CHAPTER 3

POSITION OF RIGHT TO PRIVACY IN INTERNATIONAL LEGAL ARENA

3.1. Prologue

The idea of Privacy is deeply rooted in the human society; it grows with the society and ends with the society. In fact, Privacy is an essential element of human society, more specifically; it is an essential element of civilized human society. In this sense, the traces of Privacy are found more in the ancient or modern societies than in the primitive societies. The primitive societies had witnessed existence of no Privacy at the very beginning. Gradually, when the societies moved towards civilization from barbarism, the existence of Privacy came into being. This example shows the evidence of growth of Privacy with the growth of human civilization. As the societies have become civilized, they have tried to understand the necessity of shield or guard for the protection of themselves physically and psychologically. As such, the necessities of clothing and shelter have emerged in the human society. Though these two are the two basic needs of human lives, but the idea of Privacy is also culminated into these two basic elements. Various instances can prove this situation. As for example, at the early stage of human civilization, human beings did not understand the necessity of clothing and shelter. But, as soon as the feeling of nakedness and shame emerged among themselves, practice of clothing and shelter came into being. Even today, certain primitive tribes, who are living in uncivilized manner, they do not feel nakedness and shame and as such, they do not feel the necessity of clothing and shelter. Hence, the idea of Privacy is the product of human civilization. Along with the fear of natural forces, the feeling of nakedness and shame, or in other words, Privacy is the catalyst for introduction of practice of clothing and shelter among human beings.

The social need of Privacy has been equally realized in all the primitive societies simultaneously. History evidences that, traces of Privacy have been found in various primitive societies, both Western and Eastern part of the world, at the same time. As such, growth of civilization has occurred, more or less, at the same

time in all parts of the world. Similarly, in case of ancient societies, existence of Privacy was found in American, British, French, German and Indian societies, more or less at the same time and in the same manner. Some common elements of Privacy were existed in each and every ancient society. As for example, necessity of clothing or shield, covering faces of women by veil or 'purdah', prescribing rules and regulations for construction of houses for protection of Privacy of the female occupied area, maintenance of confidentiality of information in the Ministerial meetings etc. are the common practices of all the ancient societies, which show the existence of Privacy in the ancient societies. Again, in the modern societies also, some custom has been continued. At first, strict government surveillance has been practised on citizens' lives in all the modern societies, gradually which has been terminated and necessity of individual Privacy has been recognized. Due to the advancement of Information and Communication Technology, Data theft has been a common threat to human society in the modern period, against which Data Protection Act has been passed in almost all the Modern Western societies. Another important development has been the protection of Privacy in the Criminal Justice System, which is also the creation of the modern social system. Hence, the recognition of Privacy has been evidenced by all the societies in various parts of the world simultaneously.

A study of the history and development of Privacy finds that, equal idea of Privacy was prevalent during the historical period in both the Western and Eastern societies. The texts of Bible prove the existence of Privacy in the Western society. As for example, after the flood, Noah became drunk and was lying uncovered in his tent. At that point of time, his son Ham violated his father's Privacy by looking upon his nakedness and telling his other brothers about that. After hearing that, the other sons of Noah took a garment upon their shoulders, walked backward and covered the nakedness of Noah. While doing that, their faces were turned away and they did not see their father's nakedness.[1] In this way, Noah's sons protected the Privacy and dignity of their father. On the contrary, different texts of Grihya-Sutras, Ramayana, Mahabharata, Manusmriti and Kautilya's Arthashastra prove the existence of Privacy during the Hindu period in ancient Indian society. In ancient India, the term

[1] Genesis, Revised Standard Version, Vol. 9, pp.20-27.

'Avarana' was used to denote Privacy. It meant, shield, guard or shelter. It also used to mean veil or cover for the faces of the women. The use of 'Avarana' was prescribed in various ancient Hindu texts for protection of Privacy. Apart from that, elaborate rules of Privacy were prescribed for construction of houses in the Grihya-Sutras. Both Ramayana and Mahabharata prescribed norms of Privacy in various spheres of human lives, including prohibition to see a naked woman, a sleeping woman, to enter into others houses without permission, to take women at lonely place etc. Manusmriti also prescribed the similar norms of Privacy. Kautilya's Arthashastra supported all these previous norms of Privacy and included another important norm of Privacy, like the observation of Privacy at the time of confidential communication among the ministers. Hence, the norms of Privacy were prescribed by both the Western and Eastern ancient texts, which prove the existence of Privacy in both the societies during the historical period.

A popular Western text provides that, "Every man's house is his castle". It is an acute example of Privacy of Family and Home in the Western society. It denotes the protection of Privacy within the household of an individual in the Western society. It also provides the immunity of home from outside interference in the Western social life. It also has an Indian Counterpart, which says, "Sarva Swa Swa Grihe Raja". It means, "Every man is the King of his own house". In this sense, it conveys the same meaning with the Western view, "Every man's house is his castle". The Indian view protects the Privacy of an individual in his or her home and provides freedom to act according to one's wishes within the home. It also provides the immunity of home from outside interference in the Indian society. Therefore, this Indian text signifies the Privacy of Family and Home in Indian society. Due to this reason, it can be called the Indian counterpart of the Western view. This is again, another evidence of existence of Privacy in both the societies simultaneously.

The existence of Privacy in different parts of the world is not an isolated event, but the outcome of a continuous process of development of Privacy all over the world. Though the idea of Privacy varies in the societal and cultural contexts, but existence of Privacy is found in every society, be it past, present or future society. Balancing of Individual and Social Privacy is the criteria for the peaceful co-existence of each and every society. As such, each and every society always strives

to achieve this balance. In this respect, also the basic postulates of Privacy, like Solitude, Intimacy, Anonymity and Reserve should present in every society for the achievement of the ideals of Privacy. Therefore, though the definition of Privacy varies in societal and cultural contexts, but the presence of Privacy in all the societies cannot be discarded by anyone. This idea helps to draw the contention that, Privacy is not a narrower local or regional right; rather it is a universal right having great significance in the context of the mankind in general. In the present day society, Individual privacy is recognized as a basic human right in all the developed and developing countries. Therefore, wherever person goes, his Right to Privacy goes with him. Certain common benefits of Privacy are secured in every country, which every individual is entitled to enjoy irrespective of the race, religion, caste, creed, sex, place of birth or place of residence. Benefits of Privacy are also enjoyed by every individual at the time of moving from one country to another. Hence, the significance of Privacy is not local, but Universal. In this sense, internationalization of Privacy is required by prescribing certain norms of Privacy, which should be universally acclaimed and international in character. This process of internationalization of the Privacy Rights has already been started under the auspices of the United Nations all over the world.

3.2. Privacy : The International Character

Right to Privacy has no longer been a narrow limited right within the periphery of a particular nation. Rather, it has assumed universal character due to its present significance and worldwide recognition. It is an important right all over the world in the present social scenario. In fact, it has assumed its universal character in 1948, since the proclamation of the *Article 12 of the Universal Declaration of Human Rights***,** the adoption of the *Nordic Conference of Jurists in 1967* and the submission of the *Younger Committee Report in 1972***.** All these international instruments have provided the Right to Privacy, an international character. In a modern technologically advanced society, Individual Right to Privacy is suffering from serious threats of violation, which is not a problem for a particular country, but a worldwide problem. Along with the technological threats to Privacy, another serious threat has occurred in the present social order, i.e. the Investigative Journalism, which does not only cause invasion of Privacy, but may cause loss of

life or limb of the victims. As the new social order is subjected to all these serious threats to Privacy, the necessity of international recognition and guarantee of Privacy has been increased at an alarming rate.

The international concern for Privacy is the creation of modern society. Though the origin of Privacy has been found in the 18th Century and before, but the positive Right to Privacy is the creation of 20th Century only. In fact, in the old societies, privacy was a state of affairs, of which the human lives were subjected and they observed Privacy in various activities of their lives. More specifically, they were much familiar with two worlds, 'private life' and 'public life', rather than 'Privacy'. In this sense, 'Privacy' has come to be recognised as a matter of right in the modern society. Again, the old societies observed Privacy as parts of their customs or traditions, but they were not concerned with the cases of violation of Privacy or remedies thereof. Therefore, the factors, like violation of Privacy and remedies for such violation have also come in the recent period. All these instances project the contention that, Right to Privacy is the product of 20th Century modern society, which has grown in consequent to the human rights movement in the contemporary society all over the world.

The international character of Privacy has received recognition in the 'Right to respect for a person's private and family life, his home and correspondence' as guaranteed in different articles of the *Universal Declaration of Human Rights, 1948,the International Covenant on Civil and Political Rights, 1966 and the European Convention on Human Rights and Fundamental Freedoms, 1950.* It has also been recognised in similar terms in various other International and Regional Conventions on Human Rights. Though this right is recognised as of international importance in the recent period, but the origin of this right is found in the origin of the idea of human rights, in the foundational principles of *British Magna Carta,* in the theories of various Philosophers and in the successive declarations of human rights. It is also considered as one of the foundational principles of political democracy and as such, political democracy cannot be constituted without the active protection of this right.[2] In a political democracy, freedom of individual citizens is

[2] Pierre Juvigny, "*Modern Scientific and Technical Developments and their consequences on the protection of the Right to respect for a person's private and family life, his home and*

must; otherwise the very purpose of political democracy cannot be achieved. Privacy means freedom from unwarranted interference into one's life and when Privacy is achieved, freedom is also achieved simultaneously. In this sense, the success of a political democracy lies in the guarantee of Right to Privacy of individual citizens therein. This urge of Privacy in the political democracies was understood long ago, but attempts have been taken in the recent period for the implementation of this objective.

Moreover, the attainment of Privacy in the political democracies is not the only criterion for determination of Privacy in the recent period, but there are others also. In fact, the thinking of Philosophers and Jurists of the last century has contributed much for the development of this right. Along with that, this right was embedded in the socio-political and economic conditions of the Western Europe, centuries ago. This implied existence of Right to Privacy has come to be recognised in the express manner in the 20th Century international, national and regional rules and regulations. Those rules and regulations are more or less having their source in the *Universal Declaration of Human Rights, 1948*, during the modern period. As such, all those international, national and regional laws are the reflection of a universal agreement. Apart from that, as the Right to Privacy is considered as a positive right, those laws are called the rules of positive law. All these contentions, when coupled together for a complete analysis, the ultimate conclusion will direct towards the consideration of the Right to Privacy as a positive right of a universal nature. This nature of Right to Privacy obviously projects over the international character of Right to Privacy. But, still some problems are remaining relating to the universality of this right, because the simpler societies, even today, do not feel the necessity of Privacy in their lives and the laws of Privacy are not speaking in the same lines in each and every country. Along with that, there is absence of express laws of Privacy in each and every country. Hence, the international character of Right to Privacy is not based on sound footing; rather it is based on somewhat unstable foundation.[3]

communications," in A.H.Robertson (ed.), *Privacy and Human Rights*, Manchester University Press, Manchester, 1973, p.129.

[3] *Ibid.*

The international character of Right to Privacy is deeply rooted in the idea of liberty and the concept of human rights. More specifically, the idea of Privacy has been originated from liberty and the necessity for international protection of Privacy is obvious due to the recognition of it as a liberty. Liberty of every individual should be protected in a civilized society; otherwise the very structure of the civilized society would be destroyed. Also, liberty cannot be curtailed by the government without due process of law. When this universal aspect of liberty is added to Privacy, it assumes the international character. On the other hand, another important aspect of Right to Privacy is the recognition of it as a basic human right. According to some jurists, the idea of Privacy has been originated from 'Privacy Torts' and the most prominent thinker of this view is *William Prosser.* But, the greater number of jurists considers this right as a human right and profounder of this view are *Warren and Brandeis,* whose work is called the authority on the subject. In fact, the international promoters of this right have considered it as a human right and have tried to protect this right in this light. Therefore, the international character of Right to Privacy can be clearly understood from the analysis of the following two elements:-

(i) Privacy as a Liberty, and

(ii) Privacy as a Human Right.

3.2.1. The Significance of Privacy as a Liberty

Privacy is considered as a state of affairs in the life of individual human beings. Every individual is entitled to enjoy this state of affairs as a matter of right and as such, it is called the Right to Privacy. The origin of this right is embedded in the foundation of the civil societies. The civil societies guarantee certain liberties to the individual citizens, called the 'Civil Liberties', wherein the existence of Right to Privacy is found. The guarantee of 'Civil Liberties' is must for the constitution of civil societies. 'Civil Liberties' contain various rights within their periphery, among which Right to Privacy is one important right. In this sense, Right to Privacy is a kind of 'Civil Liberty'. Again, there are various types of Liberties and 'Civil Liberty' is one among them. Therefore, to understand the nature of Right to Privacy as a Civil Liberty, the concept of Liberty should necessarily be understood.

3.2.1.1. Liberty vs. Privacy

Liberty is the opportunity or freedom for human beings to achieve their best selves. In this sense, Liberty is synonymous with Privacy. If the meaning of Privacy is analysed, then it can be found that, Privacy is freedom from any unauthorised interference into the human life. Therefore, Liberty and Privacy both mean freedom. If a comparison is made between Liberty and Privacy, then the similarities and dissimilarities between the two can be found. After comparing the both, the following points may be emerged:-

(i) Liberty and Privacy both are important for the existence of human beings in a civilized society.

(ii) Liberty and Privacy both mean freedom of individual human beings.

(iii) Liberty is necessary for the achievement of physical, psychological, emotional, intellectual and sensual developments of human beings. Privacy is also required for all these purposes.

(iv) Meditation is required for the development of human mind, which is possible only in the state of affairs, called solitude or Privacy, which in other words, refers to physical or psychological freedom. In this sense also Privacy is similar to Liberty.

(v) Though both Liberty and Privacy are essential for the existence of human beings in a civil society, but both of them are not absolute and reasonable restrictions can be imposed on both of them in the public interest.

(vi) Both Liberty and Privacy cannot be curtailed by arbitrary or unreasonable government actions.

(vii) Liberty is classified under various heads, of which Personal Liberty and Political Liberty are most important. Similarly, Privacy is also classified under various heads, of which Individual Privacy and Social Privacy are most important.

(viii) Individual Privacy and Personal Liberty are more or less same thing and on the contrary, Social Privacy and Political Liberty are more or less same thing.

(ix) Every civil society needs to create a balance between Individual and Social Privacy. Similarly, it is also necessary to create a balance between Personal and Political Liberty in a civil society.

(x) The origin of Liberty and Privacy both are found in various ancient societies, one such society is the ancient Greek society.

(xi) Various safeguards are required in a civilized society for the protection of both Liberty and Privacy.

(xii) Personal or Civil Liberty is the most important liberty guaranteed to an individual and Right to Privacy is a kind of Personal Liberty. In this sense, Privacy is a part or a kind of Liberty.

Therefore, the comparison between Liberty and Privacy has projected various similarities between Liberty and Privacy. After combining all the similarities, it can be said that, Liberty and Privacy both are synonymous. Not only that, a thorough study also provides the idea that, Right to Life is a kind of Personal Liberty and Right to Privacy is part and parcel of the Right to Life. In this sense, Right to privacy is a kind of Personal Liberty. The idea of Freedom, which is culminated into both Liberty and Privacy, again, proves this contention. Hence, there is no doubt that, Privacy is a kind of Liberty. Almost all the written Constitutions of the world in the present social scenario have considered Privacy as a part of Personal Liberty and have tried to protect it in this sense. The international legal instruments have also kept the Right to Privacy under the head Civil or Personal Liberty. Therefore, the character of Privacy as Personal Liberty is the internationally acclaimed character. As such, the significance of Privacy as a Liberty lies in the recognition of Right to Privacy as an international character, because the invasion of Privacy practically causes the invasion of Personal Liberty, which ultimately threatens the peaceful existence of the world at large.

3.2.2. The Significance of Privacy as a Human Right

Privacy is a right of individual human beings to enjoy freedom in the private life from any kind of outside interference. It is a kind of individual autonomy, wherein an individual is entitled to live a life according to one's choice. Though Privacy is a state of affairs, but it is granted as a personal liberty in a number of written Constitutions of the world in the present social scenario. As such, it can be claimed as a matter of right taking the advantage of those Constitutional provisions. Moreover, various landmark judicial decisions of U.S.A., U.K., India and other countries have guaranteed it as an important human right. It has also been recognised as a part and parcel of Right to Life by the Legislature and Judiciary of different countries. Apart from that, it has been considered as a basic human right,

the guarantee of which is utmost important for the protection of Right to Life and Personal Liberty. Above all, it has been realised presently that, Right to Privacy is interrelated with Right to live with Human Dignity and as such, violation of Privacy means the violation of human dignity. To understand this nature of Right to Privacy, it is necessary to understand the nature and concept of human rights.

3.2.2.1. Human Rights vs. Privacy

Human Rights and Privacy both are interrelated and cannot be separated from each other. In fact, most of the Western and Indian Jurists have considered Right to Privacy as a basic human right, without the guarantee of which the Right to live with human dignity would become incomplete, which is again part and parcel of the Right to Life. In this sense, Right to Life remains incomplete without the guarantee of Right to Privacy. Privacy is an existential condition of human life and is considered as a Personal Liberty under the express or implied provisions of various written Constitutions of the world. The First Generation of Human Rights is counted as Civil and Political Liberties, of which Personal Liberty is a kind. Privacy is also a type of Personal Liberty. In this sense, Privacy is a type of Human Rights of First Generation. This is not the only similarity between the Privacy and Human Rights, but there are others. A comparative analysis between the two will project the similarities and dissimilarities between the two and thereby the following points may be emerged:-

(i) Human Rights and Privacy, both are obvious for the existence of human beings in a civilized society.

(ii) Human Rights and Privacy, both are essential for the dignity and worth of human beings.

(iii) Human Rights are the basic natural rights, without which the existence of human beings would be incomplete.

(iv) Human Rights are classified into civil and political rights, economic, social and cultural rights and collective rights. Privacy is classified into Individual Privacy, Social Privacy, Family Privacy and Professional Privacy.

(v) Individual Privacy and first two types of Human Rights are similar. On the contrary, Social Privacy and Collective Rights are similar.

(vi) Privacy and Human Rights, both are the other names for liberty.

(vii) Privacy is a kind of Civil and Political right, which is a kind of Human Rights of First Generation.

(viii) Both Privacy and Human Rights are not absolute and reasonable restrictions can be imposed on both of them in the public interest.

(ix) Both Privacy and Human Rights cannot be curtailed by arbitrary or unreasonable government actions.

(x) Every civil society needs to create a balance between civil and political rights, economic, social and cultural rights and collective rights. Similarly, it is also necessary to create a balance between Individual and Social Privacy.

(xi) The origin of Human Rights and Privacy both are found in various ancient societies, one such society is the ancient Greek society.

(xii) Various safeguards are required in a civilized society for the protection of both Human Rights and Privacy.

Therefore, the comparison between Human Rights and Privacy has portrayed various similarities between them. After combining all the similarities, it can be said that, Human Rights and privacy both are synonymous. Not only that, a thorough study also provides the idea that, Right to Life is a basic human right and Right to privacy is part and parcel of the Right to Life. In this sense, Right to Privacy is a basic human right. The idea of human dignity, which is culminated into both Human Rights and privacy, again, proves this contention, because Right to live with human dignity is a basic human right and that right becomes incomplete without the protection of Right to privacy. The Right to live with dignity, which is a basic human right and which creates the difference between human beings and animal beings, get its complete shape only when the Right to privacy is protected. Hence, there is no doubt that, privacy is a kind of Human Right. Almost all the written Constitutions of the world in the present social scenario have considered Right to privacy as a part of Right to Life and have tried to protect it in this sense. The international legal instruments have also kept the Right to privacy under the head Civil and Political Rights. Therefore, the character of Right to privacy as a Civil and Political Right is the internationally acclaimed character. As such, the significance of privacy as a Human Right lies in the recognition of Right to privacy as an international character, because the invasion of privacy practically causes the

invasion of Right to live with human dignity, which is a basic human right. Above all, the violation of human dignity threatens the very existence of human beings in this world.

The international character of Right to Privacy is characterised by the ideas of Liberty and Human Rights, which are essential for giving it a concrete shape. These ideas have been recognized as the Privacy denoting factors in the international periphery with overwhelming consensus. In order to give effect to that recognition, this right has been incorporated as an important Human Right in various international, national and regional Human Rights instruments, which are essential for discussion in this respect.

3.3. Privacy : The Legal Instruments

Various Legal Instruments have been prepared for the protection of Human Rights in the international, national and regional levels, some of which have dealt clearly with the Right to Privacy. Apart from that, few international and regional legal instruments have been made dealing with Right to Privacy. Apart from that, few international and regional legal instruments have been made dealing with Right to Privacy. Moreover, the Municipal Laws of various countries either incorporated direct or indirect provisions relating to Right to Privacy in their written Constitutions or have enacted separate legislations relating to Privacy. All of such laws are required for discussion with respect to the international legal arena of Right to Privacy.

The legal instruments for the protection of Right to Privacy can be categorised as follows:-

(i) International Legal Instruments- The Legal instruments which have been made under the auspices of the United Nations.

(ii) Regional Legal Instruments- Legal Instruments which have been prepared in the regional levels, like European or American Convention or the African Charter.

(iii) Municipal Laws of Different Countries- It can again be divided into the following sub-heads:-

(a) Common law- The Common law Countries are as follows:-

(I) U. S. A. (II) U. K. (III) India. (IV) Australia. (V) Canada. (VI) South Africa.

(b) Civil Law- The Civil Law Countries are as follows:-

(I) France. (II) Germany. (III) China.

(c) Nordic Law- The following Countries are coming under this head:-

(I) Sweden. (II) Denmark. (III) Norway.

The above-mentioned classification of legal instruments on Right to Privacy all over the world is illustrative, but not exhaustive, because this classification shows some of the legal instruments pertaining to Privacy rights, but there are others also. As regards, the Municipal Laws of different Countries, the classification of Common Law, Civil Law and Nordic Law Countries, is again a broad generalisation and the laws of most important countries can only be mentioned hereunder.

3.3.1. Privacy : The International Legal Instruments

Human Rights have been categorically defined and provisions have been made for the protection of those rights in the international legal scenario. As such, various human rights have been defined by various international instruments. But, in the international legal order, Privacy is the most difficult human right to define and protect. In its narrow sense, it may mean a luxury for the citizens of developed countries, but in its wide sense, it is considered as the last resort for the poor and weak individuals to safeguard against the ever increasing encroachments on human lives due to the advancement of Information and Communication Technology.[4]

In fact, the violation of Right to Privacy includes violation of basic human rights of family, marriages, child-bearing, motherhood, education, information, reputation, personal liberty and many more, all of which are in the urgent need of protection in the contemporary social scenario. To make it more elaborate, it can be said that, the specific instances of violation of right to privacy are unauthorized and unreasonable telephone-tapping, e-mail scanning, narcotic analysis, polygraph test, lie detector test and brain mapping test, checking and abolishing the 'veil' system of Muslim women in various Countries, the role of media in violating the right to privacy of public personalities by taking their photographs without permission and unauthorized interference into their private life, growing number of the heinous crime of female foeticide as the violation of right to privacy of a woman, making of counter-terrorism laws without concerning about the violation of right to privacy of the citizens of a country. All of these rights are included in the basic human rights of

[4] A.H.Robertson, *Supra* Note 2 at pp.vii-viii.

individuals and as such the violation of right to privacy amounts to violation of basic human rights of individuals.

The problem area in this field is that, the right to privacy has not been adequately dealt with by the legislatures of different countries. The present legislations that deal with the protection of the right to privacy do not, in fact, secure this right to the greatest extent. Since protection of Human Right to Privacy is an issue that attracts global norms transcending national boundary, therefore, the development of the law relating to the right to privacy in the international field for the protection and enforcement of these rights should be taken into account in this respect.

In the present context, particularly in this cyber age, the concept of right to privacy has been expanded so much, that it includes within its ambit, almost every aspect of life. There are various international instruments, like Conventions, Declarations, Protocols etc. dealing with the provisions of right to privacy as also many Regional Conventions and Declarations which are very much worthy of mentioning in this respect.

In the international field, Privacy has been clearly and unambiguously established as a human right by the *Universal Declaration of Human Rights, 1948.* It is also categorized as a civil and political right in the *International Covenant on Civil and Political Rights, 1966.* But, there are differences of opinions among the jurists of Human Rights on the categorization of Right to Privacy as a civil and political right and as such, some of them have argued that, in certain respects, it also involves questions of economic, social and cultural rights. Accordingly, it can be categorized as an economic, social and cultural right also.[5] In this respect it is pertinent to mention that, the evidences of existence of Right to Privacy are also found in the *International Covenant on Economic, Social and Cultural Rights, 1966.* Moreover, the *Convention on the Elimination of All Forms of Discrimination against Women, 1979* and the *Convention on the Rights of the Child, 1989* have also considered the Right to Privacy of Women and Children, respectively, as an important human right. Therefore, in the international field, attempts have been

[5] James Michael, *Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology*, UNESCO Publication, France, 1994, pp.1-2.

made for the recognition and protection of Right to Privacy under the auspices of the United Nations.

Therefore, a number of international legal instruments have been found on the Right to Privacy, which may become fruitful to give a complete idea of the international legal field on the Right to privacy. The scope and ambit of the international legal scenario is very vast. But, the worth-mentioning fact in this respect is that, United Nations has played a very important role for the protection of Right to Privacy in the international field.

3.3.2. Privacy : The Regional Legal Instruments

There are two terms associated with the protection of Human Rights, one is called the Universalization of Human Rights and the other is called the Regionalization of Human Rights. Universalization of Human Rights means the declaration of all Human Rights world over, under one umbrella and trying to create provisions for protection of these rights. In other words it is the initiative of the world community to show concern for the violation of Human Rights all over the world and to take measures to prevent violation of those rights. This initiative has been taken in appropriate manner under the auspices of the United Nations by creating various Declarations, Covenants and Conventions on Human Rights. On the contrary, Regionalization of Human Rights means, Declaration of Human Rights at different regional levels, which may be continent-wise levels, by way of incorporating the Human Rights into various Regional Conventions. There may be different Regional Conventions for different regions, but the Human Rights declared therein must be same and equally applicable to all. The reason behind that is the universality of all human rights based on the ideas of Equality, Liberty and Fraternity promoted by the *Universal Declaration of Human Rights, 1948* and its universal application all over the world.

Moreover, the Declaration of the Human Rights by the Regional Conventions would not be enough; it should be coupled with the provisions for enforcement of those rights in the regional levels. However, Regionalization of Human Rights is possible and is supported by the thinkers of Human Rights all over the world. There are various reasons for supporting the Regionalization of Human

Rights. As such, the necessity of Regionalization of Human Rights is upheld due to the following reasons:-

(i) The Universal Declaration of Human Rights has enumerated the human rights with universal validity. It has not spoken anything about the regional protection of those rights.

(ii) The human rights propounded by the Universal Declaration are merely having normative values, which are expected to promote and protect by the Member-States by voluntarily incorporating them either in the national Constitutions or by enacting national legislations in this respect. Those are having no binding effects on the Member-States otherwise.

(iii) The human rights propounded by the Universal Declaration cannot be directly enforceable without incorporating them into national Constitutions of the Member-States or enacting national legislations for their enforcement.

(iv) Since these rights are having no binding efficacy, no enforcement mechanism has been provided for their implementation by the Universal Declaration.[6]

But, it should be kept in mind that, the basic human rights and fundamental freedoms should be same for all. Therefore, no regional system can be accepted, unless it is consistent with the principles established by the Universal Declaration.[7] Moreover, everyone cannot be forced to obey one Universal or International human rights instrument due to the social, economic or cultural diversities among the human beings all over the world. In this sense, it is desirable to establish a number of regional human rights instruments for promotion and protection of human rights region-wise. But, for the successful working of any regional arrangement of human rights, the homogeneity of cultural heritage and political systems among the regional group of States is obvious, without which the regional arrangement may be broken. Therefore, the regional arrangement of human rights can be supported in the interests of human beings at large. Such arrangement may be made by dividing the world region-wise or continent-wise, where the people with diverse culture and political status are not forced to join one international community and the people with homogeneous culture and political status can come under one group or community.

---

[6] V.K.Sircar, *Protection of Human Rights in India*, Asia Law House, Hyderabad, 2005, p.91.
[7] *Id* at p.92.

When the necessity of regionalization of Human Rights has been realised by the world Community, initiatives have been taken by the United Nations and at different levels for the regional protection of Human Rights. In this respect, after the creation of *Universal Declaration of Human Rights, 1948,* various regional charters and conventions on Human Rights have been enacted. The first convention which has been adopted is the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.* Next has come, the *American Convention on Human Rights, 1969.* The third regional instrument in this line has been the *African Charter on Human Rights and People's Rights, 1981.* Therefore, three important regional human rights instruments have been created for the protection of human rights and fundamental freedoms in the three regions of the world. Apart from these three regional instruments, attempts have also been taken for the creation of the *Asian Human Rights Charter* by way of enacting the *Bangkok Declaration, 1993.* But, unfortunately the attempts have been failed and the *Asian Human Rights Charter* cannot be created, also having no possibility of realization in the near future.

In the light of the need for regional protection of human rights, the need for regional protection of the Right to Privacy can be understood, because Right to Privacy is considered as an important human right in the international periphery. Due to this reason, the three regional human rights conventions, i.e. *the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the American Convention on Human Rights, 1969 and the African Charter on Human Rights and People's Rights, 1981* contain few provisions relating to the protection of Right to Privacy in the regional levels.

In this respect, it is pertinent to mention that, there are various reasons for the protection of Right to Privacy in the regional fields. The most important reason is that, the rapid growth of the information and communication media in the 20th Century has created various fundamental problems in the area of human rights concerning the Right to Privacy. Specifically, the problems are as follows:-

(i) The conflict between freedom of expression and the individual Right to Privacy.

(ii) The right of the individual to authorise the use or prevent the use of their name or likeness for publicity purposes.

(iii) The difficulties arising in a global society dependent on mass media as a result of the absence of any right protecting an individual's personality.[8]

The above stated problems are contemporary issues on Right to privacy found in most of the countries all over the world. Though attempts have been made for the universal protection of Right to Privacy, but due to the non-binding nature of the international human rights instruments, adequate protection of Right to Privacy is not possible by those instruments. Therefore, the making of regional human rights instruments for protection of the Right to Privacy is the need of the hour.

Creation of a number of regional instruments on the Right to Privacy has become fruitful to give a complete idea of the regional legal field on the Right to Privacy. Therefore, it can be seen that, the scope and ambit of the regional legal scenario is very vast. But, the most important fact is that, all the continents have adopted regional human rights instruments, each of which has contained provisions for the protection of Right to Privacy, which is a good initiative for privacy protection in the regional field.

3.3.3. Privacy : The Municipal Laws of Different Countries

The scope and ambit of Right to privacy is so vast that, it cannot be made limited to any particular region only, rather it has spreaded its wings all over the world. In this sense, Right to Privacy cannot be confined within the purview of International legal instruments or Regional legal instruments. The Privacy laws of different countries should be incorporated within it. In this sense, the Municipal Laws of different Countries should be taken into consideration, which include the Constitutional provisions of different countries and the Privacy legislations. The nature and basis of Privacy have made it a global issue and in the present era of advanced scientific as well as information and communication technology, a number of serious threats have been created which are endangering Individual as well as Data Privacy. Due to this reason, everyone is concerned with the issue of invasion of Privacy and is trying to take measures for the prevention of violation thereof. Moreover, the international charter of Privacy is also responsible for considering it as a global issue. The international character of Privacy has considered it as an important human right as well as part and parcel of the Right to live with human

[8] Michael Henry (ed.), *International Privacy, Publicity and Personality Laws*, Butterworths Publication, London, U.K., 2001, p.1.

dignity, which is a basic human right. This proposition has led to the protection of Right to privacy by way of making it a global issue, ultimately the protection of which has become utmost important for the protection of Right to Life and Personal Liberty.

Furthermore, the guarantee of Right to privacy would become incomplete under the international and regional human rights instruments, unless and until those provisions are incorporated in the Municipal laws of the States Parties to those international or regional instruments. The incorporation of the Convention rights in the Municipal laws of the States Parties should be made either by way of incorporating them in the National Constitutions of those Countries or by enacting national legislations in this respect. In fact, international or regional conventions or declarations are not directly enforceable and as such, the rights declared therein should be enforced in the indirect manner by way of incorporation of them either in the national constitutions or in the national legislations, otherwise the enforcement of those rights is impossible. Due to this reason, the necessity of discussion of Municipal Laws in the field of Right to privacy is utmost important.

Therefore, a number of legal instruments have been found worldwide dealing with various aspects of Right to Privacy. In fact, each and every legal instrument is equally important with respect to the protection of Privacy, be it an international, regional or municipal legal instrument. If each and every legal instrument is analysed, various components of Right to Privacy may be found. Moreover, another important factor is that, every legal instrument does not cover every aspect of Right to Privacy and as such, the right is scattered in a number of legal instruments. Also, the Municipal Laws of different countries are not exhaustive to cover every aspect of Right to Privacy. Hence, a detailed analysis of all the legal instruments on Right to Privacy along with the various components or dimensions of Privacy is pertinent to mention in this respect.

3.4. Privacy : The Various Components

The Western Jurists have defined Privacy in different manners. All of them are not unanimous with a same and single definition of Privacy. Each of them has highlighted a particular aspect of Privacy and has tried to protect it in that sense. In this process of definition and development of Privacy, various new aspects of

Privacy have come out. Some of them have defined Privacy as a basic human right, some as inviolate personality, some as a tort, some as freedom, some as control and the like. As such, a number of aspects have been carved out of the various definitions of Privacy propounded by the Western Jurists. Moreover, the *Nordic Conference of Jurists, 1967* has declared that, Privacy is not a single right, rather a bundle of rights and as such, it is not possible by the Western World to reach at a unanimous definition of Privacy. The western world has supported the views of the *Nordic Conference of Jurists on the Right to Respect for Privacy, May 1967,* held in *Stockholm,* which has been a meeting of the legal authorities from every part of the world organized by the *International Commission of Jurists.* The conference has declared a number of rights under the head 'Right to Privacy', by way of which it has tried to define 'Privacy' in an all-round manner covering its all aspects. Specifically, the declaration has been based on the *William Prosser's idea of Privacy Torts,* but the conference has gone beyond that idea to elaborate 'Privacy' in a more comprehensive manner. However, the rights declared therein are not legally binding directly like any other international instrument, but they highly persuasive in nature and are counted as important for defining Privacy in a well-balanced manner.[9]

The *Nordic Conference* has defined 'Privacy' by using the term 'Intimacy' and has declared as follows:-

> *"The right to intimacy is the right to live one's life in an independent manner, without outside interference".*[10]

According to the views established in the *Nordic Conference,* the Right to Privacy means the right of the individual to lead his own life protected against:

(i) *Interference with privacy, home or family;*

(ii) *Interference with mental or physical integrity or moral and intellectual freedom;*

(iii) *Attacks on honour or reputation;*

(iv) *Placement in equivocal situations;*

(v) *Unnecessary publication of painful facts of one's private life;*

(vi) *Use of one's name, identity or likeness;*

(vii) *Scrutiny, observation or pursuit;*

---

[9] *Supra Note 5 at p.13.*

[10] G. Mishra, *Right to Privacy in India*, Preeti Publication, New Delhi, 1994, p.124.

(viii) *Violation of correspondence;*

(ix) *Abuse of one's means of communication, verbal or written;*

(x) *Dissemination of information given or received in professional confidence.*[11]

The *Nordic Conference* has listed the above-mentioned ten specific rights relating to Privacy. But, the *Conference* has not ended its views with the declaration of these rights only, it has gone further to clarify these rights and for this purpose, it has specified *'the extent'* to which the protection should be available towards the above-stated rights. In this respect, the *Conference* has noted the following eleven cases:-

(i) *Entry into enclosed areas and other properties or record;*

(ii) *Medical or physical examinations or tests of physical aptitude;*

(iii) *Painful, false or irrelevant statements about a person;*

(iv) *Interference with correspondence;*

(v) *Interference with telephonic or telegraphic communication;*

(vi) *Surveillance by electric or other means;*

(vii) *Tape-recording, or still or motion pictures;*

(viii) *Intrusion by the press or other mass-media;*

(ix) *Dissemination of information given to or received from private assessors or public authorities subject to professional secrecy;*

(x) *Public exposure of private matters;*

(xi) *Harassment of person (for example, by observation or bothersome telephone calls).*[12]

In fact, *Nordic Conference* has elaborated Right to Privacy to cover almost every aspect of human life. In this sense, it has given recognition to various aspects of Right to Privacy, like *Individual Privacy, Privacy of Family and Home, Emotional and Intellectual Privacy, Privacy of Honour and Reputation, Privacy against unwanted publication, Privacy of identity, Privacy against unreasonable surveillance, Privacy of correspondence, Privacy of communication, Privacy of Information and Professional Privacy including protection of confidential information.* Therefore, an analysis of the rights listed in the *Conference* gives the

[11] *Ibid.*

[12] Fernando Volio, "*Legal Personality, Privacy and the Family*", in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, p.194.

idea that, it has not only protected a number of Privacy rights, but it has declared those rights in the light of the Privacy rights, enumerated in the *Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966 and the European Convention for the protection of Human Rights and Fundamental Freedoms, 1950.* In this sense, the *Nordic Conference* is not an isolated event; rather it is the continuation of the process of privacy protection started under the guidance of the International and Regional Human Rights Conventions. It is an elaboration of those initiatives in the *Nordic or Scandinavian region.*

Moreover, when the Western Jurists have failed to provide a uniform definition of 'Privacy', the *Nordic Conference* has attempted to define it in a comprehensive manner and as such, the definition provided by this *Conference* has been well-accepted by western world. Though the rights provided by the *Conference* may be criticized for being based on the idea of *'Privacy Torts' propounded by William Prosser,* it has gone far away beyond that idea, by incorporating various other Privacy rights within it. Practically, it has included the Privacy Torts as well as the Human Rights to Privacy, which are necessary for the Right to live with human dignity. In fact, it has tried to give protection to every aspect of Right to Privacy and thereby it is a culmination of various rights propounded in the International and Regional Declarations and Conventions. Another advantage of this initiative is that, it has specified *'the extent'* to which the rights are available, which has become fruitful for the interpretation of the rights in proper manner. Though this part of the declaration of the *Conference* is specific, but that does not mean that, it should be interpreted in a strict sense and not in a liberal sense. Hence, it should be interpreted in a liberal manner to take the full-proof advantage of the *Conference.* Finally it can be said that, the *Conference* is a well-built and comprehensive creation for the protection of Privacy, having the only disadvantage that, it has no legally binding force and it is merely declaratory in nature.

The *Nordic Conference of Jurists* has tried to create various new dimensions of Right to Privacy and in this process, has given birth to various components or aspects of Privacy. Gradually, the invention of these new components of Privacy has

become fruitful to understand that, Privacy is not a one-dimensional right, rather it is multi-dimensional. Moreover, the classification of different types of Privacy rights has given further impetus to the idea of various components of Privacy. Privacy can be broadly classified as *Intimate Privacy, Family Privacy, Social Privacy and Individual Privacy.* The *Social Privacy* can again be classified as *Political or Legal Privacy, Professional Privacy and Community Privacy.* The most important fact of this classification is that, every type of Privacy right under this classification denotes a specific component or aspect of Privacy and as such, a number of components are created by this classification. It is also pertinent to mention here that, this classification of Privacy is not exhaustive and various other classifications of Privacy can be made. Therefore, by following the process of above classification, every new classification of Privacy generally gives birth to various new components of Privacy. In this sense, classification of Privacy is another method of creating components of Privacy.

Apart from the Western view, Indian view has also made significant contribution towards the creation of components of Privacy. Though the Indian jurists have opined about the unanimous definition of Privacy and according to them, the idea of Privacy lies in the exclusion of all others from the periphery of a particular individual, but in practice, in India, various types of Privacy rights are found denoting various components of Privacy. India also supports the above-stated classification of Privacy, which is another important factor for creating components of Privacy in India. But, the most important criteria for denoting various components of Privacy in India, is the division of Privacy rights into three parts – *Customary Right to Privacy, Statutory Right to Privacy and Constitutional Right to Privacy.* In fact, the Right to Privacy in India is governed by these three types of rights, that is, *Customary Right, Statutory Right and Constitutional Right.* Both statutory right and constitutional right have created various new dimensions of Right to Privacy. Though there is no single statutory enactment on Right to Privacy in India, but the right is scattered in various sections in a number of statutory enactments. In case of Constitutional Right to Privacy in India, it has not been expressly guaranteed therein and has only been developed by way of judicial interpretation. The Supreme Court of India has taken active initiatives in this respect. Whatever may be the nature of

development of Privacy Rights in India, legislative or judicial, but a number of new aspects of Privacy have always been created. Therefore, the idea of Privacy projected by the *Nordic Conference of Jurists, 1967*, that, Privacy is not a single right, rather a bundle of rights, is equally applicable in India.

It is a well-accepted truth all over the world that, Right to Privacy is a combination of various rights and as such, it has a number of components or aspects within it. The important components or aspects of Privacy protected by various international, regional and national legal instruments have been expressly discussed hereunder.

3.5. Privacy : The Legal Protection of Various Components

There are various components or aspects of Privacy which have been protected by most of the international, regional or national legal instruments, but there are others also, which have either not been touched by any legal instrument or have been touched by the one legal instrument and not by the other legal instruments. An attempt has been taken hereunder to examine the extent of legal protection of various components of Right to Privacy.

3.5.1. Individual Privacy

Individual Privacy is the first and foremost component of Right to Privacy which is part and parcel of the Right to live with human dignity. In fact, 'Individual' has acquired an important place in the society and it is the most important subject of any law. In every society, two types of rights are necessarily protected, one is Individual Right and the other is Social Right. Individual Right is that right, which every individual acquires by birth. Human rights and fundamental rights would come under this head, which every individual enjoys in his or her individual capacity. Right to Equality, Right to Freedom, Right to Life and Personal Liberty, Right to Health, Right to Education, Right to Work, Right to adequate amount of remuneration etc., all are Individual rights. It is a right, which an individual exercises against the society and no society or government can take any administrative or other measures, by way of which individuals are deprived of their rights.

Individual rights have gained prominence worldwide after the establishment of United Nations. The United Nations has adopted the *Universal Declaration of*

Human Rights, 1948 to declare that, all human beings are born free and equal in dignity and rights. It has recognised the dignity and worth of all human beings all over the world, and for the protection of all human beings, it has declared a long list of human rights in the form of civil, political, economic, social and cultural rights. Accordingly, all these rights are Individual Rights and are required to be protected for prevention of anarchism as well as for the establishment of an egalitarian social order. Right to Privacy is an important Individual Right declared under this Declaration, the importance of which has been understood in the modern period, since the adoption of this Declaration. Among the various components of Right to Privacy, Individual Privacy is most important to give an individual various kinds of freedoms, like physical, moral, psychological, emotional and intellectual freedom.

In a democratic civil society, every individual needs to play various roles in his or her daily life, which are subjected to 'masked performances'. An individual may have to act in the like manner as his or her fellow human beings act in the society for the purpose of maintaining social relations or for discharging the social functions. In all these cases, an individual has to give the 'masked performance' and the actual individual may be missing. As such, at the end of the day, every individual needs 'emotional release' from the 'masked performance' to get one's actual entity and for this purpose, an individual needs an atmosphere of solitude or seclusion, which can be enjoyed in a state of Privacy. Such Privacy can be achieved in the form of Physical Privacy in one's home or at any private place or in the form of Psychological Privacy in the presence of others in public. Therefore, the purpose of Individual privacy is to get emotional release and to achieve physical, spiritual, psychological, moral or intellectual freedom. Spiritual freedom is required for meditation or to attain religious feelings. Intellectual freedom is required for creation of artistic works. Moreover, another function of Individual Privacy is to enjoy 'Personal Autonomy', which is the foremost criteria of Right to Privacy and where, an individual gets freedom to act according to one's wishes without the interference of anyone. Hence, Individual Privacy is utmost important to enjoy Personal Autonomy.

Individual Privacy is upheld by various legal instruments all over the world, which are discussed below.

3.5.1.1. The International Legal Arena

A number of international legal instruments have been found protecting the Individual Privacy. Those are stated hereunder:-

3.5.1.1.1. The Universal Declaration of Human Rights, 1948 : An Analysis

Article 12 of the *Universal Declaration of Human Rights, 1948* has tried to protect Individual Privacy, which runs as follows:-

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".*

Though this article has given protection to various components of Privacy, but it has specifically accorded protection to Individual Privacy. In this sense, if the above-stated article is analysed, the following components are found:-

(i) It has given protection to the –

(a) Individual Privacy;

(b) Family Privacy;

(c) Privacy of home or correspondence;

(d) Privacy of honour and reputation.

(ii) It has prohibited arbitrary interference with the Privacy rights mentioned therein.

(iii) It has enjoined legal protection to the Privacy rights mentioned therein.

(iv) It has specifically given legal protection to those rights against any kind of arbitrary attack or interference.

Therefore, from the analysis of *Article 12*, it can be found that, it has given protection to Individual Privacy from any kind of arbitrary interference or attacks.

3.5.1.1.2. A Review of the International Covenant on Civil and Political Rights, 1966

Article 17 of this Covenant deals with Individual Privacy, which runs as follows:-

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks".*

Therefore, if the above-stated *Article 17* is analysed, the same components are found, as have been found in *Article 12 of the Universal Declaration,* because *Article 17* has been drawn in same line with the before-mentioned *Article 12.* The only exception that, here protection has been given against 'arbitrary or unlawful interference' or 'unlawful attacks'. As such, the term 'unlawful' has been added here and by adding this term, the scope and ambit of *Article 17* have been elaborated than the before-mentioned *Article 12.* In this sense, this article is a slight modification of the *Article 12 of the Universal Declaration.* Though various types of privacy Rights are protected under *Article 17,* but particularly Individual Privacy has been given protection under this article against arbitrary or unlawful interference or attacks.

The idea of Individual Privacy expressed in the *Article 17* can be criticized on the following grounds:-

(i) The terms *'arbitrary or unlawful'* have been considered as debatable by various authors, especially in United Kingdom, those have been considered particularly as unsatisfactory.[13]

(ii) No complete solution of the debate is found, but it is decided that, the use of both these words is not redundant, rather it has the following two implications:-

(a) *'Arbitrariness'* includes the invasions of Privacy committed within the law, specifically in cases of abuse of administrative discretion.

(b) On the contrary, *'Unlawful'* includes the invasions of Privacy by entities other than government, which imposes an obligation on states to provide laws to protect their inhabitants against such invasions.[14]

(iii) Some critics have proposed for inclusion of a limitation clause prescribing acceptable limits to the Right to Privacy, but ultimately it has been rejected by the others.[15]

(iv) Some critics have argued on the necessity of providing more specific examples of Privacy in *Article 17.*[16]

(v) Another critic has proposed the inclusion of a more comprehensive list of activities as Privacy rights, like facts relating to one's own body which are repugnant or socially unacceptable, any personal date, fact or activity unknown to

[13] 13 GAOR Annexes, UN Doc. A/405 para. 46, 1958.
[14] *Supra* Note 5 at p.20.
[15] *Ibid.*
[16] *Ibid.*

others, which if disclosed, would produce moral or physical discomfort to an individual, e.g. nudity, premarital pregnancy etc.[17]

(vi) *The Human Rights Committee* has examined various national reports referred to it under *Article 40* and has indicated the areas of concern for *Article 17*, most prominent among them are as follows:-

(a) The measures to protect individual Privacy from automated information systems.

(b) The safeguards to protect privacy from national intelligence services.[18]

3.5.1.2. The Regional Legal Scenario

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Individual Privacy. Those are stated hereunder.

3.5.1.2.1. The American Convention on Human Rights, 1969 : An Appraisal

The important effect of American Convention is that, it has created provisions for the protection of Right to Privacy along with other human rights. In this respect, this Convention has described the Right to Privacy as a Civil and Political Right under *Article 11* of the Convention, which runs as follows:-

Right to Privacy

"1. Everyone has the right to have his honour respected and his dignity recognised . . ."

Therefore, *Article 11* of this Convention deals with Right to Privacy and the first part of this article has tried to protect the 'honour' and 'dignity' of every individual human being. It has specifically recognised everyone's *Right to Dignity.* Right to Dignity is part and parcel of Right to Individual Privacy. Hence, it can be said that, by way of protecting the Right to Dignity, *Article 11* has, in fact, tried to protect Individual Privacy.

3.5.1.2.2. The African Charter on Human and Peoples' Rights, 1981 : An Assessment

The African Charter deals with various human rights and has tried to promote and protect all the human rights declared therein. But, unfortunately there is no direct provision in the Charter concerning the Right to Privacy. The main reason

[17] *Ibid.*
[18] 33 GAOR Supp.40, UN Doc. A/33/40 para.348, 239, 1978.

behind that may be the African Charter has paid homage to the historical traditions and values of the African Civilization and has tried to reflect those values and traditions in the human and peoples' rights. As the traditional African societies were mainly open societies and they felt no need to establish Right to Privacy, thereby the Charter based on those traditional values has also not understood the necessity of Right to Privacy in the modern African society. Therefore, it may be the reason for non-incorporation of Right to Privacy in the African Charter.

However, *Article 4 of the Charter* can be indirectly made applicable to the Right to Individual Privacy, which runs as follows:-

> *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".*

In an analysis of *Article 4,* the following components may be found:-

(i) It provides inviolability to all human beings.

(ii) It provides to every human being –

(a) the right to respect for his life; and

(b) the right to integrity of his person.

(iii) Any arbitrary deprivation of this right is prohibited.

Therefore, this article upholds the inviolability of all human beings, which in other words, imports the *Warren Brandeis's* concept of 'inviolate personality' and that is the substance of Right to Individual Privacy. In this sense, though *Article 4* is not directly related to Right to Privacy, but it has given indirect protection to Right to Individual Privacy. Moreover, it has recognised and protected the right to respect for life and integrity of the person of every individual, which are part and parcel of the right to live with human dignity as well as the elements of Individual Privacy. As such, Individual Privacy is again, tried to be protected. In order to make it more comprehensive, this article has also prohibited arbitrary deprivation of the right declared therein. Not only that, right to respect for life and integrity of the person means, the right to moral and intellectual freedom also, which is culminated into the Right to Individual Privacy. Moreover, the International and Regional human rights instruments have also included these rights expressly under the Right to Privacy declared therein. In this sense, *Article 4 of the African Charter* is indirectly related to

Right to Individual Privacy and can be applicable to protect Right to Individual Privacy by way of broader interpretation.

Hence, it can be said finally that, African Charter has not taken any noteworthy initiative for the protection of Right to Privacy, except one indirect provision and as such, it has no significant contribution towards the protection of this right in the regional periphery.

3.5.1.2.3. An Overview of the Islamic Human Rights Instruments

In the regional human rights scenario, apart from the Human Rights Conventions region-wise or continent-wise, various other human rights instruments have been made, which are dominated by the Islamic religious thoughts and beliefs. Those human rights instruments can be grouped under the head *Islamic Human Rights Instruments.* A number of such human rights instruments have been made so far. Some of these instruments are mentioned below:-

(i) *Universal Islamic Declaration of Human Rights, 1981.*

(ii) *Cairo Declaration on Human Rights in Islam, 1990.*

(iii) *Arab Charter on Human Rights, 2004.*

The above-mentioned three Islamic Human Rights Instruments have contained all the human rights described in the international as well as other regional instruments. According to the *Preambles* of those *Islamic Declarations,* they are based on the principles enumerated in the *Universal Declaration of Human Rights and the two International Covenants.* Along with the other human rights, those declarations contain substantial provisions relating to the Right to Privacy in their articles. In this respect, all the three declarations are having one or two articles on general Right to Privacy including the Right to Individual privacy. In this respect, the provisions containing the Right to Individual Privacy in the three *Islamic Declarations* are listed below:-

(i) *The Universal Islamic Declaration of Human Rights, 1981 –*

(a) *Article XXII – Right to Privacy.*

(ii) *The Cairo Declaration on Human Rights in Islam, 1990 –*

(a) *Article 18 – Right to Privacy.*

(iii) *The Arab Charter on Human Rights, 2004 –*

(a) *Article 21 – Right to Privacy.*

In this sense, it can be said that, *Islamic Declarations* have taken good initiatives for the protection of Right to Privacy; they believe in Right to Individual Privacy and have faith in the Individual Privacy of human beings. In fact, the medieval period or Muslim era, the existence of Individual Privacy have been found and a number of Quranic injunctions have prescribed the observance of Privacy in various parts of human lives. As the *Islamic Declarations* are based on the Quranic injunctions, they also have recognised and considered Individual Privacy as an important human right.

But, the negative side of these declarations is that, they have considered God and Islam above all, recognised Islam as the only religion and for all Civil and Criminal matters upheld the sanctions prescribed by Islam only and nothing else. Practically, they have recognised Islam above the humanity, law and state. This view about the *Islamic Declarations* have been possessed by the Western human rights thinkers and according to the Western Jurists, the *Islamic Declarations* are not made following the principles of the *Universal Declarations of Human Rights.* In fact, Western Jurists have opined that, the *Islamic Declarations* have been made in derogation with the rules of *Universal Declaration* and as such, they are not beneficial for the mankind. Therefore, due to the negative criticisms by the Western World, inspite of possessing Privacy Rights, the *Islamic Declarations* have not recognised much attention in the context of Right to Privacy.

3.5.1.2.4. Evaluation of the ASEAN Human Rights Declaration, 2012

Article 21 of this Declaration deals with Right to Privacy, which runs as follows:-

> *"Every person has the right to be free from arbitrary interference with his or her privacy... Every person has the right to the protection of the law against such interference or attacks".*

Therefore, *Article 21 of the Declaration* deals with a general Right to Privacy for protection in the *ASEAN* region. In an analysis of this article, it is found that, this article gives protection to the right of Individual Privacy from arbitrary interference or attacks. In fact, this article has two parts and the first part is related to Individual Privacy. This article has also certain similarities with *Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966.* Hence, it can be said that, the *ASEAN*

Human Rights Declaration, 2012 has taken good initiatives for the protection of Right to Privacy in the *ASEAN* region.

3.5.1.3. The Municipal Legal Framework

Apart from the international and regional instruments, there have been various municipal laws of different countries protecting the Individual Privacy. Those are stated hereunder:-

3.5.1.3.1. A Study of the Common Law Countries

The *Common Law System* chiefly denotes the English legal system which has come into being in England in consequent to the decisions of the royal courts of justice since the Norman Conquest. This legal system is originated in England, but, apart from English Law, the Common Law Family includes all the laws of English-speaking countries, except *Scotland, Union of South Africa and Louisiana.* Moreover, apart from the English-speaking countries, the influence of Common Law is found to a considerable extent in almost all the countries, which have been or are still politically linked with England. Specifically, the prominent Common Law Countries are *U.S.A., U.K., India, Australia, Canada and South Africa.* The sources of Common Law are as follows:-

(i) *Decisions of the Courts.*

(ii) *Statute Law.*

(iii) *Custom.*

(iv) *Reason.*[19]

Though the Common Law Countries are based on the judicial decisions and customs for solving their legal problems and statutory laws are recent creations therein, but they have tried to establish a full proof law protecting the Individual Right to Privacy in those countries. *U.K.*, the originating country had tried to develop a complete law on Individual Privacy since *1848*, when there was no such law and the cases of Individual privacy violations were decided on the basis of the breach of confidence. On the contrary, *U.S.A.* had established a well-developed law on Individual Privacy in the year *1890.* The third important country *India* had a well-defined law on Individual Privacy in the ancient and medieval period, which has been deteriorated to some extent in the modern period. As regards *Canada*, it

[19] A. R. Biswas, *Modern Jurisprudence*, Kamal Law House, Kolkata, 1998, pp.415-416.

has incorporated Bill of Rights only in the recent period. Again, *Australia* has mostly unwritten laws like the England in olden days. The position of *South Africa* is yet to be decided.

The development of Right to Individual Privacy and the present position of this right in the Common Law Countries are discussed below:-

3.5.1.3.1.1. U.K. : The Originator of Common Law

U.K. is the originator of the Common Law System, but due to the absence of written laws in *U.K.*, it has become dependent on the customary rules and regulations since the very old period. In this background, the development of Privacy Laws has not become possible. Only the process of development has been started since *1848* and before that, the cases of Individual Privacy violations were decided on the basis of breach of confidence. The recent formulation of the *Human Rights Act, 1998* is an important initiative for the development of this right in *U.K.*

3.5.1.3.1.2. U.S.A. : Common Law with a Written Constitution

Though the legal system in *U.S.A.* is based on the Common Law principles, but certain amount of deviations are found therein. As for example, written Constitution and Bill of Rights have been established in *U.S.A.* in *1776.* Also it has started its initiatives for protection of Right to Individual Privacy since the very old period, which has taken a good shape by way of creating a well-developed law on Individual Privacy in *1890.* Moreover, it has enacted the *Privacy Act, 1974* and a number of other statutes for the protection of Right to Individual Privacy in *U.S.A.* in the recent period.

3.5.1.3.1.3. India : A Country based on British Common Law

India is another important Common Law Country and is very much influenced by the legal principles of the English Common Law System, because it was under the British Colonialism of prolonged 200 years. Inspite of its dependency on Common Law System, again certain deviations are found from that system in India. As for example, the making of the *Indian Constitution in 1950* and the incorporation of the *Fundamental Rights in Part-III of the Indian Constitution* are the important initiatives in this respect. The main reason behind the deviation is that, *India* had a well-advanced law of Individual Privacy in the ancient and medieval period, which the Indian Government has started to revive in the post-independence

era. Though the ancient heritage of Right to Individual Privacy has been deteriorated to some extent in modern *India,* but it has again revived in the *Nuth Mull vs. Zuka-Oollah Beg and Kureem Oollah Beg case, 1855,* which has been decided by the *Sadar Diwani Adalat of the North-Western Provinces.* As such, it has been the first Indian Case on Right to Individual Privacy, which has shown the evidence of existence of Individual Privacy laws in *India* parallel with *U.K. and U.S.A.* Apart from that, it is noteworthy to mention that, there is absence of express statutory provisions on Right to Privacy as a whole in *India,* but a number of statutes are found dealing with various aspects of Privacy in their various provisions in this Country.

3.5.1.3.1.4. Australia : A Patchwork of Divergent Legal Principles

Australia is such an important Contemporary Western democracy, which is subjected to the absence of *Bill of Rights.* The legal system of *Australia* is based on the Common Law, where no written Constitution is found. It is having a complex and pluralistic society, where the unsystematic nature of laws shows the existence of Right to Privacy in somewhat haphazard manner. Also, there is reluctance of the Australian approach to consider various legal issues including Right to Privacy from the perspective of fundamental rights and freedoms.[20]

Therefore, the *Australian Law* relating to Privacy consists of a patchwork of constitutional principles, statutes of Commonwealth, State and Territory, Common Law principles and causes of self-regulatory codes of conduct.[21] The creation of all the principles of Law of Privacy in *Australia* has been made only in the recent years.

It has been decided by the *High Court* in *Victoria Park Racing and Recreation Grounds Co. Ltd. vs. Taylor*[22] that, there is no general statutory or Common Law Right to Privacy under *Australian Law.*[23] However, attempts have been taken in *Australia* to codify the Law of Privacy since *1970,* but achievements have been made only in the area of data protection and not in the area of protection of Individual Privacy. In the area of data protection, two Acts have been enacted, the *Privacy Act, 1988 (cth)* and the *Privacy Amendment (Private Sector) Act, 2000 (cth).*

[20] David Lindsey, "*Freedom of Expression, Privacy and the Media in Australia*", in Madeleine Colvin (ed.), *Developing Key Privacy Rights*, Hart Publishing, Oxford and Portland, Oregon, 2002,p.159.
[21] *Id* at p.160.
[22] (1937) 58 CLR 479.
[23] *Supra Note 20 at p.167.*

As such, in case of violation of Individual Privacy not involving any element of data protection, action cannot be taken under the above-mentioned Acts, instead action has to be taken only under the other forms of law not specifically designed to protect Privacy, which are as follows:-

(i) *The Tort of Trespass.*

(ii) *The Tort of Defamation.*

(iii) *An action for Breach of Confidence.*[24]

It has also been tried in *Australia* to give recognition to Right to Privacy as a fundamental right and thereby it has been given limited direct recognition by the following two mechanisms:-

(i) The principle of statutory interpretation that legislation will be assumed not to infringe fundamental rights and freedoms applicable to Individual Privacy.

(ii) *Australia* is a party to a number of international instruments that recognise privacy interests including *Article 17 of the International Covenant on Civil and Political Rights, 1966,* which provides for protection against arbitrary or unlawful interference with Individual Privacy.[25]

Therefore, Individual Privacy is protected only to a limited extent in *Australia.* Among the Common Law Countries, *Australia* has tried to develop a well-advanced law of Privacy, but it is still in the developing stage therein. In the absence of Constitutional provisions of Bill of Rights and express legislations on Right to Privacy, the whole law of Privacy in *Australia* has to depend upon the Data Protection Law and the Common Law actions under the Law of Torts as well as the equitable actions Breach of Confidence. None of those laws are Laws of Privacy and as such protection of Individual Privacy is not possible by those laws. The *Australian Legal System* lacks protection of Individual Privacy. Hence, the time has come to adopt adequate Privacy Laws in *Australia* for protection of Individual privacy.

3.5.1.3.1.5. Canada : A Combination of Different Legal Systems

Canada is another Common Law Country under the regime of Privacy Laws. Though *Canada* is considered as a Common Law Country due to the prolonged British Colonialism, but it was under the French Colonialism also and as such, it has

[24] *Ibid.*
[25] *Id at pp.167-168.*

the impacts of Civil Law System. Moreover, it is subjected to the profound influence of U.S.A., which is a combination of British Common Law, Spanish and French Civil Law. Due to these reasons, almost every subject of *Canadian Law* is having influences of English, French or U.S. legal principles. In fact, all jurisdictions of *Canada* are Common Law jurisdictions, except Quebec, which is a civil code jurisdiction.[26] In this sense, *Canadian Legal System* is not a single legal system; rather it is a combination of different legal systems.

The *Canadian* law of privacy is also a mixture of Common Law principles of Law of Torts, Statutory Provisions of Privacy, Human Rights Codes and the *Canadian Charter of Rights and Freedoms, 1982.* In fact, the development of Right to Privacy in *Canada* has been started with the publication of the famous *Warren-Brandeis* article titled *"The Right to Privacy",* in the *Harvard Law Review in 1890,* in *U.S.A.* It has also the profound influences of the U.S. Supreme Court decisions. As such, the development of Privacy in the *Pre-Charter* era in *Canada* is influenced by the following three documents:-

(i) *The Warren-Brandeis Article in the Harvard Law Review in 1890.*

(ii) *The Article 12 of the Universal Declaration of Human Rights, 1948.*

(iii) *The Article 17 of the International Covenant on Civil and political Rights, 1966.*

Though *Canadian Law* is very much influenced by the above-stated international instruments, but these instruments have little impact on the judicial development of Right to Privacy in *Canada.* There are two important factors in *Canada* for determining the claims for invasion of Privacy, which are as follows:-

(i) *The Quebec Charter of Rights and Freedoms*.

(ii) *The National Charter of Canada.*[27]

Study reveals that, *Canadian Privacy Law* is a combination of Individual Privacy, Data Privacy, Constitutional or Human Right to Privacy and Criminal Law of Privacy. In this sense, it is not confined to Individual Privacy only; rather there is a little application of Individual Privacy found in *Canada*. However, certain aspects of Individual Privacy are found in *Canada,* which are pertinent to mention in this respect.

---

[26] Marguerite Russell, "*The Impact of the Charter of Rights on Privacy and Freedom of Expression in Canada*", in Madeleine Colvin (ed.), *op.cit*., p.100.

[27] *Id at pp.104-105*.

The *Canadian Charter of Rights and Freedoms* has been enacted in *1982*, which does not include the Privacy Rights directly. The next period is called the *Post-Charter* era. However, Right to Privacy has been excluded from the Charter, but by way of liberal interpretation, the Supreme Court of *Canada* has declared that, the Right to Privacy has been recognised as one of the fundamental rights and freedoms under the Charter.[28] This decision has been given by the *Canadian Supreme Court* in the case of *Hunter vs. Southam.*[29] Since the decision of this case, Privacy has played a very important role for the interpretation of a number of provisions of the *Charter*.[30] Most important provisions among them are as follows:-

Section – 7

> *"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".*

Section – 8

> *"Everyone has the right to be secure against unreasonable search or seizure".*

Therefore, these two sections of the *Canadian Charter* though do not directly related to the Right to Privacy, but have helped to develop this right in *Canada* by way of broader interpretation. It is also important to note that, only the *Canadian Charter of Rights and Freedoms, 1982* is applicable to Individual Privacy in *Canada* and that also by way of indirect application as well as broader interpretation. Apart from that, no such legal provision is found in *Canada* relating to Individual privacy. But, there is one defect of the *Canadian Charter* that, it is applicable to the governmental actions only and not the private actions. As such, it cannot be made applicable directly to the Common Law principles of torts, unless the government action is involved. However, the main advantage of the *Charter* is that, it has created the scope open for the judicial recognition of Right to Privacy. Therefore, it is not problematic in *Canada* to enhance Individual Right to privacy on the basis of the *Charter* and by way of judicial interpretation.

[28] *Id at pp.106-107.*
[29] (1984) 2 SCR 145.
[30] *Supra Note 26 at p.107.*

3.5.1.3.1.6. South Africa : A Conglomeration of Different Laws

The next important country in this respect is *South Africa*, which, though considered as a Common Law Country, but practically is a mixture of *Roman-Dutch Law, English Common Law and Customary Law.*[31] The present *South African Law* is called a *Multi-Layer Law*, which consists of *Tribal Law and Islamic Law (Sharia), Statute Law, English Law, Roman-Dutch Law as Common law and Roman law (Civil Law).*[32] In this sense, it is a conglomeration of different laws, the main reason behind which is the prolonged colonialism in *South Africa* by the Dutch and British. As such, the country follows both the Common Law and Civil Law principles for framing its laws.

In this background of mixed legal system, it is very tough to formulate written laws based on the legal principles of any particular legal system. Inspite of that fact, *South Africa* has enacted statute laws on various subjects including the Right to Privacy. In *South Africa*, the Right to Privacy has been dealt with both by the *Common Law* and the *Constitution of the Republic of South Africa, 1996. Chapter 2* of the *Constitution* deals with the *Bill of Rights*, wherein *Section 14* provides for the protection of Right to Privacy, which runs as follows:-

> *"Everyone has the right to privacy, which includes the right not to have:*
> *(a) Their person or home searched;*
> *(b) Their property searched;*
> *(c) Their possessions seized; or*
> *(d) The privacy of their communications infringed."*[33]

As a whole, the above-stated *Section 14 (a), (b) and (c)* protects an individual from searches and seizures, while *Section 14 (d)* covers a broad area of protection of Privacy as the Privacy of Communications, which is based on the

---

[31] S. D. Girvin, "*The Architects of the Mixed legal System*," in R. Zimmermann & D. Visser (eds.), *Southern Cross: Civil and Common Law in South Africa*, Kenwyn, 1996, p.95; Christa Rantenbach, "*South African Common and Customary Law of Interstate Succession: A Question of Harmonization, Integration or Abolition*," Electronic Journal of Comparative Law, Vol.12.1, May, 2008, pp.1-15 at p.2, www.ejcl.or/121/art 121-20.pdf, visited on 15.3.2015.

[32] Beat Lenel, *The History of South African Law and its Roman-Dutch Roots*, Toeberstrasse 23a, 9425 Thal, Switzerland, 2002, p.7, www.loenel.ch/docs/history-of-sa-law-en.pdf, visited on 15.3.2015.

[33] C. M. van der Bank, "*The Right to Privacy – South African and Comparative Perspectives*," European Journal of Business and Social Sciences, Vol.1(6), October 2012, pp.77-86 at p.78, www.ejbss.com/Data/Sites/1/octoberissue/ejbss-12-1164-therighttoprivacy.pdf, visited on 15.3.2015.

Common Law principles of *actio iniuriarum (action for invasion of Privacy)* taken from the old *South African Law*.[34]

Moreover, for the purpose of in-depth study, an analysis of the above-stated *Section 14* as a whole is required. The Section does not only deal with general Right to Privacy, but it has tried to protect a number of specific areas of Right to Privacy. Therefore, in an analysis of the Section, the following components of Right to Privacy may be found:-

(i) *Privacy of Person or Individual or Personal Privacy.*

(ii) *Privacy of Home.*

(iii) *Privacy of Property.*

(iv) *Privacy of Possessions.*

(v) *Privacy of Communications or Data Privacy.*

As such, the section has dealt with various components of Privacy including Individual Privacy, but it has given protection to these areas of Privacy only from search and seizure, which may be sufficient for Privacy of Home, Property or Possession, but obviously insufficient for Privacy of Person or Individual Privacy. In this sense, this section is having limited application for the purpose of protection of Individual Privacy; rather it has given for better protection to Privacy of Communication than Individual Privacy. This fact gives the evidence of absence of ample laws on Individual Privacy in *South Africa.*

In fact, no express legislation is found in *South Africa* dealing with the specific protection of Right to Privacy. As such, the protection of this right largely depends upon the Common Law principles and the Constitution. Moreover, *Section 7(2)* of the *Constitution* gives further impetus to the process of protection of Privacy, which provides that, the State should respect, protect, promote and fulfil the rights in the *Bill of Rights.* It is also helpful for the protection of Individual Privacy. Therefore, this section creates the provision by way of which protection of Right to Privacy is upheld in *South Africa.*[35]

Therefore, *South Africa* has taken a good initiative for the protection of Right to Privacy in that country. But, certain exceptions are also found therein, which are called reasonable restrictions on Right to Privacy and Right to Privacy can be

[34] *Id at p.79.*
[35] *Ibid.*

curtailed only on those grounds. Among them, *Public benefit or Public interest* is the most important ground, on which Individual Privacy may be curtailed. As such, it is a reasonable restriction on Individual Privacy.

3.5.1.3.2. A Depiction of the Civil Law Countries

The *Civil Law System or the Romano-Germanic System* of law has been originated in the ancient *Rome* and has been subjected to the evolution of more than a thousand years. This law is the result of the Roman legal theory, which is based on the *Justinian's Code.* The *Civil Law System* is found in many countries throughout large part of *Africa,* the Countries of *Near East, Japan and Indonesia.* This *Civil Law or Romano-Germanic system of law* has been expanded in the other countries due to colonialism and by way of codification. Natural Law School is the creation of this legal system. The chief exponents of this legal system are *France, Germany, Spain and Netherlands.* As the Natural Law School has established fruitful relations between administration and private individuals and has started codification of laws, the *Romano-Germanic law* has spreaded to various countries. Such countries include the *Spanish, Portuguese, French and Dutch colonies in America, Black Africa and Madagascar* as well as the *Asian Countries, like Turkey, Arab States, Japan, Thailand, the Philippines and South Korea.* The sources of Civil Law are as follows:-

(i) *Legislation.*

(ii) *Custom.*

(iii) *Decided Cases.*

(iv) *Legal Writing.*

(v) *Super-eminent Principles.*[36]

The main difference between the *Common Law System* and the *Civil Law System* is that, the first one is based on custom and precedents, whereas, the second one is based on legislations. The first is influenced by the royal power, whereas, the second is influenced by the community of culture and finally, the first is concerned with the public law, while the second is concerned with the private law.[37] Due to these differences, the countries under the *Common Law and Civil Law* are differentiated. However, the *Civil Law* countries are based on legal principles and as

[36] *Supra Note 19 at pp.413-414.*
[37] *Id at p.420.*

such; they are flourished with advanced legislations on diverse subjects, including Right to Privacy. The most important *Civil Law* countries, where Privacy Laws have been flourished, are *France and Germany*. The advanced legal principles of these countries have influenced the Socialist countries, like *China* to follow these legal principles. Therefore, the importance of these countries for the development of legal rules and regulations can be easily understood.

These countries are not only enriched with Privacy Laws but have made significant contribution for the development of Individual Privacy therein. As such, the development of Right to Individual Privacy and the present position of this right in the *Civil Law* countries are discussed below:-

3.5.1.3.2.1. France : The Chief Exponent of Civil Law System

The basic principles of law have been found to be different in the *Common Law* countries and the *Civil Law* countries, which has a great influence in the formulation of Privacy Laws in both the countries. As such, the legal protection against public disclosure of an individual's private life is subjected to great differences between the *Common Law* and *Civil Law* countries. Due to this reason, two different approaches are found with respect to protection of Privacy in these two legal traditions.[38] Such a system of difference between the two has helped the *Civil Law* countries to develop their Privacy Laws.

France is one of the important *Civil Law* countries, which has tried to protect the Right to Privacy in a very serious manner. The traces of Privacy have been found in *France* since the very old period. The first legal instrument in this respect has been the *Declaration of the Rights of Man and the Citizen, 1789,* which has a specific provision declaring the private property as inviolable and sacred. This provision is considered as the origin of Privacy in *France.* Apart from that, several specific remedies are found in *France* for particular invasion of Privacy.

The protection of Right to Privacy has been accorded a special status in *France.* The system of human rights protection in *France* is based on the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* and as such the 'Right to Privacy' is equated therein with the 'Right to respect for private life'. The notion of private life has been expanded in *France* since the end of

[38] James Michael, *op.cit*., p.15.

the 19th century by way of judicial development of *French Law* for the purpose of combating the increasing number of breaches caused by the publication of photographs.[39]

In fact, Right to Privacy and Right to respect for private life, both are equated in *France.* But, there are certain differences between the two; Privacy does not always mean private life and vice-versa. However, if both of them are equated, then obviously private life is related to Individual Privacy and not to any other type of Privacy. Hence, no direct provision of Right to Privacy is available in *France* and what is available in the name of Privacy, is actually the Right to respect for private life, which has certain indirect application with Individual Privacy.

3.5.1.3.2.2. Germany : A Mixture of Statutory and Case Laws

The next important *Civil Law* country after *France* is *Germany.* The *Federal Republic of Germany* is based mainly on the legal structure of the *U.S.A.* As such, like the *U.S.A.,* it is a federal republic with a written Constitution and a list of fundamental rights. It has also a number of works on the theory of Privacy and various specific provisions for the protection of Privacy. The Constitution has incorporated a number of provisions for the protection of Privacy. In this sense, Right to Privacy has occupied a very prominent place in *Germany.*[40]

The Privacy Law in *Germany* does not only based on the *U.S. Constitutional model,* but it has the effects of the *Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.* In this sense, the *German Law of Privacy* has also taken the approach made by the *U.K.* Courts on Privacy, consequent to which the *German Privacy Law* has been developed case by case.[41] As such, the *German Privacy Law* is subjected to both the legal approaches – *Common Law and Civil Law, Common Law* approach is the judicial development and *Civil Law* approach is the Constitutional development.

At the very beginning, there has been no express provision relating to Right to Privacy in *Germany.* But, gradually the law has been developed in this respect and now, a highly developed Right to Privacy is found in *Germany,* which has been

[39] Catherine Dupré, "*The Protection of Private Life versus Freedom of Expression in French Law*," in Madeline Colvin (ed.), *op.cit*., p.45.
[40] James Michael, *op.cit*., p.92.
[41] Rosalind English, "*Protection of Privacy and Freedom of Speech in Germany*," in Madeleine Colvin (ed.), *op.cit*., p.77.

evolved by the judgements of the *Federal Constitutional Court* and the *German Law* is *Constitution-based* and in fact, the following three types of law are found in *Germany:-*

(i) *The Basic Law (Grundgesetz)* – It is the *Constitutional Law* applied by the *Federal Constitutional Court.* It is the first source of *German Privacy Law.*

(ii) *The Civil Code (B (rgerliches Gesetzbuch)* – It deals with the rights and obligations between private parties.

(iii) *The Criminal Law Code (Strafgesetzbuch).*[42]

Apart from that, there are also certain *Federal and State Laws,* which have contributed towards the development of Privacy in *Germany.* The most important among those, is discussed below:-

(i) *The Constitutional Court* has interpreted the rights contained in the *Basic Law* as inviolability of human dignity *(Article 1)* and free development of the personality *(Article 2)* to recognise and protect the Right to Privacy.[43]

Though there have been no traces of Privacy Laws in *Germany* at the very beginning, but gradually three types of Privacy Laws have been developed therein – *Constitutional Law, Civil Law and Criminal Law.* Among these laws, the *Basic Law or Constitutional Law* is the appropriate law, dealing with Individual Privacy, because it deals with inviolability of human dignity and free development of human personality. It also, tries to protect these rights. These rights are nothing but another name for Individual Privacy. Therefore, *German Basic Law* is applicable to Individual Privacy.

Moreover, *German Law* has tried to make provisions for protection of Privacy in all-round manner, with the help of *Constitutional Law, Civil Law, Criminal Law and Law of Torts.* The remedy under the *Law of Torts* is similar to *U.K. Law* and the remedy under the *Constitutional Law* is similar to *U.S.A. Law.* In this sense, *German Law of Privacy* is a combination of the principles of *English Common Law, Constitutional Law of U.S.A. and other Civil Laws.*

The Basic Law of 1949 has created provisions for protection of Right to Privacy based on the right to dignity and development of personality. In this respect,

[42] *Ibid.*
[43] *Id at p.78.*

the *Basic Law* contains various provisions for the protection of Right to Privacy, which are stated below:-

Article – 1

"The dignity of the human being is inviolable."

Article – 2(1)

"Everyone has the right to the free development of his personality, in so far as he does not injure the rights of others or violate the constitutional order or the moral law."[44]

In this respect, another important article of the *Basic Law* is stated below:-

Article – 2(2)

It provides the 'inviolability of one's person'.[45]

Therefore, the *German Basic Law* for the protection of Right to Privacy since *1949,* that means, just after the establishment of the *United Nations* and the adoption of the *Universal Declaration of Human Rights, 1948.* This is the clear indication that, when the concern for protection of human rights has been raised world over, *Germany* has also become a party to it. Due to that reason, it has always tried to create a well-established law on privacy. In this respect, it is pertinent to mention that, the rights incorporated in the *Basic Law* are considered as fundamental rights, which can be used to provide remedy in private disputes also and in this sense, can be applicable to cases of invasion of Privacy.

Hence, the provisions relating to fundamental rights of the *Basic Law* have become helpful for the protection of Individual Privacy. In fact, these are the laws, which can be used to uphold Individual Privacy in *Germany.* The express codification of laws of Individual Privacy in the *German Basic Law* has made it much more powerful in comparison to other *Civil Law* countries and many *Common Law* countries. The provisions of *inviolability of human person, human dignity and free development of human personality* are nothing but the incorporation of *Warren-Brandeis principle of Privacy into German Law.* As the *Warren-Brandeis principle of Privacy* is the law of *Individual Privacy,* therefore, incorporation of this principle into the *German Law* has altogether enriched the *German Law of Individual Privacy.* In this sense, *Germany* has also followed the legal norms of *U.S.A.* and has

[44] *Id at p.79.*
[45] James Michael, *op.cit*., pp.92-93.

stepped into the same footing. Therefore, *Germany* has tried to create a well-established Law of Individual Privacy in an all-round fashion therein.

3.5.1.3.2.3. China : A Complex Pattern of Legal Structure

China is another important *Civil Law* country dealing with the Right to Privacy. Though the legal system of *China* is called the Socialistic pattern of legal system, but actually it is not totally based on the *Socialist Structure* like the erstwhile *U.S.S.R.* or the *Soviet Russia.* In fact, after the collapse of *U.S.S.R.,* when the *East European States* have reverted back to their original position, *China* has also released itself from the *Marxism-Leninism and Communist Theory of Law.* From that time, the characteristics of *Civil Law System* have shown their full proof existence in *China,* which had been in the dormant stage previously. However, the *Chinese Legal System* was enriched by the European legal techniques of *France and Germany,* i.e. the *Civil Law System* from the very beginning, which has been fruitfully implemented in the recent period. It has never been influenced by the *English Law System.*[46]

In this complex pattern of legal structure, *China* has started to develop and protect various human rights of its citizens including the Right to Privacy. But the development of Right to Privacy in *China* is lagging far behind the initiatives of the Western countries. In fact, it has started thinking about this right only in the recent period and as such, it is running at least 10 years behind the Western countries. The concerns relating to Privacy have been raised only since *1980* and the cases relating to Privacy matters have come in the picture since *1990.* During the period of *1990-2000,* everyone has been concerned with the general idea of Privacy and a number of cases have been found on the Right to Reputation. After *2000,* various new aspects of Right to Privacy have come into being, like the Right to Privacy of specific groups including the minors, students, patients, employees and consumers. However, the legislative developments of privacy in *China* have been started with the drafting of the *Civil Code in 2002.* Gradually, various other *Chinese Laws* have tried to protect Right to Privacy and at present, a number of such legislations are

[46] *Supra Note 19 at pp.420, 422, 424.*

found in *China*. But, the general awareness regarding Right to Privacy is absent in *China* and the present laws are also insufficient to protect Privacy Rights.[47]

As regards the *Chinese concept of Privacy*, it is found that, existence of Privacy was not found in the ancient *China.* The *Chinese* term for Privacy is *'Yinsi',* which is not equivalent with the Western view of Privacy. *'Yinsi'* is made of two words – *'Yin' and 'Si',* where *'Yin'* means *'hide'* and *'Si'* means *'private'.* This word *'Yinsi'* is most familiar among the *Chinese* people to denote *Privacy.* Similarly, *'Yinsi'* is also used to define the English terms *'Privacy, Personal Secret or Shameful Secret'.* As such, confusion is created regarding the meaning of *privacy* as *'Yinsi'* and shameful secrets as *'Yinsi'.* Due to this reason, *Chinese* people have misunderstood Privacy as shameful secret acts, which they do not wish to disclose in the public. In consequent to such misunderstanding, *Chinese* people have avoided to observe Privacy and have not bothered about the invasion of privacy. This is another impediment of the growth of Privacy in *China.*[48]

Since *1990*, *Chinese* scholars have started to define Privacy. Various definitions have been provided in this respect, among which the most important definition is given by *Professors Wang and Yang.* According to them, Right to Privacy means as follows:-

> *"A right enjoyed by natural person, under which the person is having freedom from publicity and any interference by others with personal matters only related to the person and personal information such as affairs in the area of personal life."*[49]

Again, according to *Professors Wang and Yang,* the essential characteristics of the Right to Privacy are as follows:-

(i) *The subject of the right to privacy can only be a natural person.*

(ii) *The objects of the right are private activities, and personal information.*

(iii) *The scope of protection of the right is limited by the public interest.*[50]

The definition of Privacy provided by *Wang and Yang* has been considered as very important from the perspectives of *Chinese* idea of Privacy and as such, it

---

[47] Cao Jingchun, "*Protecting the Right to Privacy in China*," VUWLR, Vol.36, 2005, pp.645-664 at p.645, www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-36-2005/issue-3/jingchum.pdf, visited on 17.3.2015.

[48] *Id at pp.646-647.*

[49] Wang Limin and Yang Lixin (eds.), *The Law of Rights of The Person*, The Press of Laws, Beijing, 1997, p.147.

[50] *Id at pp.146-148.*

has been adopted by the draft *Civil Code of 2002.* However, the *Chinese Constitution* and various *Chinese Legislations* have tried to protect the Right to Privacy. The following constitutional and legislative provisions are pertinent to mention in this respect:-

(i) *Article 38 of the Constitution, 1982* provides that, 'the personal dignity of Citizens of the *People's Republic of China* is inviolable'.

(ii) *Articles 37, 39 and 40* respectively define the 'protection of freedom of the person, the residence, freedom and privacy of correspondence'.[51]

Therefore, *China* has taken good attempt for the protection of *Right to Privacy.* As regards *Individual Privacy,* it is pertinent to mention that, the definition of *Professors Wang and Yang* has highlighted the areas of Privacy of Person and Personal matters. Again, according to them the subject of Right to Privacy can only be a natural person. All these factors point towards the direction of Individual Privacy. As such, *Professors Wang and Yang* have definitely tried to protect Individual Privacy of the Citizens' of *China.* Moreover, the *Chinese Constitution, 1982* has made the personal dignity of *Chinese* Citizens' inviolable and also has tried to protect freedom and privacy of the person through its various articles. In this sense, *Chinese Constitution* has also created provisions for the protection of Individual Privacy in *China.* In an analysis, it can be found that, by creating the provisions of inviolability of personal dignity of *Chinese Citizens,* the *Chinese Constitution,* in fact, has supported the *Warren-Brandeis* views of Individual Privacy of *U.S.A.* Hence, on this point, no difference is found between the Common Law Countries and Civil Law Countries. This similarity has brought all of them under one umbrella by creating togetherness among them.

Though the *Chinese Constitution* does not recognize Right to Privacy directly, but it has tried to protect this right under the guise of personal dignity and freedom of person. Again, the *General Principles of Civil Law* has tried to protect the right to personality of the individual citizens, remedy for the violation of which is compensation under the *Civil Law.* Therefore, the major laws of the country have incorporated various legal provisions for the protection of Privacy. All the above-

[51] Ghobin Zhu, "*The Right to Privacy : An Emerging Right in Chinese Law*", Statute Law Review, Vol.18(3), 1997, pp.208-214 at pp.210-211, www.academia.edu/237240/The_Right_to_Privacy_-_An_Emerging_Right_in_Chinese_Law.pdf, visited on 17.3.2015.

stated legal provisions in *China* are applicable to Individual Privacy. Hence, *China* has taken considerable initiatives for the protection of Individual Privacy. The attempts taken by *China* in this respect are noteworthy, though it has come in the field many years after than the Western Countries. Inspite of the complex legal system and various other hindrances in *China*, like the confusion and lack of general awareness regarding Individual Right to Privacy, the attempts taken by *China* for protection of Individual Privacy, is no doubt, praiseworthy.

3.5.1.3.3. A Portrayal of the Nordic Law Countries

The *Nordic Law* or *Scandinavian Law* means the law of the *Scandinavian* countries. The *Scandinavian Peninsula* situated between the *Atlantic Ocean* and the *Baltic Sea* in *Europe,* is called the *Scandinavia.*[52] A number of countries are situated in this part of *Europe,* like *Norway, Sweden, Denmark, Finland, Iceland and Greenland.* These countries are not only geographically located in the same area, but also they are historically and culturally similar. Due to their similarities, they are grouped under one head and called the *Scandinavian* or *Nordic Law* Countries. The legal systems of these countries are more or less similar and obviously different from the *Common Law System* or the *Civil Law System (Romano-Germanic Family).* Due to the dissimilarity with the other Families of Law, *Scandinavian* countries are governed by another system of law, called the *Nordic Legal System* or the *Nordic law*. The *Nordic Legal System* is characterised by the *limited importance of the legal formalities, the lack of modern codifications and the absence of acceptance of Roman principles of Law.*[53] Another important feature of this legal system is that, it is also based on *Judicial Precedents or case by case development of law.* In this sense, it has few similarities with the *Civil Law System and the Common Law System* both, but there are dissimilarities also, by reason of which, it is grouped under the separate head of legal system, called the *Nordic Law.*

The *Nordic Law* has tried to create its own legal principles on every sphere of law. The *Nordic Law* countries have enacted various statutes on different subjects of law including the Human Rights Law. More specifically, *Nordic Law* is well-known for protection of Right to Privacy as a whole. Though the *Nordic Law*

[52] Ulf Bernitz, "*What is Scandinavian Law? Concept, Characteristics, Future*", Stockholm Institute for Scandinavian Law, 1957-2010, p.15, www.scandinavianlaw.se/pdf/50-1.pdf, visited on 18.3.2015.
[53] *Id at p.20.*

countries have separately enacted Privacy Protection laws for their countries, but these countries are famous for taking combined efforts for the protection of Right to Privacy in general. The specific style of *Nordic Law* is to protect privacy by way of combining the principle of publicity and the principle of data protection. But the most important initiative of the *Nordic Law* in the field of Privacy has been to provide a comprehensive definition of Privacy well-accepted by the whole Western World. In fact, the importance of *Nordic Law* is considered above the *Common Law and Civil Law* in the field of Privacy due to this initiative of providing a comprehensive definition of Privacy.

In this respect, *The Nordic Conference of Jurists* has been held in *Stockholm in May, 1967,* which has been meeting of the legal authorities from every part of the world by the *International Commission of Jurists.* The *Conference* has declared a number of rights under the head 'Right to Privacy', by way of which it has tried to define 'Privacy' in an all-round manner covering its all aspects. The *Conference* has given the *Nordic Law,* worldwide recognition and the Privacy Laws of the *Nordic Law Countries* have been enacted based on this *Conference.* Due to this reason, the *Nordic Law Countries* are having good amount of Privacy Laws. The most important *Nordic Law Countries* having Privacy Laws are *Sweden, Denmark and Norway.* The Privacy laws of these three countries, more specifically covering the areas of Individual Privacy, are discussed hereunder.

3.5.1.3.3.1. Sweden : Unidirectional Attitude towards Privacy Protection

Sweden is the first and foremost *Nordic Law* country, which has incorporated provisions relating to Privacy protection. In fact, from the very beginning *Sweden* has no general Right to Privacy and the Swedish people has not raised concern about the protection of general Right to Privacy. The *Swedish Constitution, 1766* has provided for public access of government documents, which is regarded as a means for monitoring information privacy. Even after the *Nordic Conference in 1967, Sweden* has not concentrated on the protection of personal privacy; rather it has concentrated on data privacy.[54] In this sense, it can be said that, *Sweden* has not tried to protect Individual Privacy, but has only tried to protect Data Privacy.

[54] James Michael, *op.cit*., p.14.

As such, Individual Privacy has, so far, been neglected in *Sweden.* No comprehensive steps are found therein for protection of Individual Privacy. Hence, the initiatives taken by *Sweden* are unidirectional only and not comprehensive.

3.5.1.3.3.2. Denmark : A Sequel of Sweden on Privacy Protection

Other *Scandinavian or Nordic Law Countries* have also taken initiatives for the protection of Privacy. In this respect, they have more or less followed the legal approach taken by *Sweden* for the protection of Privacy. Later on, they have also adopted the principle of publicity initiated by *Sweden. Denmark* is the next important *Nordic Law Country* after *Sweden,* which has taken measures for the protection of Privacy. For this purpose, *Denmark* has followed the rules established by *Sweden.*

Though *Denmark* has followed the *Swedish* rules for privacy protection, but it has its own earlier *Danish Laws* for privacy protection. One such important *Danish Law* is the *Article 72 of the Danish Constitution,*[55] which has tried to protect various aspects of Right to Privacy, like *Privacy of Home, Privacy against unreasonable searches and seizures, Privacy of Correspondence, Privacy of Information* and the like, but not *Individual Privacy.* In this sense, Individual Privacy is neglected in *Denmark* and the *Danish Constitution* has not made any provision for protection of Individual Privacy.

Apart from that, few other important legal aspects are found in *Denmark,* which are pertinent to mention in this respect. One is that, *Denmark* has not incorporated the *European Convention for protection of Human Rights and Fundamental Freedoms, 1950* in the domestic law; except that the courts therein have taken the view to interpret the legislations in conformity with Convention, unless anything contrary is expressed in the laws. Moreover, *Denmark* is highly influenced by the *German* legal thought and has supported the necessity of a general *'personality right'.* In this sense, *Danish theory* is similar to the *William Prosser's tort of 'appropriation of likeness'* as existed in *U.S.A.* and the *Danish Courts* have given judgements on the basis of this principle. Furthermore, inspite of these provisions *Danish Law* has not gone far to protect Individual Privacy and has remained concerned with Data Privacy only like *Sweden.* In this sense, *Danish Law*

[55] *Id at p.56.*

has recognized the rights of both natural and legal persons as well as has enacted separate laws for data protection in the public and private sectors.[56] Hence, the attempts taken by *Denmark* for the protection of Right to Privacy are good, but are not good enough for the protection of Individual Privacy. In fact, Individual Privacy is neglected therein and has not been developed so far, in *Denmark.* As such, it is high time for creating laws of Individual privacy in *Denmark.*

3.5.1.3.3.3. Norway : Both Similarities and Dissimilarities with Sweden

Among the *Scandinavian Countries*, *Norway* is another important country having the Privacy protection laws. Though the Privacy protection laws of *Norway* are based on the legal principles of *Sweden*, but there are other laws in *Norway*, which are dissimilar with *Sweden.* Like *Sweden, Norway* has enacted various data protection laws, but it is not only concerned with the data privacy and as such, it has other privacy protection laws also, as for example, *Norway* has enacted criminal laws on the area of Privacy. Moreover, case by case development of Right to Privacy is found in *Norway* like *U.S.A.*[57] In this sense, two differences are found between *Norway* and *Sweden,* one is the existence of the Criminal law in *Norway*, which has never existed in *Sweden* and the other is the *U.S.A.* based judicial development of Privacy Laws in *Norway*, unlike *Sweden.*

As regards Constitutional law, the *Norwegian Constitution* has never enumerated a Right to Privacy, except under *Article 102,* which is not concerned with the Privacy of Home or Individual Privacy, but only gives protection to Private Homes against unreasonable searches, which is permitted only in criminal cases. In this sense, *Danish Constitution* provides far better protection than the *Norwegian Constitution.* Moreover, *Norway* follows the dualistic theory of international and domestic law; as such the *European Convention for Protection of Human Rights and Fundamental Freedoms, 1950* is not directly enforceable in the *Norwegian Courts,* just like the *Danish Courts.* The Convention has only persuasive value for administrative and judicial interpretation like *Denmark.*[58]

Furthermore, the *Norwegian* data protection laws are similar to *Swedish* laws and are not applicable for protection of Personal or Individual Privacy. This law is

[56] *Id at pp.56-58.*
[57] *Id at p.15.*
[58] *Id at p.58.*

applicable to both privacy of natural and legal persons. It has separate laws for both public and private sectors. From this perspective, the laws of *Sweden, Denmark and Norway* are similar.[59] Therefore, it is found that, *Norway* is also concerned with data privacy only and Individual Privacy is neglected therein. As such, no laws are found in *Norway* for protection of Individual Privacy. In this sense also, the laws of *Sweden, Denmark and Norway* are similar.

Hence, *Norway* has tried to protect the Right to Privacy in its own way. Though it has certain similarities with the laws of *Sweden and Denmark*, but it has its specialities also in making the laws of Privacy. Therefore, the initiatives of *Norway* for protection of Privacy can be called good initiatives in respect to data privacy, but not in respect to Individual Privacy. The *Norwegian* laws are also not comprehensive on the point of protection of Right to Privacy, because Individual Privacy is neglected therein.

3.5.2. Privacy of Family and Marriage

Privacy of Family and Marriage is the next important component of Right to Privacy after Individual Privacy. In fact, any discussion of Privacy remains incomplete without the discussion of Privacy of Family and Marriage. Among various types of Family, most important are the Individual Privacy, Family Privacy, Social Privacy and Professional Privacy. As such, Family Privacy is an essential component of Right to Privacy. Moreover, Privacy cannot be separated from society. As an individual born and dies in the society, every right originates and ends in the society. Right to Privacy is no exception to it. In this sense, Privacy and society are interrelated. It can be clearly understood from the standpoint of Family and Marriage in the society.

The importance of Family in a Society can be Family provided by *McIver*. He said, *"The Family is a group defined by a sex relationship sufficiently precise and enduring to provide for the procreation and upbringing of children".* According to him, the essential features of a Family are as follows:-

(i) *Creation of husband-wife relationship between man and woman by following the social norms of Marriage.*

(ii) *Creation of hereditary descendants through Family.*

[59] *Id at p.59.*

(iii) *Creating necessary financial arrangements for procreation and upbringing of children.*

(iv) *Establishment of residence for providing shelter and independency to the Family.*

The above-mentioned essential features of Family are not only important for providing idea about the nature and functions of Family, but also important for creating relationship between Family and Marriage. According to *MacIver*, first and foremost function of Family is to create marital relationship between man and woman. His definition also denotes the necessity of sexual relationship for procreation and upbringing of children, which can only be legalised through marriage. Hence, the necessity of Marriage in a society can be easily assumed. Not only that, legalisation of sexual relationship is obvious in a society, otherwise legitimacy cannot be provided to children, which will also create hindrance for inheritance of ancestral property. Therefore, Marriage is must in a civilized human society and an ideal Family cannot be formed without Marriage.

In this context, the definition of Marriage is necessary to be provided. According to *Malinowski, "Marriage cannot be defined as the licensing of sexual intercourse but rather is the licensing of parenthood".* In this sense, Marriage denotes parentage and legitimacy of children, which is the fundamental basis of Family. The Family which is created by Marriage only gets the social status and is legitimate in the eye of law. According to *Talcott Parsons,* such Family has two fundamental functions in general. Those are called *"basic and irreducible functions".* According to him, those functions are as follows:-

(i) *"Primary socialisation of children".*

(ii) *"Stabilisation of the adult personalities of the population".*

Therefore, the functions of Family in a society can be understood. It can be more fully explained in the words of *Prof. Will Durant,* which are stated below:-

> *"The family has been the ultimate foundation of every civilization known to history. It was the economic and productive unit of society, tilling the land together; it was the political unit of society, with parental authority as the supporting microcosm of the State. It was the cultural unity transmitting letters and arts, rearing and teaching the young; and it was the moral unit, inculcating through co-operative work and discipline, those social dispositions which are the psychological basis and cement of civilized society. In many ways it was more essential than the State; government might break up and order yet survive, if the family remained;*

> *whereas it seemed to sociologists that if the family should dissolve, civilization itself would disappear".*[60]

The importance of Family and Marriage in the human society is undeniable. But, the functions of Family and Marriage remain incomplete without Right to Privacy, because various functions of Family and Marriage can flourish only in the environment of Privacy. Most important function of Family is to establish marital sexual relationship and procreation of children. These two functions can only be performed in the situation of Privacy. Moreover, various other functions like upbringing of children, nursing of the aged persons, performance of private rituals, intellectual, cultural and emotional development of mind of the family-members etc. also require the environment of Privacy. Each and every Family usually has certain intimate relationships, which the family-members do not wish to share with the outsiders. Hence, they require Privacy. In fact, history shows the evidence of existence of Privacy in the families of primitive and ancient civilizations. Outsiders were not allowed in those families, Privacy of the ladies was maintained, various kinds of private rituals were practised and married couple needed Privacy for having sexual intercourse. In some families, where privacy was absent, married couple used to go to some secluded place for making sexual relationship. Even in the modern technologically advanced societies, Families are subjected to Privacy. In modern society, family-members are generally living in separate rooms, enjoying independent decisions in their private matters and having Privacy in the practice of food habit, clothing and various aspects of their lives. Hence, Privacy is part and parcel of Family and Marital life, without which the existence of Family and Marriage in the society is unthinkable.

Privacy of Family and Marriage is upheld by various legal instruments all over the world, which are discussed below.

3.5.2.1. The International Legal Regime of Privacy of Family and Marriage

A number of international legal instruments have been found protecting the Privacy of Family and Marriage. Those are stated hereunder:-

[60] Will Durant, "*The Mansions of the Philosophy*", in Augustine J. Osgmiach, O.S.B., *The Philosophical Roots of Law and Order*, 1970, p.280.

3.5.2.1.1. The Standpoint of Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights, 1948 is the first international legal instrument, which has dealt with the Privacy of Family and Marriage. In this respect, *Article 12* of the Declaration is noteworthy, which has tried to protect this right, the word for word version of which has already been discussed. Though this article has given protection to various components of privacy, but it has specifically accorded protection to Privacy of Family and Marriage. In this sense, if the above-stated article is analysed, the following components are found:-

(i) It has given protection to the Family Privacy.

(ii) It has prohibited arbitrary interference with the Privacy of Family.

(iii) It has enjoined legal protection to that right.

(iv) It has specifically given legal protection to that right against any kind of arbitrary attack or interference.

Therefore, from the analysis of *Article 12*, it can be found that, it has given protection to Privacy of Family and Marriage from any kind of arbitrary interference or attacks. Inspite of its positive contribution for the protection of Privacy of Family and Marriage, jurists have criticized *Article 12* for its incompleteness. According to them, the reasons behind the inclusion of the term 'Family' in the article, is not clear.[61] Inspite of the above criticisms, *Article 12* is supported by many authors, because it has the following advantage:-

(i) By this article, the concept of individual privacy has been extended to include the kinship *'Zone'* of the family.[62]

Hence, *Article 12 of the Universal Declaration* has both advantage and disadvantage as regards the protection of Right to privacy of Family and Marriage. One important point in this respect is that, it has mentioned about the Privacy of Family, but has never mentioned about the Privacy of Marriage. In this sense, it has expressly tried to protect Privacy of Family. But, that does not mean that, it has not tried to protect Privacy of Marriage. It has done it impliedly, because Family includes Marriage and as such, Privacy of Family obviously includes Privacy of

[61] James Michael, *op.cit.*, p.20.

[62] Samuel Warren, who wrote the seminal Harvard Law Review article '*The Right to Privacy'* in 1890 with Louis Brandeis, might have approved; the publicity given to his daughter's wedding inspired him to write, and his objection was at least in part on behalf of his family.

Marriage. In this respect, the attempt taken by the *Article 12 of the Universal Declaration* for protection of Family and Marital Privacy is a good attempt.

It is also pertinent to mention here that, *Article 12* is not the only one, but there is *Article 16* of the Declaration, which also deals with Right to Privacy of Family and Marriage. *Article 16* of the Declaration runs as follows:-

> *"(1) Men and women, of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*
>
> *(2) Marriage shall be entered into only with the free and full consent of the intending spouses.*
>
> *(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".*

The right mentioned above is called the Right to Marriage and to found a family. According to *Article 16* of the Declaration, this right is a universally acclaimed right and everyone is entitled to this right without any discrimination. But, this right can be considered as the Right to Privacy of Family and Marriage, because this right gives everyone the following freedoms:-

(i) The freedom to take decision of marriage.

(ii) The freedom to choose spouses according to one's choice.

(iii) The freedom to give consent to marriage and as such, no one can be forced to marry without consent.

(iv) The freedom to found and create a family of one's own choice.

The above-mentioned components are found by way of analysing the contents of *Article 16.* All the above components project towards the idea of freedom or privacy in case of conducting marriage. As this article gives the right to marriage according to one's wishes without any interference, therefore, it can be said that, this right recognizes the Right to Privacy of Marriage. Alongside, this article portrays the freedom to form a family and in this sense, it can be considered as the right recognizing the Privacy of Family. Hence, it can be said finally that, Universal Declaration, though has not prescribed a general Right to Privacy or has not possibly covered every aspect of Right to Privacy, but has taken a good initiative for the recognition and protection of Right to Privacy of Family and Marriage by way of incorporating provisions thereof under *Article 12 and Article 16.*

3.5.2.1.2. The Protection of Privacy of Family and Marriage under the International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, 1966 has declared the Right to Privacy as a Civil and Political Right, which is also a part and parcel of the Right to live with human dignity as promoted by this Covenant. *Article 17* of this Covenant is pertinent to mention in this respect, which deals with Right to Privacy of Family and Marriage along with other components of Right to Privacy, the literal version of which has already been discussed. If the above-stated article is analysed, various components are found which are similar with the *Article 12* of the *Universal Declaration of Human Rights, 1948.* In fact, *Article 17 of the International Covenant on Civil and Political Rights, 1966* is based on the *Article 12 of the Universal Declaration.* Due to this reason, various similarities are found in both of them and they have spoken in the same line. In this sense, *Article 17* of the Covenant is a reflection of *Article 12* of the Declaration, with certain modifications. The modifications are stated hereunder:-

(i) Instead of *'arbitrary interference',* the terms *'arbitrary or unlawful interference'* are used in *Article 17.*

(ii) Again, instead of *'attacks'* the terms *'unlawful attacks'* are used in *Article 17.*

(iii) Hence, the term *'unlawful'* is added to *Article 17,* which is not there in *Article 12.*

(iv) In this sense, *Article 17* is a slight modification of *Article 12.*

Therefore, in a summarized form, *Article 17* of the Covenant has tried to protect the Privacy rights mentioned therein including the Privacy of Family and Marriage from any kind of invasion by way of arbitrary or unlawful attacks or interference. Moreover, there is another similarity of *Article 12 and Article 17; Article 17* has also tried to protect Family Privacy in express manner and Marital Privacy in implied manner. But, it has also been criticized by various thinkers of Human Rights like *Article 12* of the Declaration on numerous grounds, relevant among them are as follows:-

(i) One critic has proposed the inclusion of a more comprehensive list of activities as Privacy rights, like facts relating to one's own body which are repugnant or socially unacceptable, any personal data, fact or activity unknown to others, which if

disclosed, would produce moral or physical discomfort to an individual, e.g. nudity, premarital pregnancy etc.[63]

(ii) The criticism for inclusion of Family with a degree of protection under Article 23(1) of the covenant.[64]

Inspite of the above criticisms, *Article 17* is supported by many authors like the *Article 12* of the Universal Declaration, because it has the same advantages as in the *Article 12.* In this sense, also both the articles are identical. Therefore, *Article 17 of the International Covenant on Civil and Political Rights, 1966* has both advantages and disadvantages like *Article 12 of the Universal Declaration of Human Rights, 1948.* Though *Article 17* is not an exhaustive one or it has not prescribed a general right to Privacy covering every aspect of this right, but it cannot be rejected totally on this ground. Moreover, due to the similarities of this article with *Article 12* of the Declaration, it is accepted on the same grounds on which the *Article 12* is accepted. Due to these reasons, the right prescribed by this article can be considered and recognised as a positive civil and political right. In this respect, the attempt taken by the covenant for the protection of Right to Privacy of Family and Marriage is a good attempt.

It is also pertinent to mention here that, *Article 17* is not the only one, but there is *Article 23* of the covenant, which also deals with Right to Privacy of Family and Marriage. *Article 23* of the Covenant runs as follows:-

> *" 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
>
> *2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*
>
> *3. No marriage shall be entered into without the free and full consent of the intending spouses.*
>
> *4. State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."*

The right mentioned above is called the Right to marriage and to found a family. This right proclaimed in *Article 23* of the Covenant is similar with the right declared under *Article 16* of the Declaration and as such some amount of protection

[63] James Michael, *op.cit*., p.20.
[64] *Ibid.*

is available under both the rights. In this sense, the right proclaimed in *Article 23* can also be considered as the Right to Privacy of Family and Marriage like the *Article 16* of the Declaration. Hence, similar freedoms are guaranteed in both the articles. Only exception is that, *Article 23* provides certain elaborations of the right declared under *Article 16* by making the provision for the protection of children in case of the dissolution of the marriage between the spouses. Therefore, it can again be said that, *Article 23* is the reflection of *Article 16* with slight modifications or elaborations.

Hence, it can be said finally that, International Covenant on Civil and Political Rights has walked in the same line with the Universal Declaration of Human Rights and as such, various rights proclaimed in the Covenant are just the replica of the rights proclaimed in the Declaration along with certain modifications. Both the international instruments, though have not prescribed a general Right to Privacy or have not possibly covered every aspect of Right to Privacy, but has taken a good initiative for the recognition and protection of Right to Privacy of Family and Marriage. In this respect, incorporation of *Article 17 and Article 23* of the Covenant is a good attempt.

3.5.2.1.3. The Role of International Covenant on Economic, Social and Cultural Rights, 1966 for Safeguarding Privacy of Family and Marriage

This Covenant has not expressly declared Right to Privacy as a right protected under this covenant like the *Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights.* Rather it has declared the Right to Family and Marriage as an important economic, social and cultural right, which can be considered as the Right to Privacy of Family and Marriage in the implied manner. *Article 10(1)* of this Covenant deals with that Right, which runs as follows:-

> *"The State Parties to the present Covenant recognise that:*
> *1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses."*

The analysis of this article shows that, this is not directly related to Right to Privacy as described in the *Article 12 of the Universal Declaration of Human Rights, 1948* or the *Article 17 of the International Covenant on Civil and Political Rights, 1966.* In fact, it is similar with the Right to Privacy of Family and Marriage as described in the *Article 16 of the Universal Declaration* or the *Article 23 of the International Covenant on Civil and Political Rights.* It has the same components as the *Article 16* of the Declaration or the *Article 23* of the Covenant. In this sense, *Article 10(1)* portrays the same meaning as accorded in those articles and not in the *Articles 12 and 17* respectively. Therefore, it can be said that, the *Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, 1966* does not speak about the Right to Privacy in express manner, but has given protection to the Privacy of Family and Marriage in the implied manner along with the other benefits accorded to family and marriage. The main reason behind that is the categorization of Right to Privacy as a Civil and Political Right. As this right is considered as Civil and Political Right, therefore, it cannot be possibly protected by the International Covenant on Economic, Social and Cultural Rights. But, by way of giving protection to the economic, social and cultural aspects of family and marriage, certain amount of protection is provided to the Privacy of Family and Marriage. In this way, Right to Privacy is clothed with the elements of Economic, Social and Cultural Rights in somewhat implied manner or by way of broader interpretation.

Again, *Article 10(1)* of this Covenant has been criticized by various thinkers of Human Rights on the following grounds:-

(i) This right is actually not the Right to Privacy of Family and Marriage; rather it is the Right to Marriage and to found a Family.

(ii) It can be kept under the umbrella of Right to Privacy of Family and Marriage in some implied manner only.

(iii) The right declared under *Article 10(1)* is closely associated with various other rights proclaimed under the Covenant on Civil and Political Rights as well as under this Covenant, as for example –

(a) Freedoms of thought, conscience and religion;

(b) The Right to determine the moral and religious education of one's children;

(c) The Right to association and non-association.[65]

(iv) In this sense, it can be said that, there is overlapping of various rights under the Covenant.

(v) On the point of this overlap, some writer has commented that, if the interpretation is like that, then in that sense, all the human rights are to be taken as various aspects of the Right to Privacy.[66]

(vi) Such an interpretation of considering every right as Right to Privacy can be criticized as stretching this right too far, which is also considered as somewhat illogical.

Hence, it can be said that, the right described under *Article 10(1)* is the reflection of the rights proclaimed under *Article 16* of the *Universal Declaration of Human Rights and Article 23 of the International Covenant on Civil and Political Rights*, with some modifications. In this respect, it is pertinent to mention that, the *International Covenant on Economic, Social and Cultural Rights* has not walked absolutely in the same line with the Universal Declaration and the Covenant on Civil and Political Rights, but it has tried to do the same. In this sense, it can be said that, it has tried to protect the Right to Privacy of Family and Marriage as an economic, social and cultural rights. Though this article has been criticized by various authors and it has not prescribed a general right to Privacy or has not covered various aspects of this right, but *Article 10(1)* can be considered as a good initiative for the recognition and protection of Right to Privacy of Family and Marriage in the international scenario.

3.5.2.1.4. The Viewpoint of the United Nations World Conference on Human Rights Instruments : The Proclamation of Tehran, 1968 on Privacy of Family and Marriage

This proclamation has proclaimed various duties of the world community, which everyone should follow for the full realization of human rights and fundamental freedoms. *Para 16* of this Proclamation deals specifically with the protection of family and children, which runs as follows:-

> *"The protection of the family and of the child remains the concern of the international community. Parents have a basic*

[65] *Id at p.19.*
[66] *Supra Note 12.*

human right to determine freely and responsibly the number and the spacing of their children".

Para 16, which deals with the protection of family and children, can be considered as the Right to Privacy of Family and Children for an individual human being. Though it does not specifically guarantee the general Right to Privacy, but it has accorded certain amount of protection to family and children, which can be taken as the Right to Privacy of family and children by way of broader interpretation. Moreover, it has given the right of number and spacing between children to an individual, which can be considered as the Right to Privacy of child-bearing for an individual, which is part and parcel of Right to Privacy of Family and Marriage. Therefore, this Proclamation has tried to give certain amount of protection to Right to Privacy of Family and Marriage.

3.5.2.2. Privacy of Family and Marriage : How Far it is Protected in the Regional Legal Field

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Privacy of Family and Marriage. Those are stated hereunder:-

3.5.2.2.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 : A Shield towards the Protection of Privacy of Family and Marriage

In the atmosphere of human rights and fundamental freedoms, this Convention has created provisions for the protection of Right to Privacy along with other human rights. *Article 8* of this Convention deals with Right to Privacy, which runs as follows:-

Article 8

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

In an analysis of the *Article 8* of this Convention, the following points may be emerged:-

(i) It has recognised that, everyone has the right to respect for his –

(a) Private Life;

(b) Family Life;

(c) Home; and

(d) Correspondence.

(ii) It has recognised and protected the Right to private life, family, home and correspondence of the individual human beings.

(iii) Though it has not spoken directly about the Right to Privacy, but by way of protecting the private and family life of individuals, it has tried to protect the Right to Individual Privacy.

(iv) It has prohibited any interference by the public authority on the exercise of this right.

(v) Interference by the public authority is permitted only in the following cases –

(a) With an established legal procedure;

(b) In the interests of national security in a democratic society;

(c) For public safety;

(d) For the economic well-being of the country;

(e) For the prevention of disorder or crime;

(f) For the protection of health or morals;

(g) For the protection of the rights and freedoms of others.

Therefore, the analysis of *Article 8* shows that, it deals with the Right to respect for Family life, which is part and parcel of Right to Family and Marriage. According to some jurists, this right amount to Right to Privacy of Family and Marriage, but some jurists say that, there are certain differences between the two. The European Convention has dealt with the Right to respect for Family life under *Article 8,* but it has not defined the term 'Family' anywhere. In this respect, various jurists have raised the question regarding what type of Family would get protection under *Article 8* of the Convention. Depending upon various social conditions, Families may be *Elementary, Extended, Legal or Natural Family.* An *Elementary*

Family comprises of married couple and their direct descendants. It may be a childless family or a family of average size or a family with a large number of children. An *Extended Family* is a family, where married children, with or without children of their own, live together with their parents or sometimes with their grandparents. In the legal sense, family is a social unit recognised by the legal system as having legal status. Hence, it is called the *Legal Family.* On the contrary, *Natural Family* is a family characterised by consanguinity or by the fact of common house holding.[67] As such *Elementary Family* can be distinguished from the *Extended Family* and *Legal Family* can be distinguished from the *Natural Family.* Due to these distinctions, the question has been raised regarding what type of Family would get protection under *Article 8 of the European Convention.*

On the basis of the vital significance of an orderly society, *Article 16(3) of the Universal Declaration of Human Rights, 1948 says* that, the family, as a social unit, was placed under the protection of human rights instruments and every form of family which meets this requirement would have to be regarded as a family within the meaning of the international agreements.[68] Therefore, according to this article, every form of family having various dissimilar features would get protection under the *Universal Declaration.* As the two *International Covenants* on human rights and the *European Convention* are based on the *Universal Declaration,* same protection would be available for every kind of family under these human rights instruments. Hence, whatever may be the nature or kind of a family; it would obviously get protection under *Article 8 of the European Convention.*

In a deep-rooted study, it is found that, the *European Convention* has tried to protect the 'Family Rights'. In fact, it has tried to prevent any interference with the right to marry and to found a family. In this sense, it has promoted the right to marry and to found a family. No doubt 'Family' is the focus of the Convention, but while protecting the family rights, various other rights have come in conflict with the family rights. These rights may be many, but most important are the *Parental Authority and Right to Education.* As for example, teenage children may claim Privacy within the family or parental authority may come in conflict with the choice

[67] Willibald Pahr, "*The Meaning of the term 'Family' in the European Convention on Human Rights*", in A. H. Robertson, *op.cit*., pp.247-250 at pp.248-249.
[68] *Id at p.249.*

of children regarding Right to Education. As such, there may be disagreements between the parents and children concerning education within the family. In this respect, another important right, which usually comes in conflict within the family, is Right to Marry. Grown up children generally claim the Privacy of their Right to Marry as against the parental authority. Here comes the conflict between the parents and children on the point that, whether the parental authority should enjoy the Privacy of choosing spouse for their children or the children themselves should enjoy the Privacy in this case. Hence, there may be various rights within a family which come in conflict with each other. More specifically, Family Rights may come in conflict with various Individual Rights in the family. In this respect, the question comes, whether Family Rights will be upheld over the Individual Rights within the family or not.

However, the Convention has not specifically answered this question. In fact, the Convention is still silent on this issue. According to various jurists, the main function of the Convention is to defend various interests within the family against the State, but not to settle conflicts between these various interests when they are not in harmony with each other. The Convention does not usually afford a basis for the solution of such conflicts.[69]

A further analysis on the point provides that, the expression 'a right' may denote one or more of three legal terms: *(i) a 'claim', (ii) a 'freedom' or (iii) a 'competence'.* These three concepts correspond respectively to : *(i) an actual, positive obligation (or a duty to act, in order to fulfil the claim, e.g. a contractual 'right' to be paid an amount of money); (ii) an actual negative obligation (or a duty not to act, i.e. to abstain from interference with the exercise of the freedom, e.g. a constitutional 'right' to enjoy privacy or free speech); and (iii) a potential, positive or negative obligation (or a duty to abide, positively or negatively, by any decisions creating claims or freedoms within the field of competence, e.g. a Constitutional 'right' to vote, or to legislate or the family 'right' called parental authority) for the other party.*[70]

[69] Torkel Opsahl, "*The Convention and the Right to Respect for Family Life, Particularly as regards the Protection of the Rights of Parents and Guardians in the Education of Children*", in A. H. Robertson, *op.cit*., pp.182-247 at p.183.
[70] *Id at p.186.*

The term *'other party'* mentioned above, means the *'State'* under the Convention. Therefore, *Article 8 of the Convention* uses the word *'right'* in the description of the legal position of the individual. However, the Convention, speaks of *'rights and freedoms'* or *'human rights and fundamental freedoms'* in a somewhat unsystematic manner. Due to this reason, the corresponding obligations devolving upon the State are mainly negative obligations, i.e. they prescribe non-interference by the State at the time of securing both *'freedoms and rights'* on the part of the Convention. Sometimes certain claims or competences may be derived from these provisions, which are truly applicable in case of *'family rights'* in the Convention.[71] Hence, *Article 8 of the Convention* mainly protects *'family rights'* against the interference by the State, but it does not specifically provides solution of the conflict between *'individual rights'* and *'family rights'.*

In this respect, it is also pertinent to mention that, the subjects or beneficiaries of the *'family rights'* mentioned under *Article 8 of the Convention* are individuals, because inmates of the family are its members, who are nothing but the individual human beings. But, family is recognised as *'the fundamental unit of society'* by various national Constitutions and some international instruments. The *Universal Declaration of Human Rights and the European Convention* have conceived family as a *'unit'* in the legal sense, i.e. being itself a subject of rights. The idea of the family as a fundamental unit of society is also implicit in the Convention, but it has not led to a similar recognition of the family as having a distinct legal personality. In other words, *'family rights',* does not mean *'rights of the family',* but rights of the individual pertaining to his family relations. The idea of the *'unit'* of the family should not be confused with the *'unity'* of the family, which is a relevant idea in the interpretation of the Convention.[72]

Hence, in an ultimate analysis, it can be said that, the *'Right to respect for Family Life'* actually deals with the protection of individual rights within the family, which, in fact, get protection against the interference by the State. As the individual family-members get the protection of their rights within a family, therefore, they can enjoy freedom or privacy within the family. As the individual family-members enjoy the freedom to exercise their rights against the State interference, therefore, this right

[71] *Id at pp.186-187.*
[72] *Id at pp.187-188.*

can be equated with Right to Privacy of the family-members. As such, Right to respect for family life is nothing but another name for Right to Privacy of Family.

European Convention is not only concerned with the Right to respect for Family Life, but also concerned with the Right to respect for Marital Life or the Right to marry and to found a Family. In this respect, *Article 12 of the Convention* is pertinent to mention. This article deals with the Right to marry and to found a Family. The text of this article runs as follows:-

Article 12

> *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".*

In fact, this article has propounded the Right to Marriage and to found a Family of one's own choice. In this sense, it can be equated with the Right to Privacy of Family and Marriage. Therefore, *Article 12* is another important initiative under the Convention for the protection of certain aspects of Right to Privacy. Again, it is noteworthy that, *Article 12 of the Convention* is similar with the *Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights and Article 10(1) of the International Covenant on Economic, Social and Cultural Rights.* In this sense, *Article 12* of this Convention has also created relationship with the International human rights instruments.

In an analysis of *Article 12 of the European Convention,* it is found that, Marriage is a social institution and States cannot decline the recognition of this right or control this right, except according to established national laws of Marriage. Moreover, States cannot impose absolute restrictions on the right, rather can only impose limited restrictions, subject to certain conditions, like monogamy, protecting very young persons against their own immaturity by prescribing certain marriageable age as well as raising certain obstacles in cases of bad health or blood relationships as prohibited relationship, within which marriage is not permitted.[73] All these conditions can only be imposed by the national laws of Marriage following *Article 12 of the Convention* and not otherwise. Hence, the men and women of marriageable age (prescribed by national laws of Marriage) are entitled to enjoy

[73] *Id at p.191.*

their Right to Marriage as per *Article 12 of the Convention.* This right can also be called as the Right to Privacy of Marriage, because adult men and women are entitled to enjoy freedom concerning their marriage. But, the article prohibits child marriage in an implied manner by expressly using the words *"men and women of marriageable age have the right to marriage".* Again, the article impliedly permits the States to impose reasonable legal restrictions on this right by expressly using the words *"according to the national laws governing the exercise of this right".* Hence, the Right to Privacy of Marriage prescribed under *Article 12 of the Convention* is a restricted right and not an absolute right.

The analysis of *Article 12* also provides that, States cannot infringe the Right to Privacy of Marriage of the adult citizens and can only impose legal restrictions by national laws of Marriage, subject to *Article 12.* Moreover, *Article 14 of the Convention* has supported *Article 12* by stating the following words:-

Article 14

> *"The national laws cannot prohibit or discriminate against marriages across racial, religious or national borders and cannot require a special economic status or prescribe a religious ceremony".*

In this sense, this article provides further freedom to the Right to Privacy of Marriage by prohibiting discrimination among marriages on the grounds of race, religion, place, social or economic conditions. It also prohibits prescription of any compulsory religious ceremony. Therefore, the Right to Privacy of Marriage cannot be curtailed on those grounds and the right prescribed by *Article 12* is further expanded by *Article 14.* However, there are certain other Aspects relating to the Right to Privacy of Marriage, which are not discussed by the *European Convention,* but discussed by the *European Commission of Human Rights and the European Court of Human Rights.* Those are, whether a prisoner should be denied his right to marry or not from the administrative point of view and whether the right to marry could be prohibited by contract or by will. In all these cases, the *Commission* or the *Court* has answered affirmative recognizing the uninterrupted right to marry for everyone and has held any restriction on Right to Marry imposed by contract or by will as invalid. Also the cases of problem of divorce in favour of one party against

the wish of other party have not been dealt with by the *Convention,* but by the *Commission* and the *Court.*[74] The reason being that, these matters are the subject of Private Law and there are no questions of interference by the State. On the contrary, the *Convention* is only concerned with the matters of Public Law, where the questions of State interference are involved.

The second part of *Article 12* is concerned with the Right to found a Family. As such, this article is not confined with Right to found a Family also. The article again guarantees the enjoyment of this right in an uninterrupted manner without any state interference. But, this right is also subjected to the national laws of Marriage like the Right to Marry. Though every married couple has the right to found a family under this article, but the national laws can be made for regulating or limiting the number of children in the interest of State or in the larger public interest. In this sense, this right is also not absolute legal restrictions can be imposed on it. However, whether unmarried couples can claim the right to found a family or can bear children or not, that is uncertain under the *Convention.*[75] The *Convention* is silent on this point. Again, the reason behind this is that, it is the subject of Private Law and the *Convention* is only concerned about the matters of Public Law or the matters of State interference.

Finally, it can be said that, the respect for family life assumes above all the protection of the family in its unity. This unity should be preserved between the parents as well as between the parents and children.[76] Last but not the least, the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* has incorporated a number of articles for the protection of Right to Privacy of Family and Marriage in the European region. Hence, it can be said finally that, the European Convention, though has not prescribed a general Right to Privacy or has not possibly covered every aspect of Right to Privacy, but has taken a good initiative for the recognition and protection of Right to Privacy of Family and Marriage by way of incorporating these rights under its different articles.

3.5.2.2.2. The American Declaration of the Rights and Duties of Man, 1948 : A Guardian of Privacy of Family and Marriage in the American Region

[74] *Id at pp.191-192.*
[75] *Id at p.192.*
[76] Vasak, *La Convention européenne,* p.51.

This Declaration contains few articles relating to the Right to Privacy of Family and Marriage. In this respect, the following Articles of the *American Declaration* are noteworthy, which deal with the Right to Privacy of Family and Marriage. Those are discussed below:-

Article – V

Right to Protection of honour, personal reputation and private and family life

> *"Every person has the right to the protection of the law against abusive attacks upon his honour, his reputation and his private and family life".*

Article – VI

> *"Every person has the right to establish a family, the basic element of society and to receive protection therefore".*

The above-stated articles of the *American Declaration,* though have not discussed about the Right to Privacy of Marriage, but have expressly discussed about the Right to Privacy of Family. *Article-V* has given legal protection to the family life of every individual human being against abusive attacks upon it, along with various other rights. This protection can be claimed as a matter of right by each and every person. *Article-VI* is further extension and elaboration of *Article-V,* because *Article-VI* has just protected Family Life, but *Article-VI* has recognised the necessity of establishment of Family as a right for every person (individual human being). More specifically, *Article-VI* has considered *'Family'* as the basic element of society and due to this reason, has recognised the right of every person to establish a Family. Moreover, this article has declared that, being the basic element of society, Family should receive legal protection by the State.

In a further analysis, it can be said that, these articles are not only dealing with Right to protection of Family Life and the Right to establish a Family, but also dealing with the Right to Privacy of Family. The reason behind this is, whenever an individual human being gets the right to establish a Family of one's own choice and gets legal protection thereof, then that individual obviously enjoys freedom to establish and to protect the Family. As the individual human beings enjoy freedom with respect to their Right to Family, therefore, this right can be called the Right to Privacy of Family. In this sense, the right guaranteed under the *Articles V and VI of the American Declaration,* is called the Right to Privacy of Family.

In a deep-rooted study, it is found that, *Article-V of this Declaration* is similar with the *Article 12 of the Universal Declaration, Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention on Human Rights and Fundamental Freedoms*, because all of them are dealing with various aspects of Right to Privacy including the Right to Privacy of Family. Again, *Article-VI of this Declaration* is similar with the *Article 16 of the Universal Declaration, Article 23 of the International Covenant on Civil and Political Rights, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights and Article 12 of the European Convention on Human Rights and Fundamental Freedoms*, because all of them are dealing with the Right to Privacy of Family and in some cases the Right to Privacy of Marriage also.

3.5.2.2.3. The Status of Privacy of Family and Marriage under the American Convention on Human Rights, 1969

In the background of equal protection of all human rights and fundamental freedoms, this Convention has created provisions for the protection of Right to Privacy of Family and Marriage along with other human rights. In this respect, this Convention has described the Right to Privacy of Family and Marriage as a Civil and Political Right under *Article 11* of the Convention, which runs as follows:-

Right to Privacy

> *"...*
> *2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence or of unlawful attacks on his honour or reputation.*
> *3. Everyone has the right to the protection of the law against such interference or attacks".*

If the above-stated article is analysed, then it is found that, it has prohibited arbitrary or abusive interference with everyone's private life, family, home or correspondence. In this sense, it has prohibited arbitrary or abusive interference with everyone's family life along with other rights. Though the article has never used the term 'Right to Privacy' anywhere, except the heading, but due to the use of the term in the heading, it can be assumed that, the article deals with various components of Right to Privacy. Therefore, all the rights described in the article are different aspects of Right to Privacy. As such, protection of family life from any kind of interference here means, freedom to enjoy the family life according to one's wishes.

Freedom means Privacy and therefore, freedom to enjoy family life means the Right to Privacy of Family life means the Right to Privacy of Family life. Hence, this article deals with the Right to Privacy of Family life. Moreover, it has specifically provided legal protection to the rights mentioned therein against any kind of interference or attacks. In this sense, it has given legal protection to the Right to Privacy of Family against any kind of interference or attacks. Hence, *Article 11* of the *American Convention* has two sides. It has not only prohibited arbitrary or abusive interference with the Right to Privacy of Family, but has also provided legal protection to this right against such interference or attacks.

In a further analysis, it can be said that, *Article 11 of the American Convention* is similar with the *Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights and Article 18 of the European Convention on Human Rights and Fundamental Freedoms.* It is also similar with the *Article-V of the American Declaration of the Rights and Duties of Man.* The reason behind this is, all these articles deal with various components of Right to Privacy including the Right to Privacy of Family.

Again, *Article 11 of the American Convention* has tried to provide a general Right to Privacy including the Right to Privacy of Family within the American region. But, it is not the only article protecting Right to Privacy of Family under this Convention, rather there is another article dealing with the Right to Privacy of Family and Marriage and that is *Article 17,* which is stated hereunder:-

Article – 17

Rights of the Family

> *"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
>
> *2. The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention.*
>
> *3. No marriage shall be entered into without the free and full consent of the intending spouses …"*

Therefore, this article has dealt with the Right to Marriage and to found a Family. In fact, *Article 17(1), (2) and (3)* have upheld the status of the family as the natural and fundamental unit of the society, right to marriage and to found a family

as an inherent right of men and women as well as the right to free consent at the time of marriage by the spouses, respectively. In this sense, the first three clauses of this article have propounded the right to marriage and to found a family of one's own choice. No one can be forced to marry under this article. As such, this article provides freedom to individual human beings in the exercise of their Right to Family and Marriage. Hence, it can be equated with the Right to Privacy of Family and Marriage. As such, *Article 17* is another important initiative under the Convention for the protection of Right to Privacy of Family and Marriage.

Again, it is pertinent to mention here that, *Article 17 of the American Convention* is similar with the *Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights and Article 12 of the European Convention on Human Rights and Fundamental Freedoms.* It has also various similarities with the *Article 14 of the European Convention.* In fact, this article is a combination of both *Article 12 and Article 14 of the European Convention,* because it has the components of both these articles. Again, this article has similarities with the *Article-VI of the American Declaration of the Rights and Duties of Man.* In this sense, *Article 17 of the American Convention* has also created relationship with the other International human rights instruments. Hence, the American Convention has taken good initiatives for the protection of Right to Privacy of Family and Marriage.

3.5.2.2.4. An Account of the African Charter on Human and Peoples' Rights, 1981 with respect to Privacy of Family and Marriage

Article 18 of the African Charter deals with the rights of the Family. This article has certain indirect application to the Right to Privacy of Family. The text of the article runs as follows :–

Article 18

> *"1. The family shall be the natural unit and basis of society. It shall be protected by the State.*
>
> *2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community . . ."*

If the above-stated article is analysed, then it is found that, it has recognised family as the natural unit and basis of society. It has also provided protection to the

family by the State. Though this article has never stated about the nature of the protection given by the State to the family, but it can be assumed that, it should be the legal protection. Again, it is silent about any kind of interference on the family from which it would get the State protection, but it can be assumed that, it would be any kind of arbitrary or abusive interference upon the family. After conducting a long study of a number of international and regional legal instruments as well as the provisions of the Right to Privacy of Family and Marriage thereof, such contention can be drawn. More or less, all these legal instruments are drawn in the same line, where the bottom line is the *Universal Declaration of Human Rights.* As all these instruments have given legal protection by the State to the family from any kind of arbitrary or abusive interference, therefore, obviously the *Article 18 of the African Charter* has accorded same status and protection to the family.

Article 18 of the African Charter is not only relevant for its first part, but for its second part also, where it has imposed the duty upon the State to assist the family. This article gets importance due to this reason. Other articles under various legal instruments have only talked about the State protection upon the family, but it has enjoined the duty upon the State to assist the family for its development. The role of the State here is expanded not to control the family, but to assist the family in the enjoyment of its freedom. Moreover, this article has recognised the family as the custodian of morals and traditional values recognised by the community. By using these words, this article has not only upgraded the status of the family, but also shown respect to the morals and traditional values of the community. Therefore, a special status has been accorded to the family under the *African Charter,* but nowhere the freedom of the family has been taken away. As the freedom of the family remains, so is the Privacy of the family. In this sense, this article can be indirectly made applicable to the Right to Privacy of Family.

Hence, it can be said finally that, *Article 18 of the African Charter* has certain similarities with the *Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, Article 12 of the European Convention on Human Rights and Fundamental Freedoms, Article-VI of the American Declaration of the Rights and Duties of Man*

and Article 17 of the American Convention on Human Rights. All of these articles are dealing with the Right to Privacy of the Family and hence, these are similar. In this sense, though *African Charter* does not contain express provisions for the protection of Right to Privacy, but has contributed to some extent for the protection of Right to Privacy of Family.

3.5.2.2.5. A Study of the Islamic Human Rights Instruments regarding Privacy of Family and Marriage

The *Islamic Human Rights Instruments* prepared in the regional periphery can be classified as follows:-

(i) *Universal Islamic Declaration of Human Rights, 1981.*

(ii) *Cairo Declaration on Human Rights in Islam, 1990.*

(iii) *Arab Charter on Human Rights, 2004.*

The above-mentioned three Islamic human rights instruments have contained all the human rights described in the international as well as the other regional instruments. According to the *Preambles* of those *Islamic Declarations,* they are based on the principles enumerated in the *Universal Declaration of Human Rights and the two International Covenants.* Along with the other human rights, these declarations also contain few provisions relating to Right to Privacy of Family and Marriage. Those provisions of the three declarations are listed below:-

(i) *The Universal Islamic Declaration of Human Rights, 1981 –*

(a) *Article XIX – Right to found a Family and Related Matters.*

(ii) *The Cairo Declaration on Human Rights in Islam, 1990 –*

(a) *Article 5 – Right to Marriage and Family.*

(iii) *The Arab Charter on Human Rights, 2004 –*

(a) *Article 33 – Right to Marriage and Family.*

In this sense, it can be said that, *Islamic Declarations* have taken good initiatives for the protection of Right to Privacy of Family and Marriage; they believe in this right and have faith in this right. In fact, Marriage and Family have accorded special status in Islam. According to *Mohammed,* Marriage was his *'Sunnah'.* He considered Marriage as a pious act and recommended his disciples to perform Marriage to obtain merit in the eye of *Allah.* Marriage is the foundation of a Family. Marriage is necessary to found a family and to increase the number of

legitimate children in the society. At the time of the advent of Islam, when society was full of illegitimate children and the women were equated with goods or chattels and then *Mohammed* came into being with his idea of *Islam* to bring the society in the path of progress and development. He insisted upon the performance of Marriage to found a family and to give birth to the legitimate children. Later on, various Muslim jurists have enjoined importance on the idea of Marriage for the procreation of children and to found a Family for social progress and development.

The concepts of Marriage and Family have not only accorded special status in the Muslim society, but the idea of Right to Privacy also. The root of Privacy has been found in the medieval period or the Muslim era in the *Quranic* injunctions. A number of *Quranic* injunctions have prescribed the observance of Privacy in various parts of human lives. Such is the situation in case of Right to Privacy of Family and Marriage. As the *Islamic Declarations* are based on the *Quranic* injunctions, they also have recognised and considered Right to Privacy of Family and Marriage as an important human right. But, there are various negative criticisms of these *Declarations* by the Western World, which have already been mentioned, owing to which, the *Islamic Declarations* have not received much attention in the context of the Right to Privacy of Family and Marriage.

3.5.2.2.6. The Viewpoint of ASEAN Human Rights Declaration, 2012 for upholding Privacy of Family and Marriage

Article 21 of the ASEAN Human Rights Declaration, 2012 deals with general Right to Privacy and various other components of Right to Privacy. It also deals with the Right to Privacy of Family and Marriage along with other Privacy rights. The article runs as follows:-

Article – 21

> *"Every person has the right to be free from arbitrary interference with his or her privacy; family . . . Every person has the right to the protection of the law against such interference or attacks".*

Therefore, *Article 21 of the Declaration* deals with a general Right to Privacy for protection in the *ASEAN* region. In an analysis of this article, it is found that, this article gives protection to the rights of Individual Privacy, Privacy of Family and various other components of Right to Privacy from arbitrary interference. This article also provides legal protection to those rights against such

interference or attacks. As such, this article can also be applicable to Right to Privacy of Family.

However, the analysis of *Article 21* has projected the similarities of this article with *Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights, Article V of the American Declaration on Rights and Duties of Man and Article 11 of the American Convention on Human Rights.* In this sense, these articles are not only similar, but also the reflection of one another.

Again, *Article 21 of the Declaration* is not the only one; there is *Article 19* also, which deals with the Right to Privacy of Family and Marriage. In this respect, *Article 19* runs as follows:-

Article – 19

> *"The family as the natural and fundamental Unit of Society is entitled to protection by society and each ASEAN Member state. Men and Women of full age have the right to marry on the basis of their free and full consent, to found a family and to dissolve a marriage, as prescribed by law".*

Therefore, *Article 19* has recognised family as the natural and fundamental unit of society. It has also given protection to family by society and by each *ASEAN* Member State. In this sense, slight difference is found in *Article 19* from other articles relating to Right to Privacy of Family and Marriage under various other International and Regional legal instruments. Most of those articles have given legal protection to this right, but this article has given social protection to it. As law is part and parcel of society, therefore, social protection includes legal protection. It means that, *Article 19* has also given legal protection to this right. By saying about the protection by each *ASEAN* Member State, this article has tried to protect this right in the *ASEAN* region.

The second part of *Article 19* has dealt with the Right to marriage and to found a family. It also provides the right to free choice of spouses and that one cannot be forced to marry without the consent. Moreover, it has also given the right to parties to dissolve their marriage according to their wishes. But, all these rights are subjected to the domestic laws of marriage of the respective countries. As this article has provided every protection to the Right to Family and Marriage as well as

given the scope to enjoy every freedom in the exercise of this right, therefore, this article can be considered as the Right to Privacy of Family and Marriage.

Again, a further analysis of *Article 19* gives the idea that, *Article 19* of this *Declaration* is similar with *Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, Article 10(1) of the International Covenant of Economic, Social and Cultural Rights, Article 12 of the European Convention on Human Rights and Fundamental Freedoms, Article VI of the American Declaration of Rights and Duties of Man, Article 17 of the American Convention on Human Rights and Article 18 of the African Charter on Human and Peoples' Rights.* All these articles deal with the Right to Privacy of Family and Marriage. Therefore, all these articles are not only similar, but also the reflection of one another, because all of them have covered more or less the same area. The scope and ambit of all these articles are also more or less same. As such, *Article 19 of the ASEAN Declaration* is based on the other previously created articles.

3.5.2.3. The Municipal Legal Arena regarding Privacy of Family and Marriage

The Municipal Laws of different countries for the protection of Right to Privacy of Family and Marriage are found inadequate. The reason being that, each and every country all over the world does not possess separate laws on Right to Privacy of Family and Marriage. The domestic laws on Marriage are only help in this respect. Protection of Family is found only in Sociological perspectives. Hence, it can be said that, it is high time for making exhaustive legislations in this field.

3.5.3. Privacy of Home

Since the time immemorial, sanctity of home is recognised and it is considered as a place of shelter and retreat from the outside world. The importance of *'Home',* since long ago, can be understood from the writings of *William Pitt*, which runs as follows:-

> *"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!"*[77]

[77] William Pitt, *Speech on the Excise Bill*, 1763, quoted in *Miller v. United States*, 357 U.S.301, 307 (1958).

The views of *William Pitt* provide the idea that, the sanctity of 'Home' is above all, which cannot be violated even by the King of England. Accordingly, whatever may be the nature and condition of Home, it may be frail, shaken, ruined or exposed to natural forces due to its poor or inhabitable condition, but the King's forces cannot enter thereby without permission. It is immune from trespass and any type of unauthorised entry. In this sense, a poorest person is also secured in his or her home and the immune nature of home cannot be prevented by anyone. This law of immunity of home is created by the God or Nature and as such, even the King cannot override this law, because *'Law is the King of Kings'* and the King is not superior to law, rather he is also subjected to law. This is the Western Concept of Home which is likely tom upheld the sanctity and Privacy of Home.

Moreover, this Western concept of Home is uplifted since long ago by the famous Common Law, maxim that a *'man's house is his castle'.* It is the oldest and deepest maxim of the Anglo-American Jurisprudence. The whole Anglo-American Jurisprudence on the Privacy of Home is based on this principle. The maxim can be highlighted as follows:-

> *"Every man's house is his castle, which secures to the citizen immunity in his home against the prying eyes of the government".*[78]

The maxim that, *"a man's home is his castle"* is engrafted in the Anglo-American legal tradition. The privileged legal status of home has been derived from the sanctity of private property which is limited to the four corners of a person's home. According to various jurists, the right to hold property should include the right to exclude others from one's property, which is essential for the safety and peace of an individual and his family-members. This is the truth behind the peaceful enjoyment of the ownership and possession of one's property. This right to own and control private property has given birth to the concept of inviolability of one's home. The Common Law doctrine of inviolability of home includes the right to prevent the intruders from one's home and to bring an action for trespass to claim damages or compensation. Again, in criminal cases, a sheriff could not forcibly enter a man's home without signifying the cause of his coming and requesting to enter. The

[78] Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, 1868, Law Book Exchange 1998, p.365, stating this Common Law maxim has been incorporated into the Fourth Amendment of the U. S. Constitution.

common law also did not recognize a broad doctrine of official immunity that might otherwise limit the home's protection.[79]

The importance of the conception of home as a man's castle can be further illustrated by the arguments of *James Otis* in the *Boston Writes of Assistance Case,* which are stated below:-

> *"Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please – we are commanded to permit their entry – their menial servants may enter – may break locks, bars and every thing in their way – and whether they break through malice or revenge, no man, no court can inquire – bare suspicion without oath is sufficient".*[80]

The freedom and sanctity of *Home* are upheld by the *English Law,* which bring with those, *Right to Privacy of Home.* In fact, *Home* does not only provide security and protection to an individual, but also provides physical, emotional and intellectual freedom to an individual. An individual feels secured in the home, because unauthorised interference of the outsiders is prohibited therein. When an individual becomes free from outside interference, then he or she can act accordingly to his or her wishes. Home gives physical as well as moral, intellectual and emotional freedom. As such, an individual can meditate, study, read, write or create anything for the development of one's intellectual quality. A person is also free to lead one's life without any outside interference, by way of which one enjoys freedom in every aspect of one's life. All the family members can share their family secret within the four corners of home, where there is no danger of disclosure of their secrecy in front of the outside world. Therefore, home provides the freedom to enjoy life according to one's wishes within the four corners of home. Freedom means Privacy and in this sense, every individual enjoys Privacy in one's home. Privacy of home is utmost important for the physical and mental development of an individual.

Privacy of Home is upheld by various legal instruments all over the world, which are discussed below.

---

[79] *Id at pp.180-181.*
[80] M. H. Smith, *The Boston Writes of Assistance Case*, 1978, reprinting James Otis, Address, p.344.

3.5.3.1. The International Legal Scenario of Privacy of Home

A number of international legal instruments have been found protecting the Privacy of Home. Those are stated hereunder:-

3.5.3.1.1. A Depiction of the Universal Declaration of Human Rights, 1948

Article 12 of the Universal Declaration of Human Rights, 1948 has tried to protect *Privacy of Home*, the text of which has already been discussed. This article has specifically accorded protection to *Privacy of Home* along with various other components of Privacy. In this sense, if this article is analysed, it can be found that, it has given protection to *Privacy of Home* from any kind of arbitrary interference or attacks. Inspite of its positive contribution for the protection of *Privacy of Home,* some jurists have criticized *Article 12* for its incompleteness. According to them, the reasons behind the inclusion of the term *'Home'* in the article, are not clear.[81] Inspite of the above criticisms, *Article 12* is supported by many authors, because it has the following advantage:-

(i) The physical zone of protection includes the home and correspondence with others, which may go very far from the physical home.[82]

Hence, *Article 12 of the Universal Declaration* has both advantage and disadvantage as regards the protection of *Right to Privacy of Home.* One important point in this respect is that, it has provided legal protection to the Privacy of Home against any arbitrary attack or interference. It has not defined the term *'Home'* or has not specified any limits of the idea of *'Home'* as stated therein. In this sense, this article is inclusive in nature as regards the idea of *'Home',* which extends its protection beyond the *'physical zone'* of *'Home'. 'Home'* here means, *'Home'* in both actual and constructive sense of the term. Therefore, this concept of *'Home'* includes not only physical home, but any shelter or home-like situation, where an individual gets physical, moral, emotional and/or intellectual freedom. As such, this article has considered *'Home'* in very broad perspective, which has been further elaborated by a number of other international, national and regional legal instruments. In this sense, this article has formed the basis of those legal instruments. Hence, the attempt taken by the *Article 12 of the Universal Declaration* for protection of Privacy of Home is a good attempt.

---

[81] James Michael, *op.cit., p.20.*
[82] *Id at p.19.*

3.5.3.1.2. Status of Privacy of Home under the International Covenant on Civil and Political Rights, 1966

Article 17 of the International Covenant on Civil and Political Rights, 1966 has dealt with *Right to Privacy of Home,* the text of which has already been discussed. If this article is analysed, various components are found, which are similar with the *Article 12 of the Universal Declaration of Human Rights, 1948.* In this sense, *Article 17 of the Covenant* is a reflection of *Article 12* of the Declaration, with certain modifications. As for example, the term *'unlawful'* is added to *Article 17,* which is not there in *Article 12.* Therefore, in a summarized form, *Article 17* of the Covenant has tried to protect the Privacy rights mentioned therein including the Privacy of Home from any kind of invasion by way of arbitrary or unlawful attacks or interference. Moreover, there is another similarity of *Article 12* and *Article 17; Article 17* has also tried to protect Privacy of Home in express manner. It has also dealt with the right in broad perspective in both actual and constructive sense of the term. Due to this reason, the idea of 'Home' used herein, can be expanded beyond the 'physical zone' of 'Home' to cover any home-like situation where an individual enjoys physical, moral, emotional and/or intellectual freedom. Therefore, *Article 17* is again similar to *Article 12.*

But, it has also been criticized by various thinkers of Human Rights like *Article 12* of the Declaration on numerous grounds. Most important Criticism on which unanimity among the jurists have been found, is made for the use of the term *'arbitrary or unlawful',* because both the terms are not similar. As such, implications of both the terms are also not similar and it has been criticized due to this reason. But, no such criticism is found with respect to the Right to Privacy of Home as stated therein. However, *Article 17* is supported by many authors like the *Article 12* of the Universal Declaration, because it has the same advantages as in the *Article 12.* In this sense, also both the articles are identical. Therefore, *Article 17 of the International Covenant on Civil and Political Rights, 1966* has both advantages and disadvantages like *Article 12 of the Universal Declaration of Human Rights, 1948.* Due to these reasons, the right prescribed by this article can be considered and recognised as a positive civil and political right. In this respect, the attempt taken by the Covenant for the protection of Right to Privacy of Home is a good attempt.

3.5.3.2. The Regional Legal Periphery of Privacy of Home

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Privacy of Home. Those are stated hereunder:-

3.5.3.2.1. Privacy of Home and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 : A Legal Analysis

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 has created provisions for the protection of various components of *Right to Privacy* along with the *Right to Privacy of Home.* The word for word version of this article has already been discussed. In an analysis of this article, it is found that, it has recognised that, everyone has the right to respect for his home along with other rights. It has also protected the Right to Home of the individual human beings and has prohibited any interference by the public authority on the exercise of this right along with other rights. Though it has not spoken directly about the Right to Privacy, but by way of protecting various rights allied to Right to Privacy, it has tried to protect Right to Privacy and its various components. In this sense, by way of protecting the Right to respect for Home, it has protected the Right to Privacy of Home. This article has tried to give legal protection to this right against any interference including interference by the public authority, which is permitted only in certain circumstances mentioned therein.

Therefore, the analysis of *Article 8* shows that, it deals with the Right to respect for Home, which provides the security and protection to the life of an individual in the home and obviously it includes the Right to Privacy of Home. According to various jurists, the Right to respect for Home has been well-protected by *Article 8* of the European Convention, which has also been upheld by various decisions of the European Commission on Human Rights. This idea has been enriched with the juristic opinions and judicial decisions, which can be summarised as follows:-

(i) Sanctity of Home is upheld by *Article 8* of the European Convention and various other international and domestic laws.

(ii) Any unauthorised entry into an individual's home would amount to violation of *Article 8* of the European Convention, if it has been made for the purpose of

interfering with the secrecy of private life of that individual. Hence, it violates the Privacy of Home of that individual.

(iii) This rule will be equally applicable to all the member-states of the European Convention, even if no legal provisions have been incorporated in the domestic Constitutions in this respect.

(iv) According to the opinion of the European Convention on Human Rights, in the absence of any public emergency threatening the life of the nation, any arrest made by the police authorities at night, would amount to violation of the right to respect for Home under this article. As such, it cannot be justified under *Article 15* of the Convention, which permits any derogation of the parties to the Convention from their obligations during emergencies.

(v) Again, the European Commission has held that, the cases of house, searches would not violate *Article 8,* if those are made by following the requirements of *Article 8(2)* of the Convention.

(vi) The right to respect for a person's home does not include the right to decent accommodation and as such, if the municipal authorities have failed to provide suitable accommodation, it would not be violative of *Article 8* of the Convention.

(vii) Again, it has been held by the European Commission that, a court order to demolish an illegal construction of a dwelling house would not amount to violation of right to respect for one's home and as such, would not be violative of *Article 8* of the Convention.[83]

Article 8 of the European Convention has given protection to the Right to respect for one's home and as such, it has prevented the violation of secrecy of one's home-life. The Right to respect for home does not only provide security and protection of one's home-life, but it also includes the secrecy and privacy of home. Once the respect is shown to home-life, that means, sanctity of home is upheld and once it is upheld, an individual enjoys the freedom to lead the home-life according to one's wishes, which in other words, means, any secrecy of home-life should not be interfered with by any outsider. Secrecy and Privacy are synonymous and in this sense, the Right to respect for Home under *Article 8* of the European Convention

[83] A. H. Robertson, *op.cit.,* pp.59-62.

includes the Right to Privacy of Home, because respect to home remains incomplete without the guarantee and protection of Privacy of home.

Moreover, any unauthorised interference with this right by anyone is prevented under *Article 8,* which includes even the Public Authorities. The Public Authorities can only interfere with this right in exceptional circumstances provided under *Article 8(2)* and during emergencies as provided under *Article 15* of the Convention. But, this right is exclusive in nature and not inclusive, because of which it has certain limitations. As such, the right to suitable or decent accommodation and the right to prevent demolition of illegal construction of a dwelling-house would not be included within the scope and ambit of this right. Hence, the right to respect for home means the sanctity and privacy of home, which should be enjoyed according to law.

As the *Article 8 of the European Convention* has actually protected the Right to Privacy of Home in disguise of the Right to respect for Home, therefore, this article is similar with the *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.* In this sense, the scope and ambit of all these articles are more or less similar. Therefore, the initiatives taken by the European Convention are good initiatives for the protection of Privacy of Home in the European region.

3.5.3.2.2. An Interpretation of the American Declaration of the Rights and Duties of Man, 1948 regarding Privacy of Home

Article-IX of the American Declaration of the Rights and Duties of Man, 1948 contains provision relating to the Right to Privacy of Home, which is discussed below:-

Article – IX

Right to inviolability of the Home

"Every person has the right to the inviolability of his home"

.

This article of the *American Declaration* expressly deals with the *'inviolability of one's home'* within the American region. In fact, *'inviolability of home'* means, no one can violate the *Right to Home* of any individual human being. A man is free to live with his home-life according to his wishes and no one can enter there without permission. Every unauthorised entry therein is prohibited. This

inviolable nature of home has actually upheld the sanctity of home, which also includes the secrecy and privacy of home. As inviolable nature of home denotes the freedom of home-life, therefore, it protects the Privacy of Home, because on the one side Privacy means Freedom and on the other side, Inviolability denotes Privacy. According to *Warren-Brandeis,* Privacy means something which is inviolable. Therefore, inviolability of home discussed here obviously means the Privacy of Home. Again, this idea of the *American Declaration* also brings forth the Common Law principle of *"Every man's home is his castle".* According to this principle, home is like a castle, where the security and liberty of an individual is well-guarded. This idea attaches inviolability to the concept of home. Again, protection of liberty of an individual in his home includes the protection of Privacy of his Home. Finally, when all these elements are taken together, the idea of Privacy of Home comes into being from the idea of inviolability of home as stated in the *Article-IX of the American Declaration.* Hence, the *American Declaration* has taken good initiatives for the protection of Privacy of Home in the American region.

In a deep-rooted study, it is found that, *Article-IX of this Declaration* is similar with the *Article 12 of the Universal Declaration, Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention on Human Rights and Fundamental Freedoms,* because all of them are dealing with various aspects of *Right to Privacy of Home.* Therefore, the above-stated article of the *American Declaration* has dealt with the express provision for the protection of *Right to Privacy of Home* in the American region. For the purpose of protection and enforcement of the various human rights contained in the *American Declaration* including the Right to Privacy, later on, the *American Convention on Human Rights* has been adopted.

3.5.3.2.3. An Elucidation of Privacy of Home under the American Convention on Human Rights, 1969

Article 11 of the American Convention on Human Rights, 1969 has created provisions for the protection of *Right to Privacy of Home* along with other components of Right to Privacy, the textual version of which has already been discussed. In an analysis of this article, it is found that, it has prohibited arbitrary or abusive interference with everyone's private life, family, home or correspondence.

In this sense, it has prohibited arbitrary or abusive interference with everyone's home-life along with other rights. Though the article has never used the term *'Right to Privacy'* anywhere, except the heading, but due to the use of the term in the heading, it can be assumed that, the article deals with various components of *Right to Privacy*. Therefore, all the rights described in the article are different aspects of *Right to Privacy.* As such, protection of home-life or *Right to Home* from any kind of interference here means, freedom to enjoy the *Right to Home* according to one's wishes. Freedom means Privacy and therefore, freedom to enjoy the *Right to Home* means the *Right to Privacy of Home.* Hence, this article deals with the *Right to Privacy of Home.* Moreover, it has specifically provided legal protection to the rights mentioned therein against any kind of interference or attacks. In this sense, it has given legal protection to the *Right to Privacy of Home* against any kind of interference or attacks. Hence, *Article 11 of the American Convention* has two sides. It has not only prohibited arbitrary or abusive interference with the *Right to Privacy of Home,* but has also provided legal protection to this right against such interference or attacks.

In a further analysis, it can be said that, *Article 11 of the American Convention* is similar with the *Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention on Human Rights and Fundamental Freedoms.* It is also similar with the *Article-IX of the American Declaration of the Rights and Duties of Man.* The reason behind it is, all these articles deal with various components of *Right to Privacy* including the *Right to Privacy of Home.* Hence, the American Convention has taken good initiatives for the protection of Privacy of Home in the American region.

3.5.3.2.4. Privacy of Home under the ASEAN Human Rights Declaration, 2012 : An Exposition

Article 21 of the ASEAN Human Rights Declaration, 2012 deals with general Right to Privacy as well as various components of this right including the Right to Privacy of Home, the textual version of which has already been discussed. In an analysis of this article, it is found that, this article gives protection to the Right to Privacy of Home from arbitrary interference along with other privacy rights. It also

provides legal protection to those rights against such interference or attacks. However, the analysis of *Article 21* has projected the similarities of this article with *Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights, Article-IX of the American Declaration on Rights and Duties of Man and Article 11 of the American Convention on Human Rights.* In this sense, these articles are not only similar, but also the reflection of one another. Hence, it can be said finally that, the *ASEAN Human Rights Declaration, 2012* has taken good initiatives for the protection of Right to Privacy of Home in the ASEAN region in the light of the *Universal Declaration of Human Rights* and other international as well as regional legal instruments.

3.5.3.3. The Municipal Laws on Privacy of Home : Whether Adequate or Not

Apart from the international and regional legal instruments, there have been various municipal laws of different countries protecting the Right to Privacy of Home. Those laws can be divided into the *Common Law Countries, Civil Law Countries and Nordic Law Countries.* But, specific laws are not found in all those countries, rather only in some Countries, those are discussed hereunder.

3.5.3.3.1. A Portrayal of the Common Law Countries regarding Privacy of Home

The specific laws on Privacy of Home are found in *Canada and South Africa,* which are discussed hereunder.

3.5.3.3.1.1. Judicial Exposition of Privacy of Home : The Canadian Experience

Canada is an important Common Law Country under the regime of Privacy Laws. The *Canadian* Law of Privacy is a mixture of Common Law principles of Law of Torts, Statutory Provisions of Privacy, Human Rights Codes and the *Canadian Charter of Rights and Freedoms, 1982.* The development of Privacy Laws in the *Pre-Charter* era in *Canada* is influenced by *the Warren-Brandeis Article in the Harvard Law Review in 1890, Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966.*

Though *Canadian Law* is very much influenced by the above-stated international instruments, but these instruments have little impact on the judicial

development of Right to Privacy in *Canada.* In fact, delayed judicial development has been noticed in *Canada* for recognizing Right to Privacy therein. Thereafter, the *Canadian Charter of Rights and Freedoms* has been enacted in *1982,* which does not include the Privacy Rights directly, but by way of liberal interpretation, the Supreme Court of *Canada* has tried to incorporate those rights therein as one of the fundamental rights and freedoms. The *Canadian Supreme Court* has opined that in the case of *Hunter v. Southam.*[84] Since the decision of this case, Privacy has played a very important role for the interpretation of a number of provisions of the *Charter,*[85] most important among them are *Sections 7 and 8 of the Charter*, the textual version of which has already been discussed.

As there is no direct law on Right to Privacy in *Canada*, therefore, there is no question of existence of law on Right to Privacy of Home. But, the *Canadian Supreme Court* has applied the above-stated two sections in matters of privacy by way of liberal interpretation. These sections deal with the rights to life, liberty and security of persons as well as the right to be secured against unreasonable searches and seizures. Liberty and Security would remain incomplete without the guarantee of Privacy and as such Right to Privacy is protected hereby in implied manner. Again, security of persons and protection against unreasonable searches and seizures include the Right to Privacy of Home. In all these cases, what is violated is actually the Right to privacy of Home. Therefore, by way of indirect application, these provisions *Canadian Charter* are protecting the Right to Privacy of Home. Hence, this right is protected under the Public Law in *Canada* in implied manner.

Again, certain legal provisions are found in *Criminal Law in Canada* relating to the cases of search and seizure and Police surveillance, where unauthorised government intrusion is prohibited. These legal provisions have been made applicable to Right to Privacy of Home by way of judicial interpretation of the *Supreme Court of Canada* and the *Ontario Criminal Court.* These are not allowed by the Courts therein on the ground of violation of Right to privacy of Home. Though Canadian Legislature has not taken active steps for the protection of Right to privacy of Home, but Canadian Judiciary has played active role in this respect.

[84] (1984) 2 SCR 145.
[85] Marguerite Russell, *op.cit.*, p.107.

3.5.3.3.1.2. Privacy of Home : The South African Agenda

In *South Africa*, the Right to Privacy has been incorporated both in the *Common Law* and the *Constitution of the Republic of South Africa, 1996. Chapter 2* of the *Constitution* contains the *Bill of Rights*, wherein *Section 14* provides for the protection of Right to Privacy of Person, Home, Property, Possession and Communication, the textual version of which has already been discussed.

In an analysis of the above-stated *Section 14*, it can be said that, though this section is mainly related to the matters of search and seizure as well as provides protection to individuals, their homes, properties and possessions from unlawful searches and seizures, but it has expressly mentioned the term "Right to Privacy". As such, this section has specifically recognised the Right to Privacy of everyone. Therefore, it has not only provided protection against unlawful searches and seizures, but has also protected the Individual Privacy, Privacy of Home, Property, Possession and Communication. It has just only included the specific aspects of search and seizure within the broad ambit of Right to Privacy. As such, it has recognised the Right to Privacy of Home and has tried to protect it; protection from search and seizure is just one aspect of Right to Privacy of Home.

Apart from *Section 14*, no such express legal provisions are found in *South African Law* regarding Right to Privacy of Home. In fact, the whole Right to Privacy is neglected therein. Moreover, *Section 7(2)* of the *Constitution* provides that, the State should respect, protect, promote and fulfil the rights in the *Bill of Rights.* Therefore, this section is another initiative for the protection of Right to Privacy and its various components along with the protection of other rights in the *Bill of Rights.*

3.5.3.3.2. The Legal Framework of Civil Law Countries

The express legal provisions are found in *Germany and China* regarding the protection of Right to Privacy of Home, which are discussed hereunder.

3.5.3.3.2.1. The German Attitude towards Privacy of Home

The protection of Right to Privacy is a very important aspect in *Germany.* The Privacy Laws in *Germany* are based on the *U. S. Constitutional Model* as well as the *Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The German basic Law or the Constitutional Law* is the first source of Privacy Law in *Germany*, but there are *Civil and Criminal Laws*

on the subject also. The *German Basic Law* contains various provisions for the protection of Right to Privacy and its various components. In this respect, the following article is important to mention herein, which deals with the Right to Privacy of Home:-

Article 13

[Inviolability of the home]

> *"(1) The home is inviolable.*
>
> *(2) Searches may be authorised only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.*
>
> *(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.*
>
> *(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay . . .*
>
> *(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk."*

This article provides the *'inviolability of home'* and prohibits searches therein, except in accordance with law and to prevent imminent danger to public security and order. In this respect, it has prescribed certain conditions, only when the searches are permitted.[86] It has allowed surveillance of any home only according to judicial order and not otherwise. Most importantly, interference to home is permitted under this article only to combat the danger of an epidemic, or to protect young persons at risk. As such, this article truly portrays the inviolable nature of

[86] James Michael, *op.cit.*, pp.92-93.

German home, which can be interfered with only in limited circumstances as stated expressly in the said article.

Therefore, this article deals with the Right to Privacy of Home. According to the views of *Warren-Brandeis in U. S. Law,* Privacy means inviolability. As such, inviolability of home denotes Privacy of Home without any doubt. Again, prohibitions of unlawful searches are necessary for the protection of Privacy of Home, which has been done by this article. Again, this article permits searches of Home only to prevent imminent danger to public security and order as well as on the fulfilment of certain conditions prescribed therein. Hence, searches of Home are permitted only in exceptional circumstances, which obviously uphold the Right to Privacy of Home in *Germany.*

3.5.3.3.2.2. The Chinese Outlook regarding Privacy of Home

The *Chinese Constitution* and various *Chinese Legislations* have tried to protect the Right to Privacy and its various components including the Right to Privacy of Home. In this respect, the following article of the *Chinese Constitution* is noteworthy, which deals with the Right to Privacy of Home:-

Constitution of the People's Republic of China, 1982

Article – 39

"The home of citizens of the People's Republic of China is inviolable. Unlawful search of, or intrusion into, a citizen's home is prohibited."

Therefore, this article provides inviolability of the home of the *Chinese* citizens and prohibits any unlawful search or intrusion thereof. Basically, it is a part of search and seizure law and provides protection to private homes against unlawful searches. But, incorporation of this article in the *Chinese Constitution as a Fundamental Right* gives different impetus to this right. *'Inviolability of Home'* is recognised as a fundamental right vide this article of the *Chinese Constitution*. *'Privacy'* and *'Inviolability'* are nothing but the different names of one aspect and in this sense, *'Inviolability of Home'* denotes *'Privacy of Home'*. As such, this article applies to Right to Privacy of Home in *China.* Hence, *Chinese Constitution* has tried to protect the Right to Privacy of Home. But, apart from this provision, no such laws are found in *China* in this respect. In this sense, this right is protected in *China* only to a limited extent.

3.5.3.3.3. The Viewpoint of Nordic Law Countries as regards Privacy of Home

Among the *Nordic Law* Countries, only *Denmark and Norway* have considered the importance of Privacy of Home. As such, the laws of these two countries are discussed hereunder.

3.5.3.3.3.1. Denmark and the Privacy of Home : A Legal Analysis

Denmark has taken initiatives for the protection of Privacy of Home. One such important *Danish Law* is the *Article 72 of the Danish Constitution*, which runs as follows:-

> *"The dwelling shall be inviolable. House searching, seizure and examination of letters and other papers as well as any breach of the secrecy to be observed in postal, telegraph and telephone matters shall take place only under a judicial order unless particular exception is warranted by statute".*[87]

Therefore, *Article 72* provides that, the *Danish Constitution* has tried to protect the Privacy of Home, Privacy against unreasonable searches and seizures, Privacy of Correspondence, Privacy of Information and the like. Only exception provided under this article is that, invasion of those Privacy rights is possible under judicial order or according to express statutory provisions enacted in this respect. Further it can be said that, this article has made the dwelling place of a person inviolable. Dwelling place obviously includes Home and inviolability denotes Privacy and in this sense, this article deals with the Right to Privacy of Home along with the other components of this right. The initiatives taken under this article are good enough due to the reason that, it has permitted the violation of this right only in exceptional circumstances and not otherwise. The scope and ambit of this article is broad enough to protect the Privacy of Home.

3.5.3.3.3.2. Attempts taken by Norway to Safeguard Privacy of Home

The *Norwegian Constitution* has never enumerated a Right to Privacy, except under *Article 102,* which provides that, *"Search of private homes shall not be made except in criminal cases"*. This article is not concerned with the Privacy of Home or Individual Privacy; it gives protection to Private Homes against unreasonable searches, which is permitted only in criminal cases. In this sense, *Danish Constitution* provides far better protection than the *Norwegian Constitution.*

[87] *Id at p.56.*

However, the provision of *Article 102* cannot be totally rejected regarding the protection of Privacy. Basically, this article provides protection from unreasonable searches and seizures, except in criminal cases. In this sense, it is a search and seizure law with respect to the private homes. But, prohibition of search and seizure provides better protection to the Right to Privacy of Home. It also upholds the inviolability of Home. If unreasonable search and seizure is prohibited, freedom or Privacy of Home is automatically protected in better manner. Therefore, this article can be applied for the protection of Privacy of Home in implied manner. Hence, the initiatives taken by *Norway* are good enough for the protection of Privacy of Home.

3.5.4. Privacy of Correspondence and Communication

The process of Communication through Correspondence or exchange of letters dates back to letters sent through pigeons, which has gradually been replaced by informal and then formal postal system with the passage of time. But, the watching of mails and interception of messages are not the newly created ideas; rather those also have been started since the starting of Communication through Correspondence. In fact, Right to Communication and Correspondence is a basic human right as declared by various international and regional human rights instruments as well as by the domestic laws of different countries. This right brings with it the Right to Privacy of Communication and Correspondence. Communication through Correspondence is generally of two types – formal and informal. As a matter of fact, both these two types of correspondences require Privacy, because these are made for the purpose of Communication between the sender and receiver and these are not for Communication with any third person between the sender and receiver. As such, the third person is not supposed to know the information Communicated through the Correspondence. The same rule would be applicable to any modern means of Communication, like telephone, mobile phone, e-mail or sms or chatting. Hence, the Right to Communication or Correspondence includes the Right to Privacy of Communication or Correspondence.

Communication through Correspondence can be made among the intimate relations, family relations or in the acute professional relations, where the matter deserves circumstances of extreme professional confidence. Right to Privacy is also

subjected to Intimate Privacy, Family Privacy, Social Privacy and Professional Privacy. All these four types of Privacy rights are subjected to the Privacy of Communication or Correspondence, because exchange of letters can be made in all these cases. Not only that, but also the other modern means of Communications is made in all these cases. In most of the cases, information shared in these mediums is confidential information, which if communicated to any third person; the chances of loss of Privacy may arise. Again, three things are involved in case of exchange of letters – Sender, Receiver and the Subject of Correspondence. Hence, the chance of loss of Privacy is not related to the Sender or Receiver, but of the Subject-matter, where some information about a third person is communicated, which if known to someone else, every chance of breach of Privacy would automatically arise.

As already discussed, interpretation of messages or tapping of telephones are age-old practice, which have been increased in the present day society. These practices were morefully found during the era of totalitarian states. In the totalitarian states, the governments were induced by sovereign functions only and as such, a number of personal liberties of the citizens were curtailed in the name of governance of States. Right to Privacy was not recognised in those states and every action of the citizens was subjected to state control, even the personal lives of them were not relieved from prying eyes of the States. The situation has become worsen in the post Second World War era, when spying has reached its highest level. The situation has been continued during the cold war between U.S.A. and the erstwhile U.S.S.R. Even, now-a-days it is still continuing between the cold war of India and Pakistan. However, the situation has been changed with the abolition of totalitarian states and the rise of welfare states. In these States, governments generally perform various welfare functions and as such the personal liberties of the citizens have been given prominence. Along with other personal liberties, Right to Privacy has also been given importance and the states cannot curtail this right without due process of law or procedure established by law. But, there also this right has not been accorded absolute status and it can be restricted on the grounds of exceptions prescribed by the national constitutions, among which national security and interest of the State are the prime concern. As such, this right can be curtailed in the name of the national security, interest of the State or public interest.

The Privacy of Communication or Correspondence was not recognised in the totalitarian States and during the post Second World War era. Spying has reached its highest point during that period and every letter, message, code or number was subjected to scanning by the State in the interest of national security. War and war like situation was very common during the then period, by reason of which States had curtailed the personal liberties of the citizens including the liberty of personal correspondence for the protection of national security. But, in the present day welfare states, personal liberty of the citizens are guaranteed including the Privacy of Correspondence, except when the national security is threatened. As such, restriction on the freedom of personal Communication or Correspondence is imposed in most civilized nations today in the interest of national security and not otherwise. But, practically various modes of interception of letters, codes or breaking of emails and cracking of computer passwords are regularly found in the advanced and developing countries. In most of the cases, these are only private activities and are not made by the States. In this sense, spying, prying, besetting and eavesdropping and various other activities are common practice now-a-days, which have threatened the Privacy of Communication or Correspondence.

Moreover, a new practice has arisen in the present day society, which is called 'the Direct Mail Industry'.[88] The Direct Mail Industries use to purchase the Computerized personal information of the citizens of different countries from whatever source they can get the information and use to send mails to the persons they have found thus. In the present day technological world, all information about individuals is recorded in Computer databases as and when they avail of any service. As such, the Direct Mail Industries can easily purchase the information stored in the databases of the service providers. These organisations, called the Direct Mail Industries have made them heavily computerized and usually manipulate millions of pieces of personal information about individuals and families to produce selective lists for sale to advertisers who have a product or service to sell and organizations that have a cause or philosophy to promote.[89] As such, sending and receiving of unsolicited mails are common practices today covering which a nationwide

[88] Hyman Gross, *Privacy – Its Legal Protection*, Oceana Publications Inc., New York, Revised Edn., 1976, p.29.
[89] *Ibid.*

profitable industry has grown up. This new practice is a serious threat to personal privacy and people feel that, receipt of unsolicited mails amounts to violation of their Privacy of Correspondence. Again, the information stolen thereunder amounts to violation of the Information Privacy of the private individuals. This is not the only one, but also sending of fraud emails containing false promises and hacking of emails are also serious threats to Privacy of Correspondence, which are called the evil effects of advanced scientific technology.

Therefore, Privacy of Communication and Correspondence is very much threatened in the present day society. But, the most important fact is that, spying is the oldest industry of the world, consequent to which the concepts like 'Spy' and 'Secret Agent' are found since the very old period. Again, curiosity of man has always led him to read the letters of others without consent. As such, advancement of information and communication technology is nothing but the addition of more smart techniques to intercept letters of others or decode the messages of others in any medium. Due to these reasons, the threat to Privacy of Communication and Correspondence has increased in the present day world. However, Privacy of Communication and Correspondence is upheld by various legal instruments all over the world, which are discussed below.

3.5.4.1. An Overview of the International Legal Instruments dealing with Privacy of Communication and Correspondence

A number of international legal instruments have been found protecting the Privacy of Communication and Correspondence. These are stated hereunder:-

3.5.4.1.1. An Interpretation of the Universal Declaration of Human Rights, 1948 regarding Privacy of Communication and Correspondence

Article 12 of the Universal Declaration of Human Rights, 1948 has tried to protect the Privacy of Communication and Correspondence, the text of which has expressly dealt with the matter. In this sense, it has expressly tried to protect the Privacy of Correspondence along with other Privacy rights. But, it has never used the term 'Privacy of Communication', which does not mean that, it has not protected the other means of Communication, except Correspondence. In fact, it includes the protection of Privacy of all modes of Communication including Correspondence without mentioning them in express manner and protecting them in implied manner.

Also it has provided legal protection to this right from arbitrary interference or attacks.

This article is subjected to both positive and negative criticisms, because it has both advantages and disadvantages. It is criticized by many authors, because it has not specifically mentioned the dimensions of Privacy of Communications and Correspondences that it has tried to protect. But, it is supported by many authors due to the advantage that, under this article, the physical zone of protection includes the home and correspondence with others, which may go very far from the physical home.[90] Though this article can be criticized for coupling the rights to Privacy of Home and Correspondence together, but it is advantageous, because it has left the scope open for liberal interpretation of these rights. In this sense, it can go far beyond the physical home or correspondence and can cover within its ambit, different modes of Communication also.

3.5.4.1.2. A Representation of the International Covenant on Civil and Political Rights, 1966 as regards Privacy of Communication and Correspondence

Article 17 of the International Covenant on Civil and Political Rights, 1966 has tried to protect the Privacy of Communication and Correspondence along with other privacy rights, because it has expressly mentioned about the protection of Privacy of Correspondence therein. In fact, this article is drawn in same line with *Article 12 of the Universal Declaration* and as such, same kind of protection is accorded herein. Hence, Privacy of Correspondence is expressly protected herein, but Privacy of Communication is protected in implied manner. Only difference lies between the two articles is that, *Article 17* has provided protection to the Privacy Rights mentioned therein from arbitrary or unlawful interference, but *Article 12* has provided protection to those rights from arbitrary interference only. In this sense, *Article 17* has provided far better protection than *Article 12,* because the scope and ambit of *Article 17* is larger than *Article 12.* Hence, Privacy of Communication and Correspondence get better protection under *Article 17.* Though *Article 17* is based on *Article 12,* but it has expanded its scope and ambit to cover the areas uncovered under *Article 12. Article 17* is also subjected to both positive and negative criticisms

[90] James Michael, *op.cit.*, p.19.

like *Article 12*, but it is also supported by various authors due to its advantages. Hence, it is a good attempt for protection of Privacy of Correspondence and Communication in the international legal arena.

3.5.4.2. An Analysis of the Regional Legal Scenario regarding Privacy of Communication and Correspondence

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Privacy of Communication and Correspondence. Those are stated hereunder:-

3.5.4.2.1. A Review of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 has created provisions for the protection of various components of Right to Privacy along with the Right to Privacy of Communication and Correspondence. This article has expressly protected Privacy of Correspondence and impliedly protected Privacy of Communication from any interference by a public authority, except in exceptional circumstances provided under *Clause (2) of Article 8.* But, the limitation of this article is that, it has provided protection from the interference by any private authority or individual. In this sense, the scope and ambit of this article is lesser than *Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights*, because those articles have provided protection to this right from any kind of interference, be it by public or private entity.

This article has recognised that, everyone has the right to respect for his correspondence along with other rights. Though it has not spoken directly about the Right to Privacy, but by way of protecting various rights allied to Right to Privacy, it has tried to protect Right to Privacy and its various components. In this sense, by way of protecting the Right to respect for correspondence, it has protected the Right to Privacy of Correspondence. Therefore, the analysis of *Article 8* shows that, it deals with the Right to respect for Correspondence, which provides the security and protection to the Correspondence of an individual and obviously it includes the Right to Privacy of Correspondence, because respect for Correspondence remains incomplete without the Privacy of Correspondence.

Jurists have expressed different opinions regarding the scope and ambit of *Article 8* on the point of Respect or Privacy of Correspondence. In fact, they are not unanimous on the issue that, whether the article covers respect for Correspondence only or includes other means of Communication also. But, most of them have expressed that, the article applies to other means of Communication also, apart from Correspondence. In this respect, the idea of Correspondence is necessary to explain. Generally, the term 'Correspondence' includes every Communication between persons by exchange of letters. Again, the term 'Letter' should also be explained hereunder. Accordingly, letter means any written communication, but it includes closed letters, post cards as well as anything else despatched or transmitted through a private individual or the post office.[91] As such, *Article 8* is applicable to all these kinds of letters and the protection it provides to Correspondence is applicable to both public and private means of transmission of Correspondence. Not only that, this article has tried to provide safeguards against violation of the Right to respect for Correspondence by providing following protections:-

(i) Protection against examination of Correspondence.

(ii) Protection against prevention of Correspondence from reaching its destination.

(iii) Protection against making the contents of Correspondence or its existence known to a third person.[92]

In this respect, the article has tried to provide every protection to the Right to respect for Correspondence. Moreover, this article has provided protection to other means of Communication also, apart from Correspondence. The reason behind that is, Correspondence is a medium of Communication and the idea of Communication remains incomplete without Correspondence. Again, in the modern age, the system of Correspondence is supplemented by other means of Communication and those new means are used to communicate between two or more persons instead of Correspondence. Therefore, protection of the means of Correspondence is automatically applicable to the other means of Communication with the passage of time. In this sense, expansion of *Article 8* is required to cover other means of Communication, which has already been done and it includes the Communication by means of telephone, telegraph, electrical, wireless, pneumatic or other mediums. As

[91] A. H. Robertson, *op.cit., p.62.*
[92] *Id at p.63.*

such, the interception, suppression or disclosure of a message transmitted by these means of Communication amounts to violation of *Article 8 of the Convention.* Any intentional telephone-tapping by a public authority without the consent of the parties to Conversation will also amount to violation of Right to respect for Correspondence under this article.[93] Telephone-tapping is an acute case of violation of Privacy of Communication and in this sense, the Right to respect for Correspondence includes the Right to Privacy of Correspondence and other means of Communication without any discrepancy.

However, the protection of Right to respect for Correspondence under *Article 8* is not absolute and reasonable restrictions can be imposed by a public authority on this right on the following grounds:-

(i) Derogations in time of war or other public emergency threatening the life of the nation – Article 15.

(ii) Restrictions on the political activity of aliens – Article 16.

(iii) Forfeiture of the right to rely on the Convention – Article 17.

(iv) Reservations – Article 64.[94]

Therefore, in an ultimate analysis, it is found that, though *Article 8 of the European Convention* expressly deals with the protection of Right to respect for Correspondence, but this protection is applicable to other means of Communication also, in the implied manner, because Correspondence is supplemented by those means of Communication with the passage of time. In fact, Correspondence or exchange of letters between persons is made through the electronic medium by email, mobile sms or whatsapp messages in the contemporary society, which are nothing but the modern forms of Correspondence or exchange of letters. In this sense, the traditional mode of Correspondence is replaced by these modern modes. As such, the protection of Right to respect for Correspondence would be applicable automatically to these modern forms of Correspondence and other means of Communication. This is the reason by way of which it can be said that, though *Article 8* expressly protects Correspondence, but is applicable to other means of Communication in implied manner. Now this reason does not only apply to *Article 8,* but also equally applicable to other international, regional and national legal

[93] *Id at pp.65-66.*
[94] *Id at p.66.*

instruments and due to this reason, each and every legal instrument protecting the Right to Correspondence automatically protects the Right to Communication in the modern period in implied manner. Hence, it is always true that, Right to Correspondence covers the Right to Communication in implied manner.

Moreover, the Right to respect for Correspondence includes the Right to Privacy of Correspondence, because in most of the cases, Correspondence contains private information between the persons or deals with information of professional confidence, where maintenance of Privacy is must. Therefore, if the Correspondence is to be respected, then the Privacy of Correspondence should be maintained first. This is true in case of other means of Communication also, because Communication over telephone or electronic media is also subjected to the Right to Privacy. In this sense, Right to respect for Correspondence and Communication remains incomplete without the guarantee of Right to Privacy of Correspondence and Communication. Hence, Right to respect for Correspondence should always include the Right to Privacy of Correspondence. This is true not only in case of *Article 8 of the European Convention,* but also in case of any other legal instrument containing this right. As the other international, regional and national legal instruments have specifically spoken about the Privacy of Correspondence, therefore, this problem of interpretation does not arise in those cases. However, it should always be remembered that, Right to respect for Correspondence remains incomplete without the guarantee of Right to Privacy of Correspondence. Hence, both of them can be called two sides of the same coin or mirror reflection of each other.

Last but not the least, *Article 8 of the European Convention* has actually protected the Right to Privacy of Correspondence and Communication in disguise of the Right to respect for Correspondence, therefore, this article is similar with the *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.* In this sense, the scope and ambit of all these three articles are similar with a slight difference that, *Article 8* has provided protection from interference by public authority and is silent about the interference by private entity, whereas, both *Articles 12 and 17* have provided protection from any interference, both by public and private. In this sense, other two

articles, except *Article 8,* are having larger scope and ambit than *Article 8.* Apart from this difference, all the three articles share similarities with one another.

3.5.4.2.2. An Assessment of the American Declaration of the Rights and Duties of Man, 1948 on the point of Privacy of Communication and Correspondence

The American Declaration of the Rights and Duties of Man, 1948 contains an article relating to the Right to Privacy of Correspondence and Communication, which is discussed below:-

Article – X

Right to inviolability and transmission of Correspondence

"Every person has the right to the inviolability and transmission of his Correspondence".

This article of the *American Declaration* expressly deals with the 'inviolability and transmission of one's Correspondence' within the American region. In fact, 'inviolability of Correspondence' means, no one can violate the Right to Correspondence of an individual human being. A man is free to communicate with others by means of Correspondence and other means of Communication, like telephone, telegraph as well as the newly invented modes of Correspondence, like email, mobile sms and whatsapp messages. Any interference with this right is unauthorised interference and as such, prohibited. This inviolable nature of Correspondence has actually upheld the secrecy and privacy of Correspondence. As inviolable nature of Correspondence denotes the freedom of Correspondence, therefore, it protects the Privacy of Correspondence, because on the one side Privacy means Freedom and on the other side, Inviolability denotes Privacy. Therefore, inviolability of Correspondence discussed here obviously means the Privacy of Correspondence. Again, Privacy of Correspondence means Privacy of every means of Communication, which has already been discussed. In this sense, inviolability of Correspondence includes inviolability of Communication, which ultimately means, both Privacy of Correspondence and Communication. Moreover, this article also speaks about the Right to transmission of Correspondence. It means every person should enjoy freedom to transmit one's Correspondence without any interference as and when wishes in the American region. Such transmission of

Correspondence should not be prevented by anyone. Therefore, by way of guaranteeing inviolability and transmission of Correspondence, this article has tried to protect freedom or Privacy of Correspondence. Privacy of Correspondence remains incomplete without the inviolability and free transmission of Correspondence. Hence, this article deals with the Privacy of Correspondence in the American region.

Finally, it can be said that, *Article X of this Declaration* is similar with *Article 12 of the Universal Declaration, Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention,* because all of them have dealt with the Right to Privacy of Correspondence and Communication along with other privacy rights.

3.5.4.2.3. An Examination of Privacy of Communication and Correspondence in the light of the American Convention on Human Rights, 1969 and the ASEAN Human Rights Declaration, 2012

Article 11 of the American Convention on Human Rights, 1969 and *Article 21 of the ASEAN Human Rights Declaration, 2012* have dealt with Right to Privacy. Specifically, these two articles prevent any arbitrary or abusive interference on the Right to Privacy of Correspondence as well as these articles provide legal protection to this right against such interference as a matter of right. As such, these articles have tried to protect the Right to Privacy of Correspondence in an all-round manner. Though these articles have not used the term 'Privacy of Correspondence', but by providing freedom from arbitrary interference to Right to Correspondence, those have recognised the Right to Privacy of Correspondence, because Privacy means Freedom. As already stated, Right to Privacy of Correspondence includes the Right to Privacy of other means of Communication. Therefore, these articles also provide protection to Right to Privacy of Communication. In this sense, these articles are similar with *Article 12 of the Universal Declaration, Article 17 of the International Covenant on Civil and Political Rights and Article X of the American Declaration.* Those have a slight difference with *Article 8 of the European Convention* like the other articles, because *Article 8* provides protection against the interference by public authority only and these *Articles 11 and 21* provide protection against any interference. Hence, *Article 11 of the American Convention* and *Article 21 of the*

ASEAN Declaration are good initiatives for the protection of Right to Privacy of Correspondence and Communication in their respective regions.

3.5.4.3. The Standpoint of Municipal Laws regarding Privacy of Communication and Correspondence

The standpoint of Municipal Laws of different Countries as regards the protection of Right to Privacy of Correspondence and Communication has been discussed hereunder.

3.5.4.3.1. An Exposition of the Common Law Countries

The most important Common Law Country, which deals with the Right to Privacy of Correspondence and Communication, is *Australia.*

3.5.4.3.1.1. The Australian Viewpoint of Privacy of Communication and Correspondence

The legal protection of Privacy against intrusion in *Australia* has been divided into *Territorial Privacy and Electronic Privacy. Electronic Privacy* is protected by legislation regulating the unlawful interception of telecommunications by way of enacting the federal *Telecommunications (Interception) Act, 1979 (cth),* which also prohibits unlawful dealing with intercepted information. It is also protected by making legislation regulating the use of listening and surveillance devices and in this respect, each *Australian* jurisdiction has enacted *"Listening Devices" Legislation.*[95] This Electronic Privacy protection legislation in *Australia* is an initiative for the protection of Privacy of Communication in *Australia.* Telecommunication is part and parcel of Correspondence and Communication. Hence, protection of Privacy of telecommunication amounts to protection of Privacy of Correspondence and Communication and in this respect, the action taken by the Common Law Country *Australia* is a good action.

3.5.4.3.1.2. Inadequacy of Canadian Laws for Protection of Privacy of Communication and Correspondence

The next important Common Law Country in this respect is *Canada.* Certain amount of protection is found in *Canadian Criminal Law* with respect to the Privacy of Correspondence and Communication. *Part VI of the Criminal Code titled*

[95] David Lindsay, *op.cit.*, pp.168, 171-172.

"Invasion of Privacy" deals with the interception of Communications.[96] Hence, this is the only legislation in *Canada* providing protection to the Right to Privacy of Communication. Therefore, the *Canadian Laws* are inadequate for prevention of violation of Privacy of Correspondence and Communication thereof.

3.5.4.3.1.3. Protection of Privacy of Communication and Correspondence : The South African Strategy

In *South Africa*, the Right to Privacy has been dealt with both by the *Common Law* and the *Constitution of the Republic of South Africa, 1996. Chapter 2* of the *Constitution* deals with the *Bill of Rights*, wherein *Section 14(d)* provides for the protection of Right to Privacy of Communication, which runs as follows:-

> *"Everyone has the right to privacy, which includes the right not to have: . . . (d) The Privacy of their Communications infringed".*[97]

In fact, *Section 14 of the Bill of Rights* expressly deals with various components of the Right to Privacy including the Right to Privacy of Communications. Specifically, *Section 14 (d)* covers a broad area of protection of Privacy as the Privacy of Communications, which is based on the Common law principle of *actio iniuriarum (action for invasion of Privacy)* taken from the old *South African Law.*[98] This legal provision is important, because it provides protection against the infringement of the Privacy of Communications of every person in *South Africa.* As such, the protection of Privacy of Communication in *South Africa* largely depends upon the above-stated Common Law principles and the Constitution. In this respect, incorporation of *Section 14* is a great initiative, because it empowers the Government to take steps for the protection of the so far neglected areas of the Right to Privacy. Moreover, *Section 7 (2) of the Constitution* gives further impetus to this process, which provides that, the state should respect, protect, promote and fulfil the rights in the *Bill of Rights.* Therefore, this section creates the provision by way of which protection of Right to Privacy is upheld in *South Africa.*[99] Hence, this section would also become helpful for the protection of Right to Privacy of Communication therein.

---

[96] Marguerite Russel, *op.cit.*, pp.105-106.
[97] C. M. van der Bank, *op.cit., p.78.*
[98] *Id at p.79.*
[99] *Ibid.*

In this sense, it can be said that, *South African Constitution* has expressly tried to protect the Right to Privacy of Communication, but is silent about the Right to Privacy of Correspondence. But, by way of larger interpretation and analysis, it is already found that, Correspondence is a part of Communication and as such, Right to Privacy of Communication includes the Right to Privacy of Correspondence. Hence, the law protecting Privacy of Communication in *South Africa* would obviously include the Right to Privacy of Correspondence. In order to give effect to this right, the *Electronic Communications and Transactions Act, 2002* has been enacted in *South Africa.* More or less, this is the situation in this Country as regards the protection of Right to Privacy of Correspondence and Communication.

3.5.4.3.2. The Approach of Civil Law Countries towards Protection of Privacy of Communication and Correspondence

The most important Civil Law Countries as regards the protection of Privacy of Correspondence and Communication are *Germany* and *China.*

3.5.4.3.2.1. Privacy of Communication and Correspondence : The German Exposition

The German Constitutional Law is called the *Basic Law,* which deals with various components of Right to Privacy in its different articles. It has also dealt with the Privacy of Correspondence and Communication. In this respect, the following articles of the *Basic Law* are important, which are stated hereunder:-

Article 10

[Privacy of correspondence, posts and telecommunications]

"(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature."

Article 18

[Forfeiture of basic rights]

"Whoever abuses . . . the privacy of correspondence, posts and telecommunications (Article 10) . . . in order to combat

> *the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court."*

These two articles of the *German Basic Law* are noteworthy. *Article 10* provides for the inviolable nature of privacy of correspondence, posts and telecommunications, restrictions on which may be ordered only pursuant to a law. Therefore, this article has tried to protect the Privacy of Correspondence and Communication in an express manner. The last part of this article is more significant, because it says that, if legal restrictions are imposed on those rights without informing the person on whom the restrictions are imposed, in the interest of national security or for free democratic basic order, then the court orders should be reviewed by the agencies appointed by the legislature. In this sense, this article has practically made these rights immune from any interference in *Germany*, which projects towards a strong law for protection of Privacy of Communication and Correspondence in *Germany*. Only exception in this respect is *Article 18*, which provides that, the right to privacy of correspondence, posts and telecommunications is forfeited in order to combat the free democratic basic order, if it is abused by any individual. However, the Federal Constitutional Court reserves the right to determine this forfeiture and its extent as per *Article 18 of the German Basic Law*. In this sense, the power to forfeiture this right is also not absolute and is subjected to the conditions prescribed under *Article 18*.

Therefore, the above-stated articles of the *German Basic Law* have tried to protect the Privacy of Correspondence and Communication in *Germany* in full-proof manner. The most important part of these articles is that, these have expressly tried to protect both the Privacy of Correspondence and Communication by using the terms 'correspondence, posts and telecommunications', whereas, most of the international, regional or other national legal instruments have expressly protected either Privacy of Correspondence or the Privacy of Communication. In this sense, the scope and ambit of *German Basic Law* is far more significant and comprehensive than the other legal instruments and it has far reaching consequences as regards the protection of this right. Moreover, this law is all pervasive, because it has allowed only legal restrictions on this right and has provided the forfeiture of this right only when the right is abused. Accordingly, such forfeiture is permitted

only for the maintenance of free democratic basic order of the society and not otherwise. In this sense, these rights can be curtailed only by imposing reasonable restrictions on them. Hence, the attempts taken by the *German Basic Law* for the protection of Privacy of Correspondence and Communication are highly appreciated.

3.5.4.3.2.2. An Account of Chinese Laws for Protection of Privacy of Communication and Correspondence

China is another important Civil Law Country which deals with various components of Right to Privacy and provides legal protection thereof. But, *China* has mainly dealt with Personal Privacy and Privacy Torts. Not more legal provisions are found therein as regards the protection of Privacy of Correspondence and Communication. However, the *Chinese Constitution* has tried to protect this right to some extent. In this respect, the following provision of the *Constitution of the People's Republic of China, 1982* is pertinent to mention, which is stated hereunder:-

Article – 40

> *"Freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organisation or individual may, on any ground, infringe upon citizens' freedom and privacy of correspondence, except in cases where, to meet the needs of State security or of criminal investigation, public security or procuratorial organs are permitted to censor correspondence in accordance with the procedures prescribed by law".*

Therefore, *Article 40 of the Chinese Constitution* has expressly tried to protect the freedom and privacy of the Correspondence of the Chinese Citizens. It has provided legal protection to this right and has expressly prevented its infringement by any organization or individual on any ground, except the exceptions provided in that article. In this sense, violation of this right is not allowed in *China* by any private organization or individual and it can only be curtailed by the public authority or State in the public interest, for protection of national security, for the purpose of Criminal investigation or any other matter mentioned therein. Again, it can only be curtailed by procedure prescribed by law or express legal procedure. As such, this article has tried to protect the Privacy of Correspondence in *China* against

any interference and it has provided protection to this right in an all-round manner. However, it has not provided express protection to the Privacy of Communication, which can be included within the Privacy of Correspondence by larger interpretation. Hence, *Chinese Constitution* has taken good initiative for the protection of Right to Privacy of Correspondence and Communication in *China.*

3.5.4.3.3. A Portrayal of the Nordic Law Countries regarding Privacy of Communication and Correspondence

Denmark is the only *Nordic Law* country, which has certain laws for the protection of Privacy of Correspondence and other means of Communication.

3.5.4.3.3.1. The Standpoint of Denmark

Article 72 of the Danish Constitution is the only provision for protection of Privacy of Communication and Correspondence in *Denmark,* the text of which has already been discussed. Therefore, *Article 72* provides that the *Danish Constitution* has tried to protect various aspects of Right to Privacy, including *Privacy of Correspondence and Privacy of other means of Communication, like telegraph and telephone.* In this sense, this article has tried to protect the Privacy of Correspondence and Communication in express manner in *Denmark.* Moreover, this article is having a broad ambit, because it says that, invasion of the Privacy rights stated therein, is possible only in exceptional cases by any judicial order or as per the express statutory provisions enacted in that effect. Hence, this article has tried to provide protection to Privacy of Correspondence and Communication in an all-round manner.

3.5.5. Privacy of Honour and Reputation vis-a-vis Defamation

Reputation of a person is utmost important, because the loss of reputation creates the violation of Privacy of a person along with the violation of human dignity. Privacy means Freedom and when the reputation of a person is lost, he is not free to live his life according to his wishes and as such, Privacy of the person is lost. Moreover, defamation causes both physical and mental harm to a person and the mental loss or loss to feelings amounts to violation of Privacy of that person. Every human being needs freedom or privacy in a civilized society and as such, a person becomes incomplete without privacy. Honour or Reputation includes within it certain private facts relating to an individual, which an individual may not want to

share with others or may cause loss of Privacy, if discussed in public. Every individual has both private and public lives. Public life is for maintaining relations with the outside world, but private life is personal life, which includes various private and secret facts, which can be shared only with family or intimate relatives. In this sense, if the private facts of an individual are brought in public, then those may create embarrassment in the public life of that person by damaging the picture of that person before general public. This situation is morefully applicable for a celebrity or public figure. As such, the disclosure of private facts in front of public amounts to violation of Privacy of an individual, which causes loss of one's reputation also. Therefore, the question of Privacy of Honour or Reputation comes into picture, the maintenance of which is utmost important for the sake of maintaining social relations by an individual.

Every individual is entitled to enjoy his or her right to reputation and if right to reputation is destroyed, the right to live with human dignity is also destroyed. Reputation is an essential attribute of human character and in this sense; it is directly related to human dignity. The wrong which takes away human reputation is called Defamation. Defamation does not only cause harm to human reputation but it also affects the human dignity, because reputation is part and parcel of human dignity. In this sense, if Privacy is violated, human dignity is also violated, because another meaning of Right to Privacy is protection of inviolate personality of human beings, which is directly related to human dignity. Therefore, ultimate consequence of Defamation not only affects human dignity but also violates the Right to Individual Privacy. In this sense, there is a close connection between Defamation and Privacy.[100] More specifically, it can be said that, Defamation is closely connected to Privacy of Reputation.

Privacy of Reputation is not only a human right but also it is considered as a tort, because the wrong of Defamation is a tort, which takes away the right to reputation of individual human beings or causes harm to their reputation. Therefore, compensation can be claimed under law of torts for the violation of right to reputation by way of Defamation. In this sense, an analysis of Privacy as a tort is also required.

[100] Sangeeta Chatterjee, "*Privacy and Defamation: A Legal Analysis in the Indian Context*", JCC Law Review, Vol. V (1), 2014, pp.99-117 at p.100.

3.5.5.1. Analysis of Privacy as a Tort

Privacy was considered as a tort in the Western World and most of the Western jurists have defined privacy as a tort. Still it is considered as a tort today and parallel action can be taken for violation of Right to Privacy under the Law of Torts along with the Constitutional or Human Rights Laws.[101]

Privacy was considered as a Tort for the first time by *William L. Prosser in 1960.* He has defined Privacy as a tort after analyzing a number of judicial pronouncements and has finally contended that, Privacy is not one tort, but a combination of four torts.[102] Prosser's idea of Privacy is called the *'Privacy Torts'.* He has enumerated the following four *Privacy 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.[103]

3.5.5.2. Defamation : The Concept

Defamation is a tort causing injury to a person. In fact, it is a civil wrong causing harm to a person's reputation. Every individual human being has a right to reputation and defamation directly attacks a person's reputation by publication of false and defamatory statement about that person in front of everybody. Defamation can be in any form, temporary or permanent, verbal or written but it should have the capacity of causing harm to the reputation of an individual.[104]

Defamation has the following essential elements:-

(i) There must be a statement.

(ii) The statement must be false and defamatory.

(iii) The statement must refer to the plaintiff.

(iv) There must be publication of the statement.

Defamation is divided into two types – *Libel and Slander. Libel* is the publication of false and defamatory statement in some permanent form, like writing, printing, picture, effigy or statue, whereas, *Slander* is the publication of false and

[101] *Id at p.103.*
[102] *Ibid.*
[103] William Prosser, "*Privacy*", California Law Review, Vol.48, 1960, p.389.
[104] *Supra Note 100 at p.105.*

defamatory statement in some temporary form, like spoken by words or gestures. Though Defamation is considered as a tort, but it has the following defences:-

(i) Justification or Truth.

(ii) Fair and Bonafide Comment.

(iii) Privilege – (a) Absolute privilege; and

(b) Qualified Privilege.

Absolute Privilege is applicable in the following cases:-

(i) Parliamentary proceedings.

(ii) Judicial proceedings.

(iii) State Communications.

Qualified Privilege is applicable in the following cases:-

(i) Statements should be made in discharge of a duty or protection of an interest.

(ii) The statement should be made without any malice.

Therefore, action can be taken under the law of torts for Defamation, but the wrong-doer can escape the liability, if the case fits under any of the above-mentioned defences. In those cases, the person is not liable for Defamation.

3.5.5.3. Comparison between Privacy and Defamation

Privacy and Defamation are two separate legal aspects, but they are related with each other by a common term, called 'Reputation'. Right to Reputation is an important human right, the violation of which amounts to the wrong of defamation. Again, violation of right to reputation brings with it, the violation of Right to Privacy also. In fact, any loss of reputation of a human being creates defamation as well as the invasion of Privacy. Though the law of defamation protects the reputation of an individual and the law of privacy protects the feelings of an individual, but a common element, called 'reputation' exists between them, because due to the loss of reputation by way of defamation, certain amount of mental loss is also caused to an individual and that is the invasion of Privacy.[105]

There is another important aspect of the relation between Defamation and Privacy. To constitute Defamation, there should be the publication of a false statement. As such, if the statement is true, there should be no defamation, but there may be the invasion of privacy due to the causing of injury to one's feelings.

[105] *Id at p.108.*

Therefore, violation of privacy may be caused without creating any harm to reputation of an individual by stating true facts about the person. In such situations, no action for defamation would lie, because the information that is discussed is merely embarrassing, not false.[106] In those cases, only the action for invasion of Privacy would lie.[107]

Therefore, a number of differences are found between Privacy and Defamation, which are stated below:-

(i) *The law of Defamation does not attract any loss or damage arising from publication of true facts, whereas, the law of Privacy attracts such loss or damage.*

(ii) *The law of Defamation mainly covers physical sufferings of an individual, whereas, the law of Privacy covers both physical and mental sufferings.*

(iii) *The law of Defamation has been originated in England, whereas, the law of Privacy has been originated in various countries at the same time.*

(iv) *Truth is a defence in an action for Defamation, while it is not a defence in an action for invasion of Privacy.*

(v) *Defamation hurts an individual's public reputation or status, whereas violation of Privacy causes injury to one's private life.*

(vi) *Defamation is a recognized tort, whereas, Privacy is not a recognized tort and is still in developing stage regarding its tortuous liability.*

(vii) *In most of the countries, protection against Defamation is available both against the State and private individuals, but protection against invasion of privacy is available only against the State and not by private individuals.*[108]

The comparison between Defamation and Privacy also projects towards the necessity of considering Privacy as a tort. In gist, it can be said that, the cause of action in privacy cases is not injury to one's public reputation or status as in defamation cases, but injury to emotional and mental sufferings.[109] As such, the mental distress causing from the fear of being exposed in front of the public, should be protected by adequate law of Privacy considering it as a tort.[110]

---

[106] P. M. Bakshi, "*Defamation and Privacy*", in *Law of Defamation: Some Aspects*, N. M. Tripathi Pvt. Ltd., Bombay, 1986, p.21.
[107] *Supra Note 100 at p.108.*
[108] *Id at pp.108-109.*
[109] Wade, "*Defamation and the Right to Privacy*", Vanderbuilt Law Review, Vol.15, Oct.1962, p.1093.
[110] *Supra Note 100 at p.109.*

In the present day society, Right to Privacy of Reputation of the human beings is very much threatened by the over-encroachment of media into human lives. In fact, media has reached at every door-step in today's world for the purpose of gathering information in order to publish news over print or electronic media. As such, private lives of the celebrities and public personalities are very much endangered. Every time media tries to publish embarrassing private facts about them in public, which causes violation of their Right to Privacy of Reputation as well as amounts to Defamation. Sometimes these attacks by media end into many tragic stories, like the death of Lady Diana. As such, Right to Life and Human Dignity of the celebrities are very much threatened along with their Right to Privacy of Reputation due to the over-encroachment of media into human lives. Moreover, media tries to publish private facts about the ordinary citizens also causing violation of their Right to Privacy of Reputation. Hence, it is high time to enact extensive legislation in this field. However, Privacy of Honour and Reputation is upheld by various legal instruments all over the world, which are discussed below.

3.5.5.4. An Appropriation of the International Legal Instruments regarding Privacy of Honour and Reputation

A number of international legal instruments have been found protecting the Privacy of Honour and Reputation. Those are stated hereunder:-

3.5.5.4.1. The Universal Declaration of Human Rights, 1948 : A Liberal Attitude towards Protection of Privacy of Honour and Reputation

Article 12 of the Universal Declaration of Human Rights, 1948 has tried to protect the Privacy of Honour and Reputation, the textual version of which has already been discussed. It has prevented any attacks on the Privacy of Honour and Reputation and has provided legal protection to this right against such attacks as a matter of right. Though this article has expressly provided protection to the Honour and Reputation of an individual against any attack, but surely this article has provided protection to Privacy of Honour and Reputation of an individual. The reason is that, attack on Honour and Reputation means, any attack on Honour and Reputation, which includes the Privacy of Honour and Reputation.

This article is subjected to both positive and negative criticisms, because it has both advantages and disadvantages. It is criticized by many authors, because it

has not specifically mentioned the dimensions of Privacy of Honour and Reputation that it has tried to protect. Again, the reasons for inclusion of the terms 'honour and reputation' are not clear to many authors. But, some have suggested a distinction between the two terms – honour and reputation to give a clear idea. Accordingly, it has been prescribed that, personal integrity of human beings is based on both the subjective and objective elements, wherein 'honour' is the subjective element and 'reputation' is the objective element.[111] Therefore, authors have tried to provide positive criticism to this article.

Moreover, this article can be criticized for coupling the rights to Privacy of Honour and Reputation together, but it is advantageous, because it has left the scope open for liberal interpretation of these rights. In this respect, the attempt taken by the Universal Declaration is a good attempt.

3.5.5.4.2. Whether the International Covenant on Civil and Political Rights, 1966 has upheld the Privacy of Honour and Reputation or not

Article 17 of the International Covenant on Civil and Political Rights, 1966 has tried to protect the Privacy of Honour and Reputation along with other privacy rights, because it has expressly mentioned about the protection of Privacy of Honour and Reputation therein. In fact, this article is drawn in same line with *Article 12 of the Universal Declaration* and as such, same kind of protection is accorded therein. Only difference lies between the two articles is that, *Article 17* has provided protection to the Privacy of Honour and Reputation against unlawful attacks only, but *Article 12* has provided protection to this right against any attacks. In this sense, *Article 17* has further elaborated *Article 12* by specifically mentioning the nature of 'attacks' as 'unlawful attacks'. This article has also provided legal protection to this right against such attacks as a matter of right. In this sense, *Article 17 of the International Covenant on Civil and Political Rights* is a slight modification of *Article 12 of the Universal Declaration of Human Rights.* Hence, it is a good attempt for protection of Privacy of Honour and Reputation in the international legal arena.

[111] James Michael, *op.cit.*, p.21.

3.5.5.5. The Role of Regional Legal Instruments for Protection of Privacy of Honour and Reputation

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Privacy of Honour and Reputation. Those are stated hereunder:-

3.5.5.5.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 : Incomplete Protection

Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950 deals with Right to Respect for private life and various components of Right to Privacy, like the Privacy of Family life, Home and Correspondence, but it does not deal with the protection of Right to Privacy of Honour and Reputation. In fact, it has never mentioned expressly about the Right to Privacy of Honour and Reputation in *Article 8*, but that does not mean that, this article has accorded no protection to this right. This article has provided protection to this right in implied manner and it is applicable only to the protection of Honour and Reputation in Private life. In this sense, a slight difference is found between *Article 8 of the European Convention and Article 17 of the International Covenant on Civil and Political Rights,* because *Article 17* deals with the protection of Honour and Reputation in public life. Therefore, *Article 8* only secures Privacy of Honour and Reputation in private life, but *Article 17* secures Privacy of Honour and in public life also. In this sense, the scope and ambit of *Article 17* is larger than the scope and ambit of *Article 8.* As *Article 17* is based on *Article 12 of the Universal Declaration of Human Rights,* hence, same difference is found between *Article 8 and Article 12.*

However, it does not mean that, *European Convention* is totally silent about the protection of Privacy of Honour and Reputation. Though it has not mentioned anything about this right in *Article 8,* but it has tried to protect this right under *Article 10(2). Article 10* deals with Freedom of Expression. Under *Article 10(1)* the Right to Freedom of Expression of everyone is protected. But, *Article 10(2)* imposes certain reasonable restrictions on the unfettered use of this right. The restrictions imposed thereunder must be prescribed by law. It is also stated under this article

that, the restrictions can be imposed for the protection of the rights or reputation of others and for the protection of the confidential information.

In this respect, the text of **Article 10(2**) runs as follows:-

> *". . . restrictions . . . prescribed by law and are necessary in a democratic society. . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence . . ."*

Therefore, *Article 10(2)* is also a good attempt for protecting the Right to Privacy of Honour and Reputation. It has prescribed legal restrictions on the Right to Freedom of Expression in the interests of the protection of rights or reputation of others as well as for the protection of confidential information, which is part and parcel of Right to Privacy of Honour and Reputation. In this sense, *Article 10(2)* is also a supplement to *Article 8,* because it has completed the incomplete works of *Article 8.* Moreover, *Article 10(2)* has also helped to bridge the gap between *Article 12 of the Universal Declaration or Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention.* The term 'reputation' used in the above-stated *Articles 12 and 17* has not been used in the *Article 8* and thus, a gap is created between them, which are filled up by *Article 10(2)* by using the word 'reputation'. Apart from that, protection of confidential information means the protection of Right to Privacy and more specifically Right to Privacy of Honour and Reputation, because Privacy and Confidentiality of Information are synonymous. Moreover, maintenance of confidentiality of information about oneself is required for the protection of Honour and Reputation of that person, either in private life or in public life, which is called the Privacy of Honour and Reputation. In this sense also, *Article 10(2)* is a supplementary provision to *Article 8,* because the direct use of Privacy is found therein, which is used indirectly in *Article 8.* Hence, the incorporation of *Article 10(2)* is a good initiative under the Convention.

Hence, it can be said that, *Article 10(2)* has accorded protection to the Privacy of Honour and Reputation in line with *Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights,* which is left by *Article 8 of the European Convention.* Due to this reason, it can be said that, *European Convention* has provided protection to various

components of Privacy under its different articles, which denotes the completeness of the *European Convention.*

3.5.5.5.2. The American Declaration of the Rights and Duties of Man, 1948 : A Positive Contribution for Protection of Privacy of Honour and Reputation

Article V of the American Declaration of the Rights and Duties of Man, 1948 deals with the protection of Right to Privacy of Honour and Reputation, which runs as follows:-

Article V

Right to Protection of honour, personal reputation and private and family life

> *"Every person has the right to the protection of the law against abusive attacks upon his honour, his reputation and his private and family life".*

This article deals with the legal protection of honour, reputation, private and family life of a person against any abusive attack as a matter of right. Therefore, this article deals with Privacy of Honour and Reputation along with other Privacy rights, because protection of Honour and Reputation against any abusive attack means the protection of that right in an all-round manner, which includes the protection of Privacy also. Any attack on Honour and Reputation always curtails the Privacy of that right and as such, those attacks cannot be separated from violation of Privacy. Hence, this article is applicable to Privacy of Honour and Reputation without expressly using the term 'Privacy'. In this sense, it is applicable to protection of various components of Privacy in implied manner.

However, this article is similar with *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights* as regards the protection of Privacy of Honour and Reputation, with the only exception that, it has never used the term 'Privacy' expressly as have been used in the other two articles. It is also not similar with *Article 8 of the European Convention,* because *Article 8* has not used the terms 'Honour and Reputation' in express manner. In this sense, it is similar with *Article 10(2) of the European Convention,* which has provided express protection to Privacy of Honour and Reputation. Hence, it is a good attempt for the protection of this right in the American region.

One more difference is found in this article with the other articles that, it has used the term 'abusive', whereas, the others have used the term 'unlawful'. More or less, these two terms are similar with a difference that, 'abusive' means misuse of law which means, partial violation of law, but 'unlawful' means total violation of law. In this sense, the scope and ambit of this article is narrower than the other articles stated above. Inspite of this criticism, this article is advantageous as regards the protection of Privacy of Honour and Reputation. The positive side of this article is that, it has taken initiative for protection of Honour and Reputation of individual persons.

3.5.5.5.3. The American Convention on Human Rights, 1969 : Specific Protection to Privacy of Honour and Reputation

Article 11 of the American Convention on Human Rights, 1969 expressly deals with Right to Privacy as a Civil and Political Right. It has provided protection to various components of Right to Privacy including the Privacy of Honour and Reputation. Specifically, it has accorded respect to everyone's honour and has recognized everyone's dignity. Moreover, it has provided protection to the honour and reputation of every person against unlawful attacks. Such legal protection is provided to everyone as a matter of right under this article. Therefore, this article is drawn in same line with *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.* Only exception lies between the three articles is that, above stated *Article 11* has used the term 'Right to Privacy' only in the heading and not in any other place, but the other two articles have used this term within the articles expressly. In this sense, *Article 11* has provided protection to the Right to Privacy in implied manner, whereas, the other two articles have provided express protection to this right.

But, it can be said without doubt that, this article provides protection to the Privacy of Honour and Reputation, because unlawful attacks on Honour and Reputation always amount to violation of Privacy of Honour and Reputation. In this sense, whenever this article provides legal protection against unlawful attacks on Honour and Reputation, it obviously provides legal protection to the Privacy of Honour and Reputation.

However, this *Article 11* can be criticized on the following grounds:-

1) This article has never used the term 'Right to Privacy', except the heading.

2) It has given protection to 'honour', 'reputation' and 'dignity' separately, though all these terms are synonymous and can come under one umbrella.

Therefore, the criticisms of the article have made it narrower in its scope and ambit. But, in the ultimate effect, this article has become broader in its scope and ambit, because it has tried to protect various components of Right to Privacy thereunder. It is just specific about various terms relating to the Privacy of Honour and Reputation, wherein it has used the similar terms separately. By using the words in this manner, it has tried to provide special protection to each and every aspect of the Privacy of Honour and Reputation without any ambiguity or doubt. In this sense, the scope and ambit of this article have become broader as regards the protection of Privacy of Honour and Reputation. Hence, *Article 11 of the American Convention* has been proved to be advantageous with respect to the protection of Privacy of Honour and Reputation. This is the usefulness of the separate use of similar terms relating to Honour and Reputation. This separation should be taken as positive side of the article and not as negative side.

Finally, if this *Article 11* is compared with *Article 8 of the European Convention,* then dissimilarities are found between them, because *Article 8* has not used the terms 'honour and reputation'. In this sense, this *Article 11* is similar with *Article 10(2) of the European Convention,* which has tried to protect the Privacy of Honour and Reputation like this article. *Article 11* also differs from *Article V of the American Declaration* as regards the nature of attacks on Privacy of Honour and Reputation, because *Article V* has used the terms 'abusive attacks' and *Article 11* has used the terms 'unlawful attacks'. In this sense, the scope and ambit of *Article 11* is broader than *Article V.* Hence, it is a good initiative for protection of this right in the American region.

3.5.5.5.4. A Perusal of the Islamic Human Rights Instruments regarding Privacy of Honour and Reputation

The *Islamic Human Rights Instruments* dealing with various components of Right to Privacy are mentioned below:-

(i) *Universal Islamic Declaration of Human Rights, 1981.*

(ii) *Cairo Declaration on Human Rights in Islam, 1990.*

(iii) *Arab Charter on Human Rights, 2004.*

As such, the provisions containing the Right to Privacy of Honour and Reputation in the three *Islamic Declarations* are listed below:-

(i) *The Universal Islamic Declaration of Human Rights, 1981 –*

(a) *Article VIII – Right to Protection of Honour and Reputation.*

(b) *Article XXII – Right to Privacy.*

(ii) *The Cairo Declaration on Human Rights in Islam, 1990 –*

(a) *Article 4 – Right to good name and honour***.**

(b) *Article 8 – Right to Privacy.*

(iii) *The Arab Charter on Human Rights, 2004 –*

(a) *Article 21 – Right to Privacy.*

3.5.5.5.5. An Examination of the ASEAN Human Rights Declaration, 2012 regarding Protection of Privacy of Honour and Reputation

Article 21 of the ASEAN Human Rights Declaration, 2012 has dealt with the protection of various components of Right to Privacy including the Privacy of Honour and Reputation. It declares every person's right to be free from attacks upon that person's honour and reputation. Not only that, but it also provides legal protection to every person against such attacks as a matter of right. In this sense, this article has tried to provide all-round protection to the Right to Privacy of Honour and Reputation. More or less, this article is drawn in same line with *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights.* But, there is a slight difference between these three articles on the point that, both *Article 21* and *Article 12* have used the term 'attacks' on honour and reputation without specifying the nature of 'attacks'. On the contrary, *Article 17* has specifically mentioned the nature of attacks by using the terms 'unlawful attacks'. As such, *Article 17, Article 12 and this Article 21* are not different from each other by nature, but are different from the point of view of specific protection or more elaboration. However, there is no doubt that, every article provides protection to the Privacy of Honour and Reputation of individual persons.

Moreover, *Article 21* is also not similar with *Article 8 of the European Convention,* because it does not deal with the protection of Privacy of Honour and

Reputation; rather it is similar with *Article 10(2) of the European Convention,* which deals with the protection of this right. *Article 21* also differs from *Article V of the American Declaration* regarding the nature of attacks on Privacy of Honour and Reputation, because *Article V* has used the terms 'abusive attacks' as well as also differs from *Article 11 of the American Convention* as regards the nature of attacks on Privacy of Honour and Reputation, because *Article 11* has used the terms 'unlawful attacks'. Hence, the initiatives taken by the *Article 21 of the ASEAN Declaration* for the protection of Privacy of Honour and Reputation are not as praiseworthy as the other international and regional legal instruments, due to the reason that, others have provided far better or specific protection to this right.

3.5.5.6. An Appropriation of the Municipal Legal Framework regarding Privacy of Honour and Reputation

As regards the protection of Right to Privacy of Honour and Reputation, the Municipal Laws of different countries are discussed hereunder.

3.5.5.6.1. The Viewpoint of Common Law Countries

The most important *Common Law Country* regarding the protection of Privacy of Honour and Reputation is *Australia.* It has provided protection to this right under the law of torts.

3.5.5.6.1.1. The Australian Outlook of Privacy Torts

Australia has the codified laws on Privacy as well as the Common Law action of torts for the protection of Right to Privacy. It has tried to protect various components of Privacy in various manners. But, as regards the protection of Privacy of Honour and Reputation, it has taken the help of Law of Torts. As such, in case of violation of Individual Privacy not involving any element of data protection, action cannot be taken under the *Australian Statutory Provisions,* instead action has to be taken only under the other forms of law not specifically designed to protect Privacy, which are as follows:-

(i) *The tort of Trespass.*

(ii) *The tort of Defamation.*

(iii) *An action for Breach of Confidence.*[112]

[112] David Lindsay, *op.cit.*, p.167.

Another type of Privacy protection available in *Australia* is the prevention of *Disclosure of Private Facts.* In this respect, mainly two types of actions can be taken to protect private facts, which are the *action for breach of confidence* and the *action for the tort of defamation.* In certain limited circumstances, action can also be taken under the *tort of malicious falsehood.* Under the *Action for Breach of Confidence,* a duty to keep the material confidential may be imposed by contract or may arise from an equitable obligation. In order to maintain an *Action for Breach of Confidence,* the following elements should be satisfied:-

(i) *The information must have the necessary quality of confidence;*

(ii) *The information must have been imparted in circumstances importing an obligation of confidence;* and

(iii) *There must be an unauthorised use of the information by the person to whom it has been imparted, to the detriment of the confidence.*[113]

Therefore, these *Australian Laws* can be taken into account for the protection of Right to Privacy of Honour and Reputation in *Australia,* because these are concerned with the disclosure of private facts about an individual, which are also directly related to the tort of defamation. Tort of defamation causes harm to the reputation of an individual, which has both physical and mental effects. The mental loss occurs due to defamation amounts to violation of Privacy of Honour and Reputation. In case of tort of breach of confidence, the same wrong occurs, which causes violation of Privacy of Honour and Reputation. Also the *Australian Law* prescribes the types of confidential information, disclosure of which amounts to breach of confidence. Privacy and Confidentiality of information are two sides of the same coin. In this sense, disclosure of confidential information about someone causes violation of Right to Privacy of Honour and Reputation of that person. Therefore, *Australian Law* prescribes protection of Privacy of Honour and Reputation under the Law of Torts. In this sense, the *Australian Law* is similar to *William Prosser's Privacy Torts* and *Australia* has tried to protect this right under the law of torts, which is another side of protection of this right simultaneous to the protection under the Human Rights Law. Hence, *Australia* has taken good initiatives for the protection of Privacy of Honour and Reputation.

[113] *Coco v. A. N. Clark (Engineers) Ltd*. (1969) RPC 41, 47 per Megarry J.

3.5.5.6.1.2. The Canadian Notions of Fault and Harm

The *Canadian* Courts have suffered from dilemma in determining a particular wrong as a Common Law tort of Privacy or a tort of nuisance. The *Canadian* Laws for determining the claims for invasion of Privacy can be divided under the following heads:-

(i) *The Quebec Charter of Rights and Freedoms* **–** It has been the first statute in *Canada* for recognizing Privacy as a legal interest.

(ii) *The National Charter of Canada.*[114]

The statutory recognition of Privacy, mostly the Privacy of Honour and Reputation, in *Canada* in the *Pre-Charter* era can be divided into the following heads:-

(i) *The Quebec Law based on the French Law having two notions of fault and harm.*

(ii) *Privacy under Criminal Law – Part VIII of the Criminal Code deals with offences against the person and reputation.*[115]

Therefore, the *Canadian* Courts have played a little role for protection of Right to Privacy of Honour and Reputation in *Canada.* But, the *Canadian* legislature has taken few initiatives for the protection of this right. In this sense, the *Quebec Law* and the above-stated other legislations are noteworthy, which are based on the notions of fault and harm either under the *Law of Torts* or under the *Criminal Law.* Moreover, the *Canadian Criminal Code* has recognised the violation of one's reputation as a punishable offence. These are the *Canadian* legislative attempts in the *Pre-Charter* era.

In the *Post-Charter* era, the *Canadian Charter of Rights and Freedoms, 1982* has not taken much initiative for the protection of Right to Privacy of Honour and Reputation. In fact, it has no direct provision in this respect. The *Canadian Supreme Court* and the *Ontario Civil and Criminal Courts* have evolved various Privacy rights by way of judicial interpretation, among which the recognition of *Invasion of Privacy as a tort in its own right in the cases of personal harassment* is important.[116] This provision is related to protection of Privacy of Honour and Reputation in *Canada.*

---

[114] Marguerite Russell, *op.cit., pp.104-105.*
[115] *Id at pp.105-106.*
[116] *Id at pp.108-109.*

3.5.5.6.1.3. The South African Negligence towards Privacy of Honour and Reputation

In *South Africa, Section 14 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996* has provided protection to various components of Right to Privacy, but unfortunately it has not incorporated the Right to Privacy of Honour and Reputation within it. In this sense, *South African Constitution* is silent about the protection of this right or has neglected this right.

The Law of Privacy in *South Africa* is based only on three pillars, *Common Law or Civil Law principles (based chiefly on Law of delict or tort), Bill of Rights and Legislations.*[117] The principles of delict or tort have been derived from the *Roman Law,* which protects the Right to Privacy with the help of Civil Law protection of dignity. In this sense, the *Roman Law* principles of *actio iniuriarum (action for invasion of Privacy)*[118]is far better than the *Common Law* principle of *torts,* because the violation of Privacy is considered as the loss of dignity in the *Roman Law,* which is absent in *Common Law*. Therefore, regarding the protection of Privacy of Honour and Reputation in *South Africa, the Common Law and Civil Law* principles of Law of Torts have given better protection to this right. The *Civil Law or Roman Law* principle has considered the violation of Privacy as the loss of dignity, which is directly related to the honour or reputation of an individual. In this sense, this provision can be applicable for the protection of Privacy of Honour and Reputation in *South Africa.* Apart from that, the traditional *Common Law* principles of *Privacy tort and Breach of Confidence* are also existed in *South Africa.* These traditional laws are noteworthy for the protection of Privacy of Honour and Reputation in *South Africa.*

3.5.5.6.2. The Standpoint of Civil Law Countries

The most important *Civil Law Countries* regarding the protection of Privacy of Honour and Reputation are *France, Germany and China.* The positions of those countries in this respect are discussed hereunder.

3.5.5.6.2.1. The French Doctrine of Delictual Liability

France is mainly concerned with the protection of private life and not the protection of Right to Privacy. But, while trying to protect the private life, it has

[117] Jonathan Burchell, *op.cit.*, p.2.
[118] C. M. van der Bank, *op.cit*., p.79.

taken initiatives for the protection of various components of Right to Privacy. Among them, Right to Privacy of Honour and Reputation is one important component.

The doctrine of private life has been developed in the *French Law* along with the development of photography. At the very beginning, in the absence of a special legal provision on private life, judges have relied on the principle of *delictual liability* under *Article 1382 of the Code Civil.* This right has been developed to protect certain aspects of the human personality, like honour and reputation, private life and the *'right to one's own image' (le droit à l'image).* This right is considered as the first approach of the *French Courts* to protect the private life in the *Pre-Act, 1970* era. The *right to one's own image* has been used to prevent breach of privacy, particularly by the tabloid press. It has also been used to protect professional life.[119] Therefore, these initiatives of the *French Law* have recognised the problem of violation of Individual Privacy due to the unauthorised taking of photographs by the tabloid press. This wrong has been considered under the *delictual liability,* which is similar to the *Common Law action of Torts.* This is also similar to *Defamation,* which takes away one's reputation by disclosing private photographs of a person in public. In this sense, this law is helpful for protecting the Right to Privacy of Honour and Reputation of a person. Moreover, the *French Law* has tried to protect the honour and reputation of human beings by protecting the *'right to one's own image'.* This right has been used to protect the secrecy of professional life as well as to prevent the disclosure of embarrassing private facts about public figures in public, which may cause harm to their reputation. Hence, this is a good initiative of the *French Law* for protection of Privacy of Honour and Reputation.

Next period of the protection of private life in the *French Law* is the period of constitutional development, which is marked by the *Conseil Constitutionnel of 1995,* which has acknowledged the incorporation of this right under **Article 66**, stating as follows:-

> *"Everybody has a right to the respect of her private life and to the dignity of her person".*[120]

[119] Catherine Dupré, *op.cit*., pp.50-51.
[120] *Id at pp.54-55.*

Therefore, the *French Constitution, 1995* has created express provisions for the protection of private life and while doing so, it has upheld the dignity of individual persons, which is part and parcel of Right to honour and reputation. In this sense, this provision can be taken into account for the protection of Privacy of Honour and Reputation. Moreover, there are also other essential attributes relating to the private life in the *French Law,* which are helpful for the protection of Privacy of Honour and Reputation. Those are listed below:-

(i) *Disclosure based on Consent.*

(ii) *The Private Life of Politicians.*

(iii) *Protection of Private Life of the Dead.*[121]

The above-stated provisions are directly related to the Privacy of Honour and Reputation of a person, because disclosure of unauthorised information in all these cases amount to the violations of this right. Hence, *France* has taken noteworthy initiatives for the protection of this right.

3.5.5.6.2.2. All-round Protection of Privacy of Honour and Reputation in Germany

The *German Law* is *Constitution-based* and in this respect, three types of law are found in *Germany,* the *Basic Law or the Constitutional Law, the Civil Code and the Criminal Law Code.*[122] Apart from that, there are also certain *Federal and State Laws,* which have contributed towards the development of Privacy rights in *Germany.* Those are discussed below:-

(i) *The Constitutional Court* has interpreted the rights contained in the *Basic Law* as inviolability of human dignity *(Article 1)* and free development of the personality *(Article 2)* to recognise and protect the Right to Privacy.[123]

These *German Laws* have contributed towards the development of human dignity and personality. As such, these can be made applicable for the protection of Privacy of Honour and Reputation in *Germany.* However, the *German Law of Privacy* was age-old and at the very beginning, remedy was provided for invasion of Privacy under the tort of breach of confidence like the English Common Law. One important landmark judgement in this respect was *Bismark Case (RG 28 December*

[121] *Id at pp.55-56, 57, 61, 63.*
[122] Rosalind English, *op.cit*., p.77.
[123] *Id at p.78.*

1899), where the remedy was provided on the ground of unjust enrichment, this case was similar with the old English case *Prince Albert v. Strange (1849), 1 Mac & G25.* Therefore, similarities with the *Common Law* have again been found.[124] Therefore, the old *German Law of Privacy* was based on the tort of breach of confidence, which has become helpful for the development of the law for protection of Privacy of Honour and Reputation.

(ii) Moreover, the *Basic Law of 1949* has created provisions for protection of Right to Privacy based on the right to dignity and development of personality. In this respect, the *Basic Law* contains various provisions for the protection of Right to Privacy, which are stated below:-

Article – 1

"The dignity of the human being is inviolable".

Article – 2(1)

> *"Everyone has the right to the free development of his personality, insofar as he does not injure the rights of others or violate the constitutional order or the moral law".*[125]

As already stated, these legal provisions are important for protection of Privacy of Honour and Reputation in *Germany,* because these have contributed towards the development of dignity and personality of human beings.

(iii) In this respect, it is pertinent to mention that, the rights incorporated in the *Basic Law* are considered as fundamental rights, which can be used to provide remedy in private disputes also and in this sense, can be applicable to cases of invasion of Privacy. Again, for further development and for specific protection of Privacy under national legislations, the Privacy provisions of *Basic Law* under *Articles 1 and 2* have been incorporated in the main tort provisions of the *Civil Code.* The important provisions in this respect are as follows:-

Article 823

> *"I. A person who intentionally or negligently injures the life, body, health, freedom, property or other right of another unlawfully is obliged to compensate the other for the harm arising from this.*

[124] *Ibid.*
[125] *Id at p.79.*

II. The same obligation applies to a person who offends against a statutory provision which has in view the protection of another".

Article 826

"A person who intentionally inflicts harm on another in a manner which offends against good morals is obliged to make compensation to the other for the harm".[126]

An analysis of the above-stated articles shows that, the first part of *Article 823* prohibits invasion of Privacy in an all-round manner, whereas, the second part of *Article 823* prohibits invasion of Privacy by way of breach of any statutory obligation. In this sense, the application of the second part is specific and limited, whereas, the application of first part is general, but covers a broad range of activities. However, the article as a whole is a good instrument for privacy protection, because it provides compensation in both the cases. The incorporation of *Article 826* actually provides additional protection to Privacy along with *Article 823,* by way of imposing obligation to pay compensation in case of intentional infliction of harm to good morals. As such, it is a provision for protection of Privacy from moral offences. In this sense, these articles can be applicable for the protection of Privacy of Honour and Reputation, because these articles have tried to protect various aspects of Right to Privacy, which include Honour and Reputation also. Moreover, those have tried to protect from moral offences, which include mental harm also. In this sense, those can be made applicable for the protection of Privacy of Honour and Reputation.

(iv) Apart from these articles, a few other important provisions for Privacy protection available in *German Law* are as follows:-

(a) *Sections 22 and 23 of the Law of Artistic Creations, 1907,* which prohibit the unauthorised publication of personal photographs.

(b) *The State Laws of the Federal Republic of Germany* prohibits the misrepresented publication by the Press by way of granting injunction.

(c) Invasion of Privacy in the public sphere amounts to a defamation, for which criminal liability is imposed under *Article 187a of the German Criminal Code.*[127]

These laws are mostly related to prevention of unauthorised publication of personal photographs as well as the prevention of defamation, all of which are

[126] *Ibid.*
[127] *Id at pp.80-82.*

related to honour and reputation of individual persons. As such, these laws are good initiatives for the protection of Privacy of Honour and Reputation in *Germany.* Hence, it can be said finally that, *German Laws* have taken good initiatives for the protection of Privacy of Honour and Reputation, but mostly under the Law of Torts and Criminal Law. The *German* Constitutional Law only incorporates indirect provisions in this respect.

3.5.5.6.2.3. The Chinese Idea of Personal Privacy and Privacy Torts

China is another important *Civil Law Country* which deals with various components of Right to Privacy and provides legal protection thereof. It has mainly dealt with Personal Privacy and Privacy Torts. In this sense, a number of provisions are found therein regarding the protection of Privacy of Honour and Reputation. The *Chinese Constitution* and various *Chinese Legislations* have taken good initiatives in this respect. The following Constitutional and legislative provisions are pertinent to mention in this respect:-

(i) *Article 38 of the Constitution of the People's Republic of China, 1982* provides for the protection of personal dignity of *Chinese Citizens,* which runs as follows:-

Article 38

"The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited".

(ii) *Article 101 of the General Principles of Civil Law, 1986* provides that, "Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited".

(iii) *Articles 145 and 149 of the General Principles of Criminal Law, 1979* consider invasion of Privacy as defamation and provide punishment thereof.[128]

Though the *Chinese Constitution* does not recognise Right to Privacy of Honour and Reputation directly, but it has tried to protect this right under the guise of personal dignity under *Article 38 of the Constitution.* This article protects the personal dignity of every *Chinese Citizen* from any insult, libel or defamation, which are the wrongs relating to reputation and in this sense, this article can be made applicable for the protection of Privacy of Honour and Reputation. Again, the

[128] Guobin Zhu, *op.cit*., pp.210-211.

general Principles of Civil Law and General Principles of Criminal Law have tried to protect the right to personality and right to reputation of the individual citizens, remedy for the violation of which are compensation under the *Civil Law* and are punishable under the *Criminal Law* as constituting the crime of *defamation.* All these aspects are part and parcel of the Right to Honour and Reputation of individual persons. As such, these laws can be made applicable for the protection of Privacy of Honour and Reputation in *China.* Therefore, the major laws of the country have incorporated various legal provisions for the protection of this right.

3.5.5.6.3. An Overview of the Nordic Law Countries regarding Privacy of Honour and Reputation

No such important initiative is found in the *Nordic Law Countries* regarding the protection of Privacy of Honour and Reputation. But, certain aspects of the legislative initiatives of *Sweden* and *Denmark* are noteworthy, which are stated hereunder.

3.5.5.6.3.1. Inadequacy of the Swedish Laws

Sweden has enumerated its laws of data protection by elaborating one of the rights of the *Nordic Conference,* called the right to protection from 'being placed in a false light'. In this respect, *Sweden* has adopted various other laws relating to data protection, like *the Freedom of Press Act, the Secrecy Act, the Credit Information Act, 1974 and the Debt Recovery Act.* The *Swedish* approach of privacy laws is not based on a general right to Privacy, which is usually infringed by an 'appropriation of likeness', rather it covers the law of copyright, trademarks, unfair competition and libel.[129] Therefore, except one aspect of legal protection from libel, *Swedish Law* does not provide any protection to the Right to Privacy of Honour and Reputation.

3.5.5.6.3.2. Denmark : Indifferent Attitude towards Privacy of Honour and Reputation

Denmark is also concerned with the Data Protection Laws like *Sweden,* but certain articles of the *Danish Constitution* have tried to protect various aspects of Right to Privacy. But, unfortunately, it is silent about the protection of Right to Privacy of Honour and Reputation. However, *Denmark* is highly influenced by the *German* legal thought and has supported the necessity of a general 'personality

[129] James Michael, *op.cit., pp.54-56.*

right'. In this sense, *Danish theory* is similar to the *William Prosser's tort of 'appropriation of likeness'* as existed in *U. S. A.* and the *Danish Courts* have given judgements on the basis of this principle. But, inspite of these provisions *Danish Law* has not gone far to protect Individual Privacy and has remained concerned with Data Privacy only like *Sweden*[130]. In the absence of further development of the above-stated principle in *Denmark*, the Right to Privacy of Honour and Reputation has always been neglected therein and any further development of this right has never been possible.

3.6. Sum Up

Right to Privacy is not a narrower local or regional human right, rather its scope and extent have been broadened so much that, it covers a wide range of globally accepted human rights within its periphery. In fact, Right to Privacy is considered as a global phenomenon in the modern age. It has international recognition and is effective in all parts of the world.

International recognition of Right to Privacy has been started just after the end of Second World War and the establishment of United Nations in the year 1945. It has got a remarkable development under the auspices of the United Nations. Presently, it is an internationally acclaimed human right. As such, it is incorporated as an important human right in numerous International Instruments. In this respect, it has a great international legal perspective.

In the international human rights law, 'Privacy' is clearly and unambiguously established as one of the basic human rights in 1948 with the proclamation of the Universal Declaration of Human Rights. The importance of Privacy as a human right and its need for legal protection has been given in the various other international instruments, like the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. In the regional level, there are also various human rights Conventions, which deal with the protection of Right to Privacy. Important conventions among them are the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the American Convention on Human

[130] *Id at pp.56-58.*

Rights, 1969, the African Charter on Human Rights and People's Rights, 1981 and the Asia-Pacific Privacy Charter, 2003.

Apart from the International and Regional legal instruments, Municipal Laws of various Countries are well-advanced on Right to Privacy. The Municipal Laws of different Countries can be divided into the Privacy Laws of Common Law Countries, Civil Law Countries and the Nordic Law Countries. A few other countries are also remaining, the Privacy Laws of which are important in this respect. Moreover, Privacy Laws are found all over the world in an all-round manner. In the modern period, the significance of Right to Privacy has been understood by all legal systems in the world and as such, the laws of Privacy enacted by them have become fruitful to portray the International Legal Arena of Right to Privacy.

Thus, the International Legal Arena of Right to Privacy can be summed-up as follows:-

1) The existence of Privacy in different parts of the world is not an isolated event but the outcome of a continuous process of development of Privacy all over the world.

2) The study of Privacy from the social and cultural contexts helps to draw the contention that, Privacy is not a narrower local or regional right; rather it is a universal right having great significance in the context of mankind in general.

3) In the present day society, Individual Privacy is recognized as a basic human right in all the developed and developing countries.

4) In this sense, the internationalization of Privacy is required by prescribing certain norms of Privacy, which should be universally acclaimed and international in character.

5) This process of internationalization of the Privacy Rights has already been started under the auspices of the United Nations all over the world.

6) Right to Privacy has assumed its universal character in 1948, since the proclamation of the Article 12 of the Universal Declaration of Human Rights.

7) It has been supported by various other International and Regional legal instruments, which have tried to give this right a concrete shape in the context of the world at large.

8) The internationalization of Right to Privacy has received a special significance by a number of Municipal legal instruments of worldwide recognition, like the Nordic Conference of Jurists, 1967 and the Younger Committee Report, 1972.

9) Moreover, the international character of Right to Privacy is characterized by the ideas of Liberty and Human Rights, which are essential for giving it a concrete shape.

10) These ideas have been recognized as the Privacy denoting factors in the international periphery with overwhelming consensus.

11) In fact, in order to give effect to that recognition, this right has been incorporated as an important human right in various international, national and regional human rights instruments as well as separate legal instruments has been created governing Right to Privacy as a whole.

12) More specifically, the legal instruments for the protection of Right to Privacy can be categorized as the International Legal Instruments mostly made under the auspices of the United Nations, the Regional Legal Instruments and the Municipal Laws of different countries.

13) The Municipal Laws of different countries can again be divided into the Laws of Common Law Countries, Civil Law Countries and Nordic Law Countries.

14) The Privacy Laws of major Common Law Countries include the Laws of U.S.A., U.K., India, Australia, Canada and South Africa whereas; the major Civil Law Countries in this respect are France, Germany and China. On the contrary, the major Nordic Law Countries having Privacy Laws are Sweden, Denmark and Norway.

15) The International Legal Instruments on Right to Privacy have tried to give protection to this right in an all-round manner, which have been made under the auspices of the United Nations and by way of adopting these instruments; United Nations has played a very important role for the protection of Right to Privacy in the international field.

16) The regionalization of Right to Privacy is also necessary along with the universalisation of this right and for this purpose, various Regional Legal Instruments have been made, which have become fruitful for the implementation of this right in the regional level.

17) As regards the Municipal Laws of different countries, the Privacy Laws of the Common Law Countries have been found to be well-developed.

18) Though the Common Law Countries are enriched with Privacy Laws, but the Civil Law Countries are not lagging behind them and in fact, Civil Law Countries have, even more advanced Privacy laws under both the constitutional provisions and national legislations.

19) The Nordic Law Countries are important for discussion, because of the Nordic Conference of Jurists, 1967, but practically, the Nordic Law Countries are not much concerned with Personal Privacy, rather they are mainly concerned with the Data Privacy and have enacted the Data Protection Laws.

20) Though the legal instruments for protection of Right to Privacy are important, but the division of this right into various components is noteworthy for a matter of discussion.

21) Apart from Individual Privacy, there are various other components of Right to Privacy also, like Privacy of Family and Marriage, Privacy of Home, Privacy of Correspondence and Communication and Privacy of Honour and Reputation.

22) The above-mentioned list is not exhaustive, rather inclusive in nature and as such, a number of other components may be found.

23) But, the international and regional legal instruments have confined themselves into these components only and as such, component-wise discussion of those instruments is confined into these components only.

24) Municipal Laws, in this respect have highlighted other components also, but these components are most noteworthy and most of the municipal laws have dealt with these elements.

25) However, protection of Right to Privacy in all round manner means the protection of all these components of Privacy worldwide, but, all the components are not adequately protected in every legal sphere.

26) Most importantly, municipal laws of each and every country have not dealt with all the components equally; rather each and every country has dealt with one or two components only.

In this respect, the most important point is that, incorporation of Privacy provisions in the Municipal Laws of different countries have become fruitful for the

enforcement of Right to Privacy and its various components throughout the world, because most of the international and regional legal instruments are not directly enforceable and can be enforced in indirect manner only by way of incorporating the provisions thereof, either in the national constitutions of different countries or by way of enacting national legislations for the implementation and enforcement of those rights. The inadequacy of municipal laws for protection of various components of Right to Privacy is the biggest problem in this respect and as such, enactment of comprehensive municipal legislations in this field is the need of the hour. Last but not the least, municipal laws are nothing but the extension of international and regional legal instruments, because most of the international and regional legal instruments are mere declaratory in nature, but the municipal laws are enforceable in nature.