposure' is closely associated with the term 'information'. Hence, control of 'outside exposure' is nothing but the 'control of information' about oneself. In this sense, Privacy means, freedom to control the flow of information about oneself. Though the nature of Privacy is culminated into the idea of freedom, but the freedom should not be exercised in the uncontrolled manner. One needs to reveal certain information to others as well as to withhold certain information from others simultaneously for maintaining one's right to Privacy. Otherwise, uncontrolled revelation of information towards others would amount to the violation of Privacy of oneself. Therefore, the main idea of Privacy is engulfed into the idea of freedom to determine the need to reveal and the need to withhold information about oneself to others. This is the second element of nature of Privacy.

In a well-balanced society, it is the duty of everyone to maintain a balance between the need to reveal and the need to withhold information about oneself towards others. If that balance is not maintained, there is a chance of occurring societal imbalance and chaotic situation. If there is uncontrolled revelation of information, then one's right to Privacy is violated. On the contrary, if there is total withhold of information, then others' right to information would be violated. Hence, the balance between revelation and withhold is required for the peaceful co-existence of everyone in a democratic society. This balance is the core element of nature of Privacy, which is subject to legal regulation. If the extent of revelation and withhold is controlled by legal rules, then only it is possible to maintain a proper balance in the society. Hence, the second element of nature of Privacy is the exercise of freedom in a controlled environment.

1.5.1.3. Privacy as the Balance between Individual and Social Rights

The first element of nature of Privacy is freedom. The second element is creation of a balance between revelation and withhold of information about oneself, which is controlled by legal regulation. It can also be called, freedom in a controlled environment. The combined effect of these two elements gives rise to the idea that, though freedom is the first element of nature of Privacy, but when freedom is exercised in a controlled environment, then only it becomes complete and effective. When the second element is effectuated, it gradually gives birth to the third element of nature of Privacy. The third element is, Privacy is characterised by the balance between Individual and Social Rights. This is the most important element and perhaps the nature of Privacy would be incomplete without this element. Therefore, this element needs specific elaboration.

A well-balanced democratic society is not only subjected to the creation of balance between revelation and withhold, but it is also subjected to the creation of balance between individual and social rights. The balancing of revelation and withholding of information about oneself gradually brings forth the necessity of maintaining balance between individual and social rights. More specifically, when an individual shares information about himself or herself with others to maintain social relations, then the right to information of the society at large, is satisfied. But, in that case, the individual right to Privacy may be hampered. On the contrary, when an individual withholds certain information from the society at large and decides to remain in privacy, then the societal right to information may be violated. Hence,

there is the necessity of maintaining balance between individual right to Privacy and societal right to information. For this purpose, it is necessary that, there should be legal rules and regulations to specify what information about an individual should be communicated to others or the society at large and what information should be kept private. Otherwise, societal balance would be jeopardised.

Every individual is a free citizen in a civilized society and that freedom can, in no way, be destroyed by state or government. But, at the same time, it should also be remembered that, no man is above the law. Law is above all and in this sense, it is called that, 'law is the king of kings.' Hence, legal rules can be framed to control every subject of a civilized society. It can also be framed to limit individual freedom or right to Privacy, if societal interest is jeopardized. In a modern democratic society, freedom of information is guaranteed as a fundamental right under the Constitutions and to protect that freedom, various limitations are imposed on right to Privacy in the interest of the state and national security. Hence, right to Privacy is not an absolute right and state can impose reasonable restrictions on this right in the interest of national security or otherwise.

Right to information and right to Privacy, both are the two wings of a civilized society. Therefore, peaceful co-existence of these two rights is obvious for the continuance of a civilized society. Here comes the question of balancing between public's right to know and citizens' right to privacy. If public's right to know is upheld, then citizens' right to privacy is violated. On the contrary, if citizens' right to privacy is upheld, then public's right to know is violated. This controversy has been resulted into the dichotomy between right to privacy and freedom of information. To end this conflict, it is necessary to maintain a balance between individual and social rights, because right to Privacy is individual right and right to Information is social right. In a free society, this balance is obvious. The moment this balance is lost, the free society will be jeopardized. As for example, in a criminal justice system, right to information and right to privacy, both should be maintained simultaneously. Sharing of information is required in different kinds of professional relationships, like doctor-patient, attorney-client, insurer-insured etc. But, it is the duty of those professionals to maintain confidentiality or privacy of that information. This represents the necessity of a delicate balance, which should be maintained between the two.

Therefore, the third element of nature of Privacy, i.e. balancing between individual and social rights is obvious to exercise the cherished goal of freedom, which is the core element of nature of Privacy. It is also necessary for peaceful co-existence of a civilized society and to prevent societal imbalance and anarchism. When the three elements of nature of Privacy are joined together, then only it is possible to achieve the cherished goal of nature of Privacy.

1.5.2. The Basis of Privacy

Every individual needs a private zone or inner zone in his or her life, where the individual wants no outside interference into the inner zone. Having a particular 'inner zone' for every individual is an essential element of a civilized society. Therefore, every civilized society is characterised by an 'inner zone' for every individual citizen. The idea of 'inner zone' is the core element of privacy, because there are certain aspects of human life, where everyone needs privacy, e.g. sexual relations, child-birth, motherhood, meditation, spiritual and intellectual development of mind including the creation of artistic and literary works etc. Human beings do not want outside interference in these areas of life. If privacy is not provided to the individuals in these areas of life, then the basic civil rights would be destroyed. With the growth and expansion of civilization, certain amount of privacy in some extreme private areas of life has become part and parcel of individual life. If that minimum amount of privacy is not maintained in the above-mentioned aspects of life, then the core self of civilization will be destroyed and it will turn into barbarism. Granting of basic civil rights coupled with minimum rights to privacy is the core element of civilization, otherwise, it will be called barbarism. Therefore, the thin line of distinction between civilization and barbarism is characterised by the element of Privacy. Hence, Right to Privacy is utmost important for the existence of a civilized society.

Right to Privacy is not the creation of modern technologically advanced society, but the creation of old and backward society. Traces have been found of the existence of Privacy in the primitive uncivilized or less civilized societies also. But, with the advancement of modern scientific technology, threats to Privacy have been increased. As a matter of fact, every human being needs privacy in certain private areas of life in every society. Those private areas always remain 'private' in every society, be it civilized, uncivilized or less civilized, be it modern, ancient or primitive. As such, there should not be any change in those 'private areas of life'

with the changing time and place or with respect to change in society or in other words, with the occurrence of social change. Hence, social change cannot take away the private areas of life with the help of modern scientific technology. Certain matters should always remain private, otherwise the social structure will collapse. There is no difference between giving of child-birth in public in a primitive society and peeping through a highly advanced camera lens to see a women giving child-birth in a private place in a modern technologically advanced society. Both the cases are examples of violation of Privacy resulting into the loss of human dignity. Therefore, what was considered as loss of privacy in the old age that is equally amounting to same in the modern age, too.

Right to Privacy is equally applicable to all ages and all societies. It has the same significance irrespective of the time, place and society. The significance of Privacy is attached to the idea of 'Freedom,' which is the basic nature of Privacy. Privacy is nothing but the freedom of an individual from any kind of interference. It is the exclusion of all others from the territory of the life of an individual. The nature of Privacy is culminated into the idea of freedom that one enjoys about oneself to determine the exposure towards outside world. But, the freedom should be exercised in a controlled environment by maintaining a balance between the need to reveal and the need to withhold information about oneself towards others. This balance is required for the peaceful co-existence of everyone in a democratic society. The balance between revelation and withhold gradually turns into the balance between individual and social rights. If that balance is maintained, the chances of societal imbalance and anarchism will be decreased. Hence, the nature of Privacy is to achieve individual freedom by creating a social balance, so that everyone can live in a peaceful social atmosphere. This is the cherished goal of nature of Privacy.

The nature of Privacy to create a balance between individual and social rights, will always remain same, irrespective of the time, place and society. This particular nature of Privacy can never be changed with the social change. Hence, the nature of Privacy is utmost important, which gradually gives rise to the concept of Basis of Privacy. Both the concepts of nature and basis of Privacy are closely related and are supplementary to each other. The discussion on nature of Privacy will remain incomplete without the discussion on basis of Privacy and vice-versa. The basis of Privacy is culminated into the idea of 'inviolate personality.' Long ago, two famous jurists, Warren and Brandeis identified the basis of Privacy as 'inviolate

personality,' in U.S.A. Later on, their views have been accepted in the Western world and now it is unanimously accepted by everyone that, the basis of Privacy is embedded into the idea of 'inviolate personality' as propounded by Warren and Brandeis. According to them, whatever may be the nature of wrong in case of interference into one's private life, physical, intellectual or emotional, actually what is violated, is the right to Privacy and human dignity of the particular individual, which is called the violation of 'inviolate human personality.'

As every individual needs a private zone for his or her spiritual or mental freedom, apart from physical freedom, the nature of Privacy is culminated into the idea of freedom for every individual. The basis of Privacy provides that, freedom is equally important for every individual and that can never be taken away by anyone absolutely, though it can be limited by State by imposing reasonable restrictions in the larger public interest. If the freedom is curtailed in unreasonable manner, then the ultimate human personality will be violated, which in other words, be called the violation of 'inviolate personality' and that can never be violated. This is the basis of Privacy. In case of curtailment of freedom in unreasonable manner, there is not only the fear of loss of 'inviolate personality,' but also the danger of loss of liberty, which is even more serious. Freedom and liberty are synonymous to each other and hence, if one is curtailed, the other is also curtailed.

The danger of loss of liberty in the absence of private zone for every individual is clearly highlighted by Douglas J. as follows:-

> *"That a time may come when no one can be sure whether his words are being recorded for use at some future time. When everyone will be in fear that his most sacred thoughts are no longer his own but belong to the Government, when the most confidential conversations are open to eager, prying ears; when that time comes privacy and with it liberty is gone. If a man's privacy is invaded at will, who can say that he is free? If his every word is taken down and evaluated or if he is afraid of every word he says, who can say he enjoys freedom of speech? If every association of man is known and recorded; if his conversation with his associates are purloined, who can say that he enjoys the freedom of association."* [91]

Accordingly, the importance of private zone for individuals, is enormous. If every activity of an individual is kept under surveillance, if every action of an individual becomes public, then nothing remains private for oneself. In

[91] *Mass Media and the Law*, 187 at p.195, quoted by S. K. Sharma, Id at pp.78-79.

that case, the freedom of an individual human being will be destroyed, alongside the liberty will also be destroyed. No one could even think of such a dangerous situation, because in that case, nobody will remain a free man. The society will also not remain a free society. Hence, the basic element of a civilized society, i.e. freedom or liberty will come to an end and in the absence of freedom, the idea of civilized society will also be destroyed. Such a situation can never be expected. For that reason, there should always be a private space or private zone of 'Privacy' for every individual human being. If 'Privacy' remains, freedom or liberty will also remain and not otherwise. This is the basic nature of Privacy. But, with the advancement of society and with the development of information and communication technology, the cases of data or information theft are increasing everyday. Now-a-days, it is also possible to keep a human being under electronic surveillance always. Hence, the chances of loss of Privacy or Freedom are growing day by day. As such, it is no longer possible for individuals to maintain privacy.

Various new threats to Privacy are the creation of modern society. As new torts can be created with the social change, new threats to Privacy can also be created. Now-a-days, there are different types of cases of violation of Privacy are found, e.g. violation of physical privacy, moral privacy, social privacy, intellectual privacy, workplace privacy, informational privacy, privacy in cyberspace etc. In all these cases of violation of Privacy, remedy can be made available under the Law of Torts, but actually in all these cases, only one right is violated and that is the right to Privacy. Hence, there is no necessity of creating various new torts for violations of different kinds of privacy rights. If remedy is provided under one umbrella, that is enough. The nature of violation is same in all the cases and that is the violation of freedom of individual human beings, which is the basic nature of Privacy. along with that, in all these cases, what is actually violated, is human dignity. Protection of human dignity is the basic criteria of a civilized society. If human dignity is not provided, then the existence of human beings will be in question. In that case, the basic structure of a civilized society will be destroyed. Therefore, human dignity or the basic human personality can never be violated. For that reason, it is called 'inviolate personality' or the personality that can never be infringed.

Though there may be various kinds of Privacy Torts, but in all cases, only one right is violated, i.e. right to live with human dignity. Another name for it is 'inviolate personality.' Hence, it can be said that, whatever may be the nature of

privacy violation, ultimately the 'inviolate human personality' is violated. In this sense, to protect right to Privacy means, to protect inviolate personality of individual human beings, without the protection of which the right to Privacy can never be protected. Hence, the basis of Privacy is nothing but the 'inviolate personality' of human beings.

1.6. Privacy : The Scope, Extent and Significance

Right to Privacy has been developed from the concept of private space. It is the right of every individual to acquire and enjoy his or her exclusive private space. The amount of private space which everyone should enjoy freely and the limit of outside interference over it, will be the elements for determining the scope, ambit and extent of Right to Privacy. On the other hand, significance means, the importance of Right to Privacy in a civilized society. Whether it is a public right or private right, what is the difference between Privacy and Right to Privacy; those are the pertinent questions under this head.

1.6.1. The Scope and Extent of Privacy

The scope and extent of Privacy are closely associated with the nature and basis of Privacy. Hence, to understand the scope and extent of Privacy, certain areas of nature and basis of Privacy need to be analysed further. There are various aspects of Right to Privacy, which are still remained undefined. If those areas are combined together, then it is found that, right to Privacy and the right to live one's life according to one's own choice are synonymous. Therefore, it can be claimed that, one has the right to do what one likes to do with one's own life without the interference of State or the Government. Hence, most of the definitions of Privacy have insisted upon the idea of private space as the basic criteria for Privacy, which means the atmosphere where a man may become and remain himself. The Common Law principle of Privacy has supported this idea of private space and to elaborate it, these principles have stressed upon the concept of physical privacy. According to this view, physical privacy is most important. Hence, the supporters of this view have considered every man's house as his castle in democratic countries, where physical privacy is protected. But, the Kantian Philosophy has imported somewhat different view. It has stressed upon the aspects of spiritual privacy apart from mere physical privacy and has identified then idea of personal dignity, which is necessary for spiritual development of individual human beings. When right to privacy considers the material aspects of life, like personal intimacies of home, family,

marriage, motherhood, child-bearing, use of contraceptives, use or abuse of sex including the practice of obnoxious personal habits, as well as the spiritual, emotional and intellectual aspects of life including the creation of artistic and literary works, then only the idea of Privacy becomes complete. Hence, the scope and extent of Privacy should not only cover the mere physical aspects of Privacy, but the spiritual, emotional and intellectual aspects also, otherwise the basic idea of human dignity will be threatened.

The scope and extent of Privacy should not only confine itself as a mere physical state of affairs, but also as a spiritual state of affairs. If Privacy is considered as a physical element only, then it would be confined only to the Privacy of bodily organs and construction of houses to secure private places. In that case, idea of Privacy would become incomplete. Hence, spiritual aspects have also been included within the term 'Privacy' and different jurists have defined it as a mental, psychological or spiritual state of affairs. These aspects would include maintaining solitude, intimacy, anonymity and reserve (Alan F. Westin's Privacy); repose, peace and sanctuary (Bostwick's Privacy); inviolate personality (Warren-Brandeis' Privacy); privacy torts (William Prosser's Privacy) etc. All these definitions of Privacy are considered self-sufficient while explaining the scope and ambit of Privacy.

There are various observations on Privacy depending upon the variations in the thinking process with respect to the idea of Privacy. All these observations are important in the discussion of scope and extent of Privacy. According to one observation, a wish to have Privacy is closely associated with a wish to have property and privacy increases with the increase of property.[92] If an individual has a private property, then only he or she has privacy and if one is without private property, then the individual is also considered as without privacy. This view has equated privacy with the idea of private property and has stressed only on the physical aspects of Privacy. Another aspect of Privacy is found in the analysis of Bill of Rights of the U.S. Constitution, where the term 'Privacy' is never used expressly, but the U.S. Supreme Court has interpreted it, in the light of freedom that every individual should exercise.

[92] Bruno Bettelheim, "*The Right to Privacy is a Myth*", Saturday Evening Post, July 27, 1968, pp.8-9.

The scope and extent of Privacy is not same in the Western world and in India. As the definition and concept of Privacy varies from society to society and culture to culture, similarly the scope and extent of Privacy also varies from country to country.

1.6.1.1. The Scope and Extent of Privacy in U.S.A.

The scope and extent of Privacy in U.S.A. is enormous and highly appreciable, because the idea of Privacy has reached such an extent in U.S.A., so that, no aspect of human life remains uncovered from the purview of Privacy. To understand the scope and extent of Privacy in U.S.A., it is obvious to know the primary object of the U.S. Government regarding invasion of Privacy and Privacy protection. There is a specific line of thinking with respect to invasion and protection of Privacy in U.S.A., since the making of U.S. Constitution. Though Right to Privacy is not expressly guaranteed by the U.S. Constitution, but various Constitutional provisions have prevented the U.S. Government from invading the right to personal privacy by way of controlling disclosure of personal information during court proceedings, imposing restrictions on Government to prevent intrusions into the Privacy of home and personal correspondence and in many other ways. The Constitutional provisions are supplemented by decisions of the U.S. Supreme Court. Inspite of that, the right to Privacy had frequently come in conflict with other liberties and the governmental power in U.S.A. Hence, the final outcome is the attempt to create a balance between invasion and protection of Privacy by way of accepting the truth that, intrusions of Privacy may be allowed in certain cases in the interest of public health, safety, morals and general welfare.

According to Prof. S. K. Sharma, the list of areas in which the Right to Privacy was found to be applicable in U.S.A., at the very beginning, are:-

(a) Marriage – as decided in the case of Loving vs. Virginia, 388 U.S. 1, 12 (1967).

(b) Procreation – as decided in Skinner vs. Oklahoma, 316 U.S. 535, 541-542 (1942).

(c) Contraception – as decided in Eisenstadt vs. Baird, 405 U.S. 438, 453-454 (1972).

(d) Family Relationship – as decided in Prince vs. Massachusetts, 321 U.S. 158, 166 (1944).

(e) Child rearing and education – as decided in Pierce vs. Society of Sisters, 268 U.S. 510, 535 (1925). [93]

The above-stated cases show the instances, where U.S. Supreme Court has interpreted and highlighted various areas of Right to Privacy. Though the U.S. Constitution has not used the term Privacy expressly, but the U.S. Supreme Court has developed it through its decisions. Most important development of Privacy has been made in U.S.A. in the Fourth Amendment cases, which deals with the right of all "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures". Hence, the Fourth Amendment Clause of the U.S. Constitution gives protection against unreasonable searches and seizures by the government without due process of law, which in turn, gives protection of Right to Privacy in U.S.A.

The direction of advancement and development of Right to Privacy in U.S.A. shows that, most significant advancements were made only in the area of contraception and abortion. The biggest example of this is the famous case of Roe vs. Wade, 410 U.S. 112 (1973), where the U.S. Supreme Court struck down a Texas Abortion Statute as ultra vires to the U.S. Constitution for violating Right to Privacy of a woman by controlling her Right to Abortion. Another instance is the old case of Griswold vs. Connecticut, 381 U.S. 479 (1965), where a general Constitutional Right to Privacy was articulated for the first time in U.S.A. In this case, the Connecticut Law, making the birth control measures a criminal offence was held unconstitutional as violative of the marital Right to Privacy of husband and wife.

Though the judicial pronouncements made by the U.S. Supreme Court were mostly found to be unidirectional, the legislative actions taken by the U.S. Federal Government were no doubt multidimensional. Those legislative actions have contributed for development of various areas of Right to Privacy. The following examples will give us a clear picture in this respect:-

(i) The Privacy Act, 1974

The Privacy Act, 1974 was the first comprehensive legislation for regulation of use of records of personal information maintained by the federal government. It prohibits unregulated dissemination and disclosure of personal information without

[93] *Supra* Note 1 at p.338.

the consent of the relevant individuals. Penal provisions have also been prescribed by the Act for violations of its provisions.

(ii) The Omnibus Crime Control and Safe Streets Act, 1968

Title 3 of the Omnibus Crime Control and Safe Streets Act, 1968 prescribes civil and criminal sanctions for unauthorised wire-tapping or electronic surveillance. Practically, this Act prevents privacy violations by prohibiting every type of electronic surveillance without the permission of the court.

(iii) The Fair Credit Reporting Act, 1970

The Fair Credit Reporting Act, 1970 was an important legislation to control the American Credit Reporting Agencies from publishing inaccurate investigative reports. According to this Act, if inaccurate credit reports are published, then civil and criminal actions can be taken against the credit report agencies by the persons whose Credit Report Privacy is so violated.

(iv) Crime Control Act, 1973

The Crime Control Act, 1973 was duly amended in America to prevent violation of individual privacy including the harm on individual's reputation by the unwarranted dissemination of criminal records. The amended Act provides that, the information should be used only for the purpose for which it was collected, including the use of those information for law enforcement and criminal justice.

Apart from the Four Enactments on Privacy mentioned above, various other steps were taken by 93rd Congress for the development of Privacy in U.S.A., among which Watergate, Revelations of Political Surveillance by the FBI and misuse of Tax Returns by the Internal Revenue Service, are the areas where most Privacy violations were found and suggestions were given for prevention of the same by legislative enactments. Somewhat clear picture can be found from the words of Sri S. K. Sharma, which are stated as under :-

> *"In 1974 alone, more actions were taken to provide formal protection to Privacy than had been achieved in all of the prior history of the United States. In addition to the passage of the Privacy Act, Congress enacted the 'Family Educational Rights and Privacy Act of 1974', which would deny federal funds to any educational institution that prevented parental access to a child's school records or permitted the release of a student's records without parental consent to anyone but another school official or in compliance with a court order. Among over 300 other Privacy Bills introduced in the 93rd Congress relating to privacy, serious consideration was given to a Bill to establish rules on the use and*

> *dissemination of criminal records and a Bill to prohibit military surveillance of civilian activities."*[94]

Hence, Judiciary and Legislature both have played important role for protection of individual Privacy in U.S.A. Apart from that, executive actions and administrative policies have also been taken for prevention of privacy violations. Therefore, the three pillars of Democracy – Executive, Legislature and Judiciary together have taken important initiatives for development of Right to Privacy in U.S.A.

1.6.1.2. The Scope and Extent of Privacy in U.K.

In comparison to U.S.A., U.K. has no general Right to Privacy as such and also no full proof development of Privacy covering its every aspect is found in U.K. like U.S.A. Since 1890, i.e. publication of the famous Warren-Brandeis article on "Right to Privacy", significant advancement is found in U.S.A. on Right to Privacy. Step by step, a well-advanced law on Privacy has been developed therein with the help of judicial decisions and legislative actions. But, in U.K., since the very beginning there was no concept of right to privacy and usually, remedy was given on the ground of breach of confidence, in cases of Privacy violations. In the modern period only, few developments have been made on Privacy and a number of Statutes have been enacted.

The origin of Privacy was found in U.K. from the old English case of Prince Albert vs. Strange, 1848, which was considered as an elaborate edifice of Privacy in England, because since the decision of this case everyone started thinking on the aspect of violation of Privacy and tried to develop a well-advanced law on Privacy in U.K. In this case, Right to Privacy of Queen Victoria and her husband Prince Albert was violated by a photographer Strange, by way of unauthorised publication of personal photographs of Queen Victoria and Prince Albert without their consent. When the case was brought into the court, decision was given on the ground of breach of confidence, because there was no law on Privacy in U.K. at that period.

The only law on Privacy available in U.K. was Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950, which did not protect Privacy, but protected everyone's 'right to respect for his private and family life'. Both were not the same thing and as such it was an obstacle

[94] *Id* at p.341.

for development of privacy law in U.K. Again, another impediment was Section 12 of the Human Rights Act, 1998, which accorded special protection to right to freedom of expression. Hence, there was a long term controversy in U.K. among these two rights, which ultimately became a major impediment for development of law on privacy in U.K. The situation was improved with the decision in Douglas vs. Hello!, 2001 case, where it was held by Sedley LJ that, "Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court". This decision was identified as a remarkable development in the field of privacy in U.K.

In the absence of a general right to privacy in U.K., the action for breach of confidence was the only remedy, which provided protection against the gratuitous publication of personal information, as was found in the case of Prince Albert vs. Strange, 1848. But, it was an equitable remedy. Hence, no direct statutory remedy was available for cases of invasion of privacy. At this juncture, the Younger Committee had published its Report on Privacy in 1972, where several specific recommendations were made by proposing a general Right to Privacy for U.K. Later on, some of those recommendations became law. But, the practical situation was that, unlike U.S.A., neither the British Parliament nor the British Courts had taken active steps for making a comprehensive law on Privacy. The Younger Committee had also accepted this truth of absence of express legislations on Privacy and the presence of the equitable remedy for breach of contract as the only effective remedy in U.K. This situation took a long time to change. Only in 1984, with the passing of Data Protection Act, one positive development was made on the issue of Privacy. But, the Act dealt with data privacy and not the individual privacy. However, the Act was concerned with personal information automatically processed, with no distinction between the public and private sectors, but no information about legal persons, such as companies, nor information in manual files were found. National security was in category of exemption. Due to the various lacuna in the Data Protection Act, 1984, a new Data Protection Act was passed in1998 and the old Act was replaced by the new one. The new Act had tried to improve the situation by covering a larger area.

These are the significant developments in U.K. on the issue of Privacy. The scope and extent of Privacy in U.K. is subjected to these developments. Hence, the scope and extent of Privacy in U.K. is characterised by transformation of the law of

breach of confidence into the enactment of Data Protection Act, 1998, which is marked as a paradigm shift in the era of development in the field of Privacy law in U.K. Therefore, it can be said that, express laws on Privacy are made in U.K. only during the modern period. This legal change is the result of social change. But, there is the necessity of making laws on individual privacy, which U.K. is still lacking. In the present day context, data theft is an important issue, which is covered by the Data Protection Act, 1998, but U.K. is still awaiting a comprehensive legislation on Privacy like the Privacy Act, 1974 in U.S.A.

1.6.1.3. The Scope and Extent of Privacy in India

India is lagging far behind both U.S.A. and U.K. in respect of scope and extent of Privacy. Absence of active judicial enforcement, express legislative enactments and lack of public discussion on the subject have led to growth and development of Right to Privacy in negative direction in India. But, surprisingly, India had a great historical background and a well advanced law of Privacy since the ancient period. In India, the origin of Privacy was found in the ancient Hindu Jurisprudence, in the description of houses in Grihya-Sutras, Kautilya's Arthashastra and the epics of Ramayana and Mahabharata. In the medieval period, Privacy was found in the habit of observing 'purdah' among Muslim women to prevent public exposure of their faces. It was only in the modern period, that the development of this right has suffered somewhat degradation and underdevelopment. Due to this instance, a casual observer may have a misleading belief that, there are no laws safeguarding Right to Privacy in India, which is totally untrue.

Unlike U.S.A. and U.K., the Privacy Laws in India were not based on Law of Confidence, rather it was considered as a Customary Right since the very old period. The development of Right to Privacy in India was marked by a very old case, Nuth Mull vs. Zuka-Oollah Beg and Kureem Oollah Beg, 1855. It was the first Indian case decided by the Sadar Diwani Adalat of the North-Western Provinces in 1855, where the question of Right to Privacy arose. This case shows the evidence that, the Right to Privacy was broadly recognised in India at least half a century before the U.S.A., where the idea came in 1890. It was held by the Court that, construction of a house should not be made in such a way, so that, the others premises may be looked into from the roof of the new house and thereby their Right to Privacy is violated. Hence, Customary Right to Privacy was available in India since olden days.

Though the situation of well-advanced Privacy Laws of ancient India has somewhat deteriorated in the modern India and separate statutes covering Right to Privacy are not found therein, but various Indian Legislations are containing provisions for protecting Right to Privacy in India. In this respect, the following examples may be cited :-

(a) According to Section 509 of the Indian Penal Code, 1860, intrusion upon the Privacy of a woman intending to insult her modesty is a crime.

(b) In the case of In re Ratnamala, AIR 1962 Mad. 31, (35), the court ruled legally inexcusable the behaviour of a Police Officer, who accompanied by witnesses to observe a raid on a brothel, proceeded to the bedroom of a girl and pushed open the door without even the civility of a knock or warning to her to prepare for the intrusion. In that case, it was held that, even a prostitute is entitled to elementary decencies.

(c) Under Indian Law, if a man has the view of the interior of his neighbour's house, it does not entitle him to gaze at his neighbour's home all the times. In India, this situation is covered by Indian Easements Act, 1882.

(d) In State of Rajasthan vs. Rehman, AIR 1960 S.C. 210, it was held that, a Police Officer searching a dwelling house without a warrant should take precautions, so that, the citizens' right to privacy is not violated. Hence, prior to the search, he should record reasons for not performing the search after obtaining warrant and should also state the expectations of findings resulting to the search. Strict compliance with this law is necessary to insure against humiliation and reckless searches in disregard of citizens' rights.[95]

The above mentioned propositions show evidences of express statutory provisions safeguarding Right to Privacy in India. In fact, these legal propositions are more or less enough to prove the existence of Privacy Laws in modern India and to disprove the views of those, who are opposing against the existence of Privacy laws in modern India. These evidences of Indian Law also show that, Indian Laws are parallel to Western Laws of Privacy in these areas. This view also supports that, in the body of Indian Law, there exists a number of safeguards which enforce the Right of Privacy of the individual. A few more instances can be cited in this context:-

[95] *Id* at p.342.

(a) Mohd. Hussain Saheb vs. Chartered Bank, AIR 1964 (1) Mad. 1012 for discussion of secrecy in Bankings.

(b) Sections 24, 25, 26, 29 of the Indian Evidence Act, 1872 on Confessions.

(c) Sections 121-129, 132 of the Indian Evidence Act, 1872 on Privileged Communications.

(d) In camera proceedings under Section 33 of the Special Marriage Act, 1954 and Section 53 of the Divorce Act, 1869.

(e) Secrecy of Ballot under Sections 16, 95, 127-A, 128 of the Representation of Peoples Act.[96]

The above-stated examples are the clear proofs of existence of statutory provisions on Right to Privacy, though scattered in various laws, in India, which are in many cases, even more powerful than American and British Laws. Hence, the scope and extent of Privacy in India cannot be totally overruled in comparison to U.S.A. and U.K., rather it can be established with the help of its laws on a strong and sound footing.

1.6.2. The Significance of Privacy

Man is a social being and lives in a community or society. Though it is impossible for man to live alone from the rest of the society, but in some cases, man needs seclusion from others for various reasons, like concentration to studies, development of brain, peace of mind, meditation and the like. Hence, privacy is needed by man. For the fulfilment of the desire to be secluded from others, right to privacy came into being. It has its significance in the civilized society, because without the existence of this right man may lose his mental peace and as such his development of brain is hampered resulting into the progress and development of society in negative direction. Therefore, the significance of Privacy in the civilized society lies in the secluded life of human beings for behavioural modification. More than 40 years ago, U.S. Supreme Court Justice Brandeis wrote that, the makers of U.S. Constitution tried to secure conditions which would be favourable for the happiness of the U.S. citizens. Justice Brandeis expressed those views while delivering his judgment in Olmstead vs. U.S., 277 U.S. 438 (1928). According to him, the makers of the U.S. Constitution conferred upon the citizens, the right to be alone against the unreasonable government intrusions, which was ultimately proved

[96] *Id* at p.343.

to be the most comprehensive right and the right most valued by civilized men. This view clearly signifies the importance of Right to be alone or Right to Privacy as the favourable condition for the happiness of not only U.S. citizens, but also human beings all over the world.

More specifically, the significance of Privacy can be understood from the words of Sri S. K. Sharma, which are as follows :-

> *"Man lives in a community of others, and he also has the need to participate and communicate. When this double faceted aspect of privacy is coupled with the recognised power of government to function for the public good, there is ample reason for much of the recent concern about invasions and intrusions into individual privacy".*[97]

Prof. Sharma has rightly said about the importance of Privacy that, there are two aspects of Privacy. On the one side, human beings have to participate and communicate with others in their daily life, where there are chances of violation of Privacy. On the other side, when the government takes actions for public benefit, again individual Privacy comes in danger. Therefore, protection of Privacy becomes an important issue for the well being of individual human beings. Again, for the public figures of social life, Privacy is needed, because they have to communicate with large number of persons daily. As such, they need Privacy for the protection of their private lives from the general public. Also, their personal freedom should be protected to increase their creativity. Hence, the significance of Privacy lies in the creative contribution of public figures developed through Privacy, which is beneficial for the general public.

The intrinsic significance of Privacy lies in the fact that, it protects decisional freedom, freedom from access, from attention by others, and from others possessing information about one.[98] In the present social structure, everyone is concerned about privacy to a considerable extent. The nature of privacy invasions have become more complex in the modern society due to the invention of sophisticated scientific devices, by which individual privacy can be invaded easily and that too in the previously untouched areas. Also, the claims of public and private agencies to get personal information have been increased enormously, which are posing constant threat to individual privacy. All these are counted in addition to the age old idea of

[97] *Id* at p.345.
[98] A. R. Desai, Chidananda Reddy and S. Patil, "*Contours of Privacy and Defamation vis-a-vis free speech*," Cochin University Law Review, 1996, pp.187-199 at pp.188-189.

purely tortiuous intrusions on Privacy. Hence, in a complex interrelated society, protection of Privacy is in great danger and is the urgent need of the hour.

Hence, Privacy is considered freedom from any kind of intrusion upon individual liberty. Different authors have described the value of Privacy not only as a means to an end, but an end in itself, which works like 'oxygen' for maintenance of various fundamental human relationships. This is the significance of Privacy in the present day society.

Significance of Privacy would be incomplete without discussing the following two aspects of Privacy :-

1) Difference between Privacy and Right to Privacy.

2) Whether Privacy is a Public Right or Private Right.

1.6.2.1. Difference between Privacy and Right to Privacy

Logically and practically, 'Privacy' differs significantly from the 'Right to Privacy'. Privacy is a state of affairs or a condition of life. Consequently, a person may have a large amount of Privacy without having opted for it. In that case he or she may have the right to choose it. On the contrary, a person who needs Privacy or would like to choose it, may not have the right to choose it. Even that person may not be in a position to enjoy the state of affairs called 'Privacy'. Therefore, 'Right to Privacy' is the right to choose and enjoy the 'condition of life', called 'Privacy'. Right to Privacy is the creation of social structure, conventions and legal policy. Therefore, 'Right to Privacy' came into being only after the establishment of civilized society, whereas the state of affairs called 'Privacy' was there since the inception of human kind. 'Right to Privacy' may try to protect the state of affairs called 'Privacy', but it cannot always determine the claims to close where, when and how one will have Privacy. Most important point of distinction between the two is that, 'Privacy', being a state of affairs, can never be created or destroyed by human beings, it is a creation of nature and not of law. On the other hand, 'Right to Privacy' is the creation of established legal system and based on principles of law, which are created by human beings. 'Right to Privacy' is the brain-child of man. Hence, 'Right to Privacy' can be created and destroyed by human beings.

In order to remove confusion between 'Privacy' and 'Right to Privacy' various authors have tried to establish legal boundaries of Privacy. Accordingly, it is held that, Privacy is a condition and as such it may be forgone, forfeited or invaded.

A Right to Privacy includes the notions of control and voluntariness in denoting individual's claims of entitlement to the recognition of their interests in Privacy.[99]

H. J. McCloskey emphasizes the difference between privacy and a right of privacy by pointing out that privacy contrasts with publicity; whereas negative liberty (freedom from) and positive liberty (freedom to) oppose the notions of coercion, interference and the lack of some facilities or opportunities, all of which imply the denial of a right or claim to do or forbear from doing something.[100]

The confusion of Privacy and a Right of Privacy arose precisely because traditional analysis presumed that Privacy entailed the notions of control, voluntariness and individual freedom. On the contrary, Privacy is an existential condition and hence not always chosen. Privacy may be both inevitable and contingent.[101]

According to David M. O'Brien, Privacy and the Right of Privacy can be differentiated as under:-

> *"Shortcomings of the prevailing theoretical approach to privacy prompted an alternative analysis of privacy as an existential condition of limited access to an individual's experiences and engagements. That analysis established that privacy differs in significant ways from the right of privacy. Individuals may have a large degree of privacy without having chosen it, and, even when individuals voluntarily undertake to secure the privacy of their engagements, their expectations of privacy need not be legally enforceable. The right of privacy does not necessarily include the right to choose where, when and how one will have privacy.*
>
> *Since privacy is an existential condition of individual's engagements, the right of privacy may encompass a broad range of privacy interests. The right of privacy is an abstract, not an absolute, right extending to a variety of privacy interests. Yet, not every assertion of a privacy interest need be legally recognised. Some privacy interests are adequately protected by non-legal safeguards, while others are guaranteed through their association with more traditional legal categories. Some privacy claims are not of sufficient importance in particular contexts of litigation to justify legal recognition".*[102]

Hence, it is obvious to distinguish between Privacy and Right to Privacy, not only to understand the meaning and concept of Privacy and Right to Privacy, but

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[99] *Supra* Note 41 at p.16.
[100] H. J. McCloskey, "*The Political Ideal of Privacy*", Philosophical Quarterly, Vol. 21, 1971, pp.303, 305-308.
[101] *Supra* Note 41 at p.17.
[102] *Id* at pp.20-21.

also to denote the legal boundaries of Privacy. This distinction is a useful instrument to ascertain the significance of Privacy.

1.6.2.2. Whether Privacy is a Public Right or Private Right

Whether Privacy is a Public Right or Private Right? It is an important question of fact as well as question of law. The significance of Privacy would not be clear without the answer of this question. Authors are also not consensus of opinion on this issue. It is a question of fact, in the sense that, from the factual point of view, in some cases, Privacy is considered as a Private Right and in other cases, it is considered as a Public Right. On the other hand, from the legal point of view also Privacy is sometimes regarded as Private Right and sometimes as Public Right. Hence, the most important question is that, whether it is a Private Right or a Public Right?

A particular right is considered as a Private Right, when it becomes the subject-matter of Private Law. On the contrary, a right is called a Public Right, when it becomes the subject-matter of Public Law. A private right is the right of an individual, but a public right is the right of public at large. Violation of individual right constitutes the violation of Private Right, whereas, when the right of public at large is violated, violation of Public Right takes place. Again, a particular right may be a private right as well as a public right. When, an individual right becomes so important that, its violation affects the public at large, then it becomes a public right also. If it is a matter of grave and serious concern, that its violation jeopardises public interest, then it is considered as a Public Right. In that case, providing remedy under Private Law is not enough, it must be coupled with severe remedy under Public Law. As such, a Private Right simultaneously becomes a Public Right and remedy is provided under both the laws, e.g. Defamation. Defamation is a tort as well as a crime. When a private individual suffers from Defamation, he or she can get the remedy of compensation under the Law of Tort, because a private right is violated. But, when the nature of Defamation is so serious that, it affects the public at large, it becomes a crime and punishment is prescribed under Criminal Law. In that case, Public Right is violated. Similar circumstances may arise in case of Right to Privacy also.

If the classification of Privacy is considered, the following types of Privacy may be found :-

(i) Intimate Privacy;

(ii) Family Privacy;

(iii) Social Privacy;

(iv) Individual Privacy.

Intimate Privacy is concerned with the matters relating to intimate relations of an individual's life, e.g. sexual relations, performance of bodily functions, maintenance of family relations etc. An individual shares these actions or emotions within intimate relations only and not with the outside world, even not with the close groups. This type of Privacy is called intimate privacy, where the essential characteristic is 'Intimacy'. Family Privacy is sharing of information within the family relations, may be when family members are living together, may be when they are segregated and living separately in different places. Keeping any secret of the family within the family members, comes under this head.

Next comes the question of Individual Privacy. It is the Privacy for mental peace, quiet, meditation, enjoyment of hobbies, cultivation of personality etc. of an individual. It is the right to seclusion of an individual from the outside world. Specifically, it is the personal and private right of an individual, which one can enjoy according to his or her wishes.

Last but not the least, is the Social Privacy. It is the privacy of an Individual as a social being. It can again be sub-divided into Political or Legal privacy, Professional Privacy and Community Privacy. Political or Legal Privacy is the privacy of the people at large. There are certain Privacy Rights, which everyone within a society is entitled to. Hence, this category of Privacy becomes a common right of everyone. As such, government is under the need of making laws for protection of various Privacy interests. Some of such regulations are relating to Procedure of search and seizure, Publications of news, Eavesdropping/wire tapping, Taking photographs, Birth Control, National Security, Public nudity (exposure), Sexual relationship beyond marriage, Privacy of court proceedings or trial in camera as well as Tax recovery and income. All these will come under the head Political or Legal Privacy.

Professional Privacy is the Privacy between different professionals and their clients. Those Professionals include Doctors, Lawyers, Chartered Accountants, Consultants, Document copiers, Magicians, Astrologers etc. These Professionals, by virtue of their professions usually come to know various private information of their clients and hence, they are under a duty to maintain the Privacy of their clients as

well as the Privacy of their professions. Laws are made by the Central Government of different countries for the protection of Professional Privacy.

Community Privacy is the Privacy of a particular group or community. A particular group or community may follow its particular rites, rituals or habits, which are peculiar to its nature and its members may not like to share those with others. As for example, Hindu Brahmins' Community disapproves cow slaughter, this is their privacy of food. On the other side, Christians and Muslims disapprove ban on cow slaughter, beef eating is their privacy of food. Various other communities, like Voodoo priests, magicians etc. who are the believers of Black Magic and Witchcraft, practise secretly their rites and rituals. It is their community privacy. Hence, Community Privacy is the special right of a community, where outside interference is unwanted.

The above discussion on various types of Privacy clearly shows that, except Social Privacy, the other three types of Privacy are Private Rights, because all of these are dealing with individual rights, may it be Intimate Privacy, Family Privacy or Individual Privacy. But, the Social Privacy along with its three sub-divisions of Political or Legal Privacy, Professional Privacy and Community Privacy, is mainly concerned with Public Rights. The reason being that, though Right to Privacy is an individual right, but, when that individual right of the public at large is concerned, then it becomes a Public Right. When the Right to Privacy of everyone in a society is in question, then its violation does not only affect a particular individual, but everyone in the society. Then it becomes a Public Right and the subject-matter of Public Law. In such circumstances, it is necessary to make Public Laws by the government for the protection of Right to Privacy. Hence, it can be said that Privacy may be a Private Right, may be a Public Right. Depending upon the nature and circumstances of each case, it is decided that, whether a particular Privacy Right is to be considered as a Private Right or a Public Right and as such, remedy for violation of that right is prescribed therefor.

Therefore, Significance of Privacy gets a shape after discussion of Difference between Privacy and Right to Privacy as well as the dichotomy between considering Privacy as a Public Right or a Private Right. Next comes the questions of Effects and Functions of Privacy.

1.7. Privacy : The Effects and Functions

Effects and Functions of Right to Privacy are the two important aspects of Privacy, without the discussion of which a study of Privacy would be incomplete. Effects of Privacy in a modern democratic society are vast. In fact, effects of Privacy are not static, but dynamic in nature and are changed according to social change or with the changing needs of the society. The effects of Privacy as prevalent in ancient society are not in existence today. Consequent to development of information and communication technology, social needs are changed resulting into changing effects of Right to Privacy. Technological advancements have given rise to serious cases of privacy violations and hence laws are needed for protection of Right to Privacy in the modern era.

Functions of Right to Privacy are various according to the views of various authors. Due to the complex technologies of the modern society, human lives have become complex. Peeping into one another's life for competition is a special characteristic of modern society, which results into serious cases of privacy violations. Media is another organ of modern social life, which interferes into human lives unnecessarily. Unauthorised media intrusions sometimes cause not only violations of Right to Privacy, but also serious accidents posing threats to human lives. The dichotomy between Freedom of Expression and Right to Privacy is the fruit of uncontrolled expansion of Media in the modern world. All of these create serious impediments on Right to Privacy. Therefore, functions of Right to Privacy are to protect human lives from unauthorised and unnecessary interventions, harassment, unwanted publicity, false light and violation of human dignity.

1.7.1. The Effects of Privacy

Effects of Privacy are nothing but the value of Right to Privacy as a fundamental human right in a modern democratic society. Those effects are not static, but dynamic in nature and are changed according to change in time, place and society. Right to Privacy as a basic human right was existed in the ancient society also, even before the legal recognition of this right. The state of affairs called 'Privacy' is not the creation of law, but the creation of nature and as such it prevails without legal recognition. But, the concept of 'Right to Privacy' is the creation of law as well as the fruit of Legal Conventions, Treaties, Legislations and Judicial Decisions. Hence, it is the creation of modern democratic society. In a modern complex society, technological advancements are causing serious privacy violations

resulting into the necessity of making legislations for protection of Right to Privacy. Hence, both of them are directly related to each other. In this context, effects of Right to Privacy means, prevention of unwanted publicity and interference into human life to protect human dignity by recognition and enforcement of Right to Privacy in a complex social structure. If Right to Privacy is enforced in the present day society with proper legal recognition, then the cases of violation of Privacy will decrease, which automatically will upheld the human dignity in a modern democratic society.

More specifically, it can be said that, Right to Privacy is a basic human right which touches upon the fundamental needs and values of all human beings. Man is a social animal and hence community-living or group-living is the basic characteristic of man. In this sense, Right to Privacy is closely associated with man to fulfil the social needs of man. The value of privacy in a civilized society is always upheld, be it a traditional or modern society. But, the technological advancements have created threats to the privacy values. Therefore, the privacy values should be protected by legal recognition for the sake of social and economic progress and development. As such, laws are necessary for the protection of this right. But, in the absence of express laws, the value of privacy can never be disregarded. On the contrary, the necessity of express legal recognition of this right is directly proportionate to the threats posed to it, as the threats increase, the need for legal recognition also increases. Hence, it can be said beyond doubt that, this relationship rests at the centre of legal development of this right and supports the views that, although Right to Privacy is legally recognised, but the need for its enforcement are realised only when the dangers towards its values are exposed. The values themselves are present in the social and cultural norms of every society, but are not considered as legal norms unless and until the right is threatened in any manner.

Finally, the effects of Right to Privacy can be summed-up with the words of Justice Mathew. He has rightly said that, “there can perhaps be no objection in regarding intrusion upon our privacy as a dignity tort. The harm caused by this intrusion is incapable of being repaired and the loss suffered in dignity is not

susceptible of being made good of damages and the injuries to spiritual element in our otherwise mundane composition".[103]

Therefore, Right to Privacy and Right to live with Human Dignity, both are inter-related and maintenance of one in society, means the maintenance of other. In this respect, the effects of Right to Privacy are directly related to Human Dignity. If Right to Privacy is established in a society, Human Dignity will be automatically upheld.

1.7.2. The Functions of Privacy

Right to Privacy is a basic human right, whose importance and significance have grown enormously in the modern democratic society. Though there was the existence of Right to Privacy in the ancient societies, but the tools for violations of Privacy wee not invented extensively like the present day society. Hence, the chances of privacy violations were limited at that period in comparison to the present day society. In the present context, cases of privacy violations have been increased enormously due to technological advancements, electronic surveillance and invention of modern tools for invasion of privacy. Along with the invasion of privacy, personal autonomy of human beings is grossly invaded resulting into the violation of Human Dignity, which protected communication of information about human lives. Only the legal recognition and enforcement of Right to Privacy can do this. Hence, the functions of Right to Privacy are to protect personal autonomy by preventing unlimited and unprotected communication of information, which ultimately protect the Right to live with Human Dignity in a modern democratic society.

The necessity of considering the functions of Privacy can be clearly understood from the expression of Prof. A. Towe, which is stated below :-

> *"One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of spiritual sensibilities have rendered people more sensitive to publicity and have increased their need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of people's private lives to exploitation by those who ponder to commercialism and to prurient and idle curiosity. A legally*

[103] Justice Mathew, "*The Right to be Let Alone*", Supreme Court Cases (Journal Section), Vol. 4, 1979, p.3.

> *enforceable right of privacy is deemed to be a properly protection against this type of encroachment upon the personality of the individual."* [104]

Specifically, the "Functions of Individual Privacy" have been categorized under four headings by Prof. Alan F. Westin, which classification is considered most appropriate and as an authority on the point of classification of Functions of Privacy. According to Prof. Westin, the "Functions of Individual Privacy" are "Personal Autonomy, Emotional Release, Self-Evaluation and Limited and Protected Communication." Though these four functions are inter-related with each other, but separation between them is absolutely necessary for analytical purposes. This Classification of Functions of Privacy was made by Prof. Alan F. Westin in 1970. It was recognized by American Law in the next decade, while making legislations on Privacy in U.S.A.

The "Functions of Individual Privacy" are discussed hereunder.

1.7.2.1. Function 1 : Personal Autonomy

According to Prof Westin, in democratic societies, the fundamental belief is to safeguard and maintain the 'sacred individuality,'[105] which means the imposition of "uniqueness" on an individual. This view supports that, individual should be considered above all and the independence of an individual human being should be maintained. From this view, the human need for autonomy came into being, which represents the desire of an individual to be free from control by others. This is called Personal Autonomy.

More specifically, Personal Autonomy means, an ultimate core of autonomy which rests in the "core self" of the "zones of privacy". The "core self" is also called the "inner circle" which gives protection to the "ultimate secrets" of an individual, like hopes, fears and prayers, which can never be shared with anyone, except in such stressful situations, when an individual has no other option, but to release all the ultimate secrets to get emotional relief. The inner circle is surrounded by various outer circles, which come step by step. The second outward circle, just after the

[104] A. Towe, "*Growing Awareness of Privacy in America*," Mont. Law Review, Vol. 39, Winter 1976, p.37.
[105] Edward Shils, "*Social Inquiry and the Autonomy of the Individual*," in Daniel Lerner (ed.), The Human Meaning of the Social Sciences, New York, 1959, pp.114-157, quoted by Alan F. Westin, *Supra* Note 26 at p.33.

inner circle contains "intimate secrets," which one usually shares with close relations, the third circle is opened to the friends and so on. In this way, the series of circles continues until it reaches the final outer circle, where casual conversation is expressed to all observers.

The Individual Autonomy is seriously threatened when the "inner zone of privacy" is penetrated by someone and the ultimate secrets are learned by physical or psychological means. In this case, the individual's protective shell is destroyed and the one becomes naked to shame as well as subjected to the fear of control by the penetrator. Hence, the protection of individual autonomy is obvious. Moreover, to protect the autonomy and to preserve the ultimate secrets, everyone lives behind a 'mask'. In fact, our social system believes in masked performances in order to protect ultimate secrets. If the mask is torn off and the one is forced to expose oneself in the masked world, one may commit suicide or suffer from nervous breakdown out of shame. Government investigation and press stories are examples of such cases. Hence, the existence of free society is obvious where the privacy of every individual is protected, which can never be curtailed except for grave social need. In this respect, preservation of privacy is must for the preservation of individual's ultimate autonomy, which in other words, is called Personal Autonomy.

Again, there is another importance of Personal Autonomy. Leontine Young has highlighted it by saying that, "without privacy there is no individuality. There are only types. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?" [106] Hence, privacy is required for development of individuality as well as for emotional and intellectual development. Intellectual ideas and literary creations should come in public with full maturity. Premature publication of ideas may become futile for the creator of those. In this sense, one should enjoy the Personal Autonomy to keep one's ideas, thoughts and sentiments private or public.

Clinton Rossiter has also given priority to privacy for protection of political liberty and has stressed on Personal Autonomy as follows:-

> *"Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few*

[106] Leontine Young, *Life Among the Giants*, New York, 1966.

> *personal and spiritual concerns, if necessary in defiance of all the pressures of modern society ... It seeks to erect an unbreachable wall of dignity and reserve against the entire world. The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself, who feels no over-riding compulsion to share everything of value with others, not even those he loves and trusts."*[107]

1.7.2.2. Function 2 : Emotional Release

The second function of Individual Privacy is Emotional Release. Emotional Release is an extension of the first function, i.e. Personal Autonomy. It should be noted that, protection of Personal Autonomy is not the only function of Privacy, but it must be coupled with Emotional Release. In a modern complex society, life should always go on and to go on with the life, an individual has to play various roles, he or she has to perform in various manners during the hours of day and night like the actors of stage. Such playing of varied roles would be continuous. But, as human beings are human beings and not machines, they cannot perform constantly and as such they need certain breaks for their relaxation. At intervals, they need to release themselves emotionally for their relaxation. Such release of emotions is called Emotional Release. Emotional Release is subjected to the situation of Privacy, because one cannot release all emotions in front of everybody. Emotions can be released only within family, among close friends, peer groups or the persons of individual choice, otherwise there may be the cases of taking advantages after knowing the "ultimate secrets" of an individual. Here lies the relation between Personal Autonomy and Emotional Release. Every individual should enjoy Personal Autonomy regarding the choice of persons and environment, where Emotional Release is to be made and that is the Right to Privacy, which one enjoys to perform Emotional Release.

There are, in general, four kinds of Emotional Release :-

(i) Emotional Release from the pressure of playing social roles.

(ii) Emotional Release from strict compliance to social norms.

(iii) Emotional Release from daily abrasions in life.

(iv) Emotional Release in the management of bodily and sexual functions.

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[107] Clinton Rossiter, "*The Pattern of Liberty*," in M. R. Konvitz and Clinton Rossiter (eds.), Aspects of Liberty, Ithaca, New York, 1958, pp.15-17.

In the first category of Emotional Release, one needs to release from the pressure of playing social roles. Each and every individual has to play varied roles everyday, like strict father, loving husband, skilled operator, union leader, office boss, Chairman or President of a Committee etc. All these are psychologically different roles on the social stage, which require masked performances. According to different social scientists, an individual cannot play such roles for indefinite period, without any relief and hence, one needs to release oneself emotionally in the moments, when one becomes the actual "oneself," like tender, angry, irritable, lustful or dream-filled. Such moments can be relished only in Privacy and among few selected persons, otherwise the social balance would be jeopardized. In this sense, Privacy is required by everyone, e.g. Labourers to Presidents, because it gives everyone the freedom from masked performances during the intervals of leisure. Such periods of relaxation is necessary for every individual, otherwise the human organism would be destroyed.

The second category of Emotional Release gives relaxation from strict compliance to social norms.[108] Every society has some strict legal and moral principles or norms, which everyone is expected to obey. These norms are absolutely necessary for maintaining the societal balance. But, deviations are permitted to a limited extent from strict compliance of these norms. As for example, violating traffic laws, breaking sexual mores, cheating on expense accounts, overstating income-tax deductions, smoking in rest rooms etc. are common deviations from social norms which almost everyone has committed once or more. Although these abuses are punished in most cases, but a large number of such abuses are overlooked as "permissible deviations." These deviations are permitted, when committed in Privacy and hence, privacy for permissible deviations is a distinguishing characteristic of life in a free society. Therefore, Emotional Release in the form of temporary deviation from social norms, is permitted in the environment of Privacy.

In the third category of Emotional Release, relaxation is sought from the daily abrasions in human life. Individual persons have to face abusing behaviours and stern actions with or without faults in their daily lives, may that be domestic life,

[108] Robert Merton, *Social Theory and Social Structure* (rev. ed.), Glencoe, III, 1957, pp.342-346; Robert Merton and Bernard Barber, *"Sociological Ambivalence,"* in Edward Tiryakian (ed.), *Sociological Theory, Values and Sociological Change*, New York, 1963, p.91.

educational field or professional life. They need to give vent to their anger against the system, the government, the strict and abusing boss at the office, the stern principal of the college, the quarrelling wife or nagging child in the family and so on. Hence, Privacy acts as "safety-valve" in case of such ventilation of anger, because the anger is expressed only in the intimacy of family or friendship circles or in private papers, where there is no fear of responsibility for such comments. This type of release of anger is contrary to the Right to Freedom of Speech and Expression, because that is subjected to fair comments and the release of anger may be totally unfair, frivolous, nasty or defamatory. But, an individual is not socially accountable for the comments made due to release of anger, because those are uttered in Privacy or within the relationship of privileged communication. This type of Emotional Release is obvious in a complex social structure, otherwise most people would suffer from serious emotional pressure.

The fourth category of Emotional Release is the release in the management of bodily and sexual functions. Human beings are having the right to live with human dignity and in this respect, they are different from animal beings. Hence, human beings need Privacy while discharging sexual and bodily functions. This is the basic characteristic of civilized societies and almost all countries are having code of conduct relating to this aspect. As for example, American society has strong codes of Privacy for evacuation, dressing and arranging the body as well as for performing sexual relations. The management of bodily and sexual functions, is a kind of Emotional Release which requires acute Privacy. Surveillance is never expected in these cases and also not recognized by the State, except in cases which are called "total institutions" [109] by the Sociologists. Prisons, Mental Asylums and Monasteries are the examples of "total institutions," where surveillance is imposed on the private activities of inmates, but in these places also prisoners and patients are usually habituated to complain for constant surveillance and try to escape from the same.

Last, but not the least, the importance of Emotional Release in human society can be understood only when it is performed in Privacy. Most important cases of Emotional Release are the moments of loss, shock, sorrow, stress, anxiety or uncertainty, where an individual needs to release oneself emotionally within a close

[109] Erving Goffman, "*On the Characteristics of Total Institutions*," in D. R. Cressey (ed.), *The Prison – Studies in Institutional Organisation and Change*, New York, 1961.

group of family or friends. Hence, Privacy and Emotional Release are directly related to each other and without the existence of one, the existence of other is impossible.

1.7.2.3. Function 3 : Self Evaluation

The third function of Individual Privacy is Self Evaluation. Every individual needs to evaluate oneself in the light of the information that one gathers and such process is necessary to exert oneself while performing in the events. An individual grows daily and moves towards maturity by gathering new experiences. But, the new experiences should be processed constantly to be integrated as well as to give them a meaningful pattern. This is called Self Evaluation. Self Evaluation is also essential for development of intellectual quality of an individual. The processing of information is not possible publicly and also at times of continuous exercise of brain. Hence, the processing of information, which is obvious for future development of an individual, must be made in Privacy and in the peaceful state of mind. As such, Privacy is essential for Self Evaluation.

Privacy has many roles to play in case of Self Evaluation. It does not only help in processing of information, but it helps in planning and anticipating the time for processing the information. The application of this theory is more specific for creative persons. Studies show that, most creative ideas are the reflection of solitude, "daydreaming" and the moments of reserve, when the most creative "non-verbal" thoughts are generally composed of. In solitude, generally a creative person runs a flow of ideas and impressions in the mind. As such, the active presence of others tends to injure the process of creativity.[110]

The role of Privacy in evaluative function is also important. Generally, people think about the moral consequences of their activities during Privacy. It is the exercise of conscience by which one tries to "repossess" oneself. It is the actual process of Self Evaluation whereby an individual measures the current performances against the past activities and personal ideals. Often it is created by religious exercise and meditation in the periods of solitude and seclusion. The system of recalling the past events and communication with oneself has been recognized as

[110] Franz Alexander, "*Observations on Organizational Factors Affecting Creativity*," in G. A. Steiner (ed.), *The Creative Organization*, Chicago, 1965, p.238.

"institutionalized system in all societies".[111] Hence, the process of Self Evaluation is possible in the environment of acute Privacy.

Last but not the least, Privacy decides the actual timing for moving to publicity from privacy, for testing one's own evaluations against the responses of peers and most important, to decide when and to what extent, information about oneself is communicated to others. The most important function of Privacy is to determine the extent of disclosure of information about oneself towards others and this is the actual outcome of the process of Self Evaluation.

1.7.2.4. Function 4 : Limited and Protected Communication

The fourth function of Individual Privacy is Limited and Protected Communication. This function is directly related to the first function Personal Autonomy, because to enjoy Personal Autonomy, unlimited and unprotected communication of information should be prohibited. Hence, the importance of Limited and Protected Communication is realized.

The most important feature of civilized social life is Limited and Protected Communication of information towards others. As individuals are habituated with "masked" performances in the modern social system, therefore, communication of every information is unexpected in the "masked" world and if, that is done, the social balance would be jeopardized. Hence, for the maintenance of interpersonal relations and peaceful co-existence of everyone in a civilized society, it is utmost important that, every information should not be communicated to everyone and certain amount of Privacy should be maintained while communicating the information. This is called Limited and Protected Communication of information which is impossible without having Privacy.

Limited Communication is the characteristic feature of modern urban life, which is subjected to crowded environment, constant physical and psychological confrontations among strangers and the complex daily lives contrary to the small-town lives. Hence, reserved communication by way of self-preservation is the basic criterion for the life in metropolis.[112]

Privacy and Limited and Protected Communication are directly related to each other. In this sense, Privacy has two general aspects. In the first aspect, Privacy

[111] Alfred R. Lindesmith and Anselm L. Stranss, *Social Psychology* (rev. ed.), New York, 1956, p.435; Editorial "*Technology and Contemplation*," 100 America 100 (1958).
[112] Georg Simmel, *The Sociology of Georg Simmel*, (tr. and ed.) Kurt Wolff, New York, 1950, pp.409-416.

provides opportunities to share confidential information within the relationships of trust. Under this head, the intimate relations, family relations and professional relations will come. In this respect, Privacy is divided into Intimate Privacy, Family Privacy and Professional Privacy. Personal friends and close associates would come under intimate relations, family members would come under family relations and the professionals, like doctors, lawyers, psychiatrists, psychologists etc. would be called professional relations of an individual. An individual shares confidential information within these relations and feels that, there are less chances of breach of confidence in these cases. It is assumed that, due to the peculiar nature of these relations, the opposite side would never take the advantage of disclosed confidences of oneself, because in that case, social balance would be seriously jeopardized.[113]

In the second general aspect, Privacy provides opportunities to maintain necessary boundaries of mental distance in interpersonal relations, like marriage, workplace associates and other professional relations, some of which are intimate and some are extreme formal and public. In case of marriage, husband and wife need to maintain privacy in their relationship to preserve respect and mystery of the relation. Generally successful marriages depend on the creation of balance between privacy and revelation as well as the respect of both the spouses for that balance.[114] In case of workplace, mental distance among the superior and subordinate is obvious to prevent any intimacy resulting into the impediment for directions. Physical arrangements and social etiquettes are two important factors for preventing on-duty and off-duty close relationships. Various other relations are subjected to such distance, like Professor and Student, Parent and Child, Minister and Communicant etc.

Hence, Limited and Protected Communication of information is necessary for maintenance of peaceful atmosphere in various areas of personal as well as social life. For that, balancing of privacy and revelation is the first and foremost criterion. Physical and psychological distance as well as the social etiquette plays an important role for protection of privacy through Limited and Protected Communication in our social scenario.

The above classification of Functions of Individual Privacy is a comprehensive classification, which explains clearly the functions which privacy

[113] Erving Goffman, *The Presentation of Self in Everyday Life*, New York, 1959, pp.160-161.
[114] Simmel, *op. cit.*, pp.326-329.

has to play in a civilized society. In this connection, Prof. Alan F. Westin has further observed that, "Privacy functions basically as an instrument for achieving individual goals of self-realization." [115] In a complex social structure, it is the human need to adjust with the changing social scenario of everyday life. It is obvious to maintain a balance between privacy and disclosure, for this purpose. In a complex social structure, human beings have to perform various functions for their material and intellectual development. As such, they have to mix up with others in the society and have to disclose various information about them to others. Sharing of information with others is a vital part of companionship also, without which human beings cannot live as social beings. But, privacy is also an important element which should be maintained for mental peace and intellectual development of human beings. Besides this, the most important fact is that, disclosure of every information to everyone puts an individual under the control of persons having ill-motive, who can easily exploit them. Hence the persons can be placed under false light and negative publicity. Therefore, privacy is also required to prevent these situations. So, the most important point is that, every individual should maintain a balance between privacy and disclosure in a civilized society for the interest of their own as well as for the larger public interest.

Finally, it can be said that, the description of Functions of Individual Privacy, though comprehensive, but is not an exhaustive one. It has discussed the human needs for privacy in a civilized society and as such explained the functions of privacy in the context of civilized society. But, it has never explained the functions of individual privacy in the primitive society as well as the functions at the time of social transformation. In this sense, it is required to mention here that, the functions of individual privacy are equally important for a civilized society as well as for a primitive society. Hence, the important functions which privacy plays, are necessary to be played during social transformation from primitive to modern or civilized society. Otherwise, the utilization of those functions will be incomplete.

1.8. Sum-Up

Right to privacy is a valuable human right for every individual of past, present and future society. It is a variable concept and varies with the passage of time, place and society. Therefore, it is not easy to define 'Privacy' in strict sense of

[115] Alan F. Westin, *Supra* Note 26 at pp.39-42.

the term. Privacy generally means, the right to be let alone (Justice Cooley, 1888). In 1890, Louis Brandeis and Samuel Warren published a seminal article in the Harvard Law Review, titled "The Right to Privacy," where it was observed that, the object of privacy is to protect 'inviolate personality.' Next important landmark in the field of privacy, is the book written by Prof. Alan F. Westin, titled "Privacy and Freedom," 1970. It defines privacy as the desire of individuals for solitude, intimacy, anonymity and reserve. According to him, privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent, information about them is communicated to others.

Adam Carlyle Breckenridge in his book, "The Right to Privacy" (November, 1971) described Right to Privacy as "A most Comprehensive Right." In view of Carlyle, Privacy is the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means, his right to withdraw or to participate as he thinks fit. It is also the individual's right to control dissemination of information about himself and it is his own personal possession.

Therefore, Right to Privacy cannot be described as a single human right, rather it is a bundle of rights and it includes human being's choice over his or her own personal affairs to decide the extent of public disclosure of the same. In brief, Privacy means, freedom from unauthorized and unwarranted intrusion into one's private and personal life. In the modern age, various new dimensions of right to privacy have been emerged, like Privacy of Family, Home and Correspondence, Privacy of Marriage, Privacy of Information, Workplace Privacy, Privacy of Celebrity Life, Health Care Privacy and so on.

Thus, the idea of Privacy can be summed-up as follows :-

1) Privacy has both material and philosophical aspects. Hence, the term 'Privacy' has been derived from the term 'Private Space.' Every individual, be he of past, present or future society, always acts in search of his own 'Private Space,' where the one can enjoy freedom from outside interference and can act according to one's wishes.

2) The oldest and traditional definition of Right to Privacy was propounded by Thomas M. Cooley as well as by Warren and Brandeis. Though various Indian and Western Scholars have tried to define Privacy in their own terms, but the

actual outcome was not very much fruitful, because the idea of Privacy is a variable concept and varies with the societal as well as cultural variation.

3) Various authors have expressed that, it is impossible to define 'Privacy' universally due to its variable nature based on the social and cultural context. Hence, the Western and Indian Scholars have possessed differences in their opinions while defining Privacy. According to Western Jurists, Privacy is not a single right, rather it is a bundle of rights and as such, the concept of Privacy defined in the Nordic Conference of Jurists, 1967, is appropriate. On the contrary, Indian Jurists have opined that, Privacy is a single concept and whatever may be the nature of the right, actually Privacy lies in the idea of exclusion of all others from the purview of the activities of an individual.

4) Depending upon the nature and circumstances of each case, Privacy can be classified as Intimate Privacy, Family Privacy, Social Privacy and Individual Privacy. Social Privacy can again be classified into Political or Legal Privacy, Professional Privacy and Community Privacy. But, the classification of Privacy is not an exhaustive one, it may change according to changing time, place and society. Also, the classification is not based on water-tight compartments and is overlapping with each other.

5) The idea of Privacy is embedded in its nature and basis. The nature of Privacy is characterized by freedom of individual human beings from any outside interference. Accordingly, Privacy is nothing but the exclusion of all others from various aspects of the life of an individual human being. Hence, the nature of Privacy is embedded in the ideas of freedom and exclusion.

6) Though there may be various kinds of Privacy Torts, but in all cases, only one right is violated, i.e. right to live with human dignity. Another name for that right is 'inviolate personality.' Hence, it can be said that, whatever may be the nature of privacy violation, ultimately the 'inviolate human personality' is violated. In this sense, to protect right to privacy means, to protect inviolate personality of individual human beings, without the protection of which the Right to Privacy can never be protected. Hence, the basis of Privacy is nothing but the 'inviolate personality' of human beings.

7) As the idea of Privacy centres around the concept of 'private space,' therefore, the amount of private space which everyone should enjoy freely and the time limit of outside interference over it, will be the scope, ambit and extent of

Privacy. On the contrary, significance of Privacy means, the importance of Privacy in a civilized society.

8) The significance of Privacy can again be sub-divided into two parts – Difference between Privacy and Right to Privacy and Whether Privacy is a Public Right or Private Right. In this sense, Privacy is a condition and hence, it may be foregone, forfeited or invaded. A Right to Privacy includes the notions of control and voluntariness in denoting individual's claims of entitlement to the recognition of their interests in Privacy.

9) Privacy also has various effects. The effects of Privacy means, prevention of unwanted publicity and interference into human life to protect human dignity by recognition and enforcement of Right to Privacy in a complex social structure.

10) Over and above, Privacy has to perform different functions in a civilized society. According to Prof. Alan F. Westin, the Functions of Individual Privacy are Personal Autonomy, Emotional Release, Self Evaluation and Limited and Protected Communication. The functions of privacy play an important role to protect personal autonomy by preventing unlimited and unprotected communication of information, which ultimately protect the right to live with human dignity in a modern democratic society.

11) The functions of Privacy propounded by Prof. Alan F. Westin can be criticized on the point that, these functions should equally be played during social transformation from primitive to modern or civilized society also. Otherwise, the utilization of those functions would be incomplete.

12) Last but not the least, the functional justification of Privacy as a basic human right is derived from the purpose it serves while protecting individuals from various emotional disturbances, like anxiety, humiliation, embarrassment, disgrace, inconvenience, annoyance, shame and indignities.