CHAPTER 5

ROLE OF JUDICIARY ENHANCING RIGHT TO PRIVACY IN U.S.A., U.K. AND INDIA

5.1. Prologue

Privacy generally has two aspects – Positive and Negative. Positive aspect of Privacy is always used for the benefit of the mankind and as such it is related to the use of seclusion or solitude for some creativity beneficial for the mankind. On the contrary, Negative aspect of Privacy is always used for the destruction of the mankind and therefore, it is related to the use of seclusion or solitude for some creativity devastating for the mankind. Seclusion of solitude can be used for certain creativity or scientific invention, which can have either good or evil effect. As for example, when a scientist invents a seed, which may increase the growth of production ten times faster, then the Privacy would be used for the benefit of mankind, because of having good effects on society. But, when a scientist invents a formula or a bomb to spread terrorism and to cause mass destruction of lives in the world, then the Privacy would be used for destroying the mankind, because of having evil effects on society. Again, a particular invention made in privacy can be used for both good and evil objective, like the invention and use of atom bomb. When atom bomb is used in war for mass killing, then it is utilized for evil purpose and when it is used for changing the flow of river to increase cultivation or to establish a new population, then it is utilized for good or beneficial purpose.

The above stated examples clearly portray the idea that, Privacy may be used for both good and evil purposes. Whether a particular society would use Privacy for good purpose or evil purpose: that depends upon the tastes and habits of the people living therein as well as the nature and circumstances of each case. Privacy is an individual right and as such; people have the freedom to enjoy Privacy according to their wishes. But, it should be remembered that, jurists have never supported the negative aspects of Privacy or the use of this right for evil purpose. Also they will never support use of Privacy for such purpose in future, the reason being that, law and legal principles cannot allow or justify the enjoyment of a right for unreasonable, illegal of immoral purpose. Use of Privacy for negative purpose, not

only would be immoral, but also would be opposed to public policy. Due to these reasons jurists never support such use of Privacy. Another point is pertinent to mention in this respect, that, man is a social being and owing to its social nature, it cannot exercise any individual right for a purpose harmful to the society. Also being a part of the society, man should exercise a private or individual right, so that, it should not come in conflict with the private or individual rights of others. It is also necessary to create a balanced between the exercise of individual and social rights for the sake of the society. Keeping in mind all these perspectives, jurists have supported the enjoyment of positive aspects of Privacy beneficial for the mankind as a whole and have rejected the negative aspects of privacy destructive to the mankind in general. Both legislature and judiciary should remember this bottom line of Privacy Principle while enacting privacy protection legislation for pronouncing judgments for the protection of Right to Privacy as a whole. In the previous Chapter the Privacy Protection Legislations of U.S.A., U.K. and India have been analysed. This Chapter will focus on the Role of Judiciary Enhancing Right to Privacy in U.S.A., U.K. and India.

5.2. Role of Judiciary in a Democratic Society

The doctrine of Separation of Powers is an animation of the Rule of Law and its roots also lie in the concept of natural law because both aim at progressive diminution of the exercise of arbitrary power necessary for protecting the life, liberty and dignity of the individual. It is an organic flexible doctrine which can be moulded to suit the requirements of governance, but its inherent fundamentals and rationality must not be compromised, i.e. "accumulation of power" is a definition of tyranny.[1]

The purpose of the Separation of Powers doctrine is not to promote efficiency in the administration, but to preclude the exercise of arbitrary power. Its purpose is not to avoid friction among various organs of the State by keeping them separate, but to protect people from autocracy by means of inevitable friction due to distribution of powers. Therefore, the basic purpose of the doctrine of "Separation of Power" is to divide governance against itself by creating distinct centres of power, so that they could prevent each other from threatening tyranny.[2]

[1]Dr. I. P. Massey, *Administrative Law*, Eastern Book Company, Lucknow, 8thEdn., 2012, p.37.
[2]*Ibid.*

The practical import is that no significant deprivation of life, liberty and dignity of any person can take place unless all the organs of the government combine together. If a person is to be put in jail, then a legislature has to pass a law making his action illegal, executive has to execute the law and judiciary must find him guilty. However, if a person is to be set free then any branch can do it. In Westminster type of democracy, where legislature and executive are not separate, and judiciary must be separated from the rest. Executive always demands power, at times by threatening insecurity among the people and legislature would always oblige because it is controlled by the executive. In such situation, judiciary, if separate, would apply brakes and save people from tyranny. It is for this, that judiciary has now been separated from Parliament in the U.K.[3]

The above stated idea of the doctrine of Separation of Powers clearly portrays the need for division of power between the three organs of the Government in a democratic civilized country. Separation of Powers is the core element of Rule of Law, if it prevails, then only the reign of Rule of Law prevails; otherwise there would be the reign of Rule of Man. In order to continue with a democratic set up, it is necessary to establish Rule of Law, which means, law should be the supreme authority in the country and even the King or the representative head should be subjected to the Rule of Law. On the contrary, if the King supersedes law, then there occurs Rule of Man or Dictatorship and Democracy is destroyed. Therefore, it is necessary to continue with the system of Rule of Law for the sake of the existence of Democracy. For the prevalence of Rule of Law, there should be the existence of Separation of Powers, because when the powers are separated, every organ of the Government can exercise control over the other and none of them can become arbitrary exercising supreme powers. Due to this reason, the King or the representative head, being part of the executive organ of the State, cannot become supreme authority, when the powers are separated. In this sense, Separation of Powers is an instrument of good governance in a democratic set up. In such a system of Rule of Law and Separation of Powers, the judiciary or the judicial organ plays the most vital role in exercising control and check upon the other two organs of the Government, so that, they could not become arbitrary powers. In this sense,

[3]*Id at pp.37-38.*

establishment of independence of Judiciary is must in a democratic civilized country and now-a-days, all the democratic countries are moving towards the establishment of an independent Judiciary.

Mere enumeration of a number of fundamental rights in a Constitution without any provision for their proper safeguards will not serve any useful purpose. Indeed, the very existence of a right depends upon the remedy for its enforcement. Unless there is remedy there is no right, goes a famous maxim *(ubi jus ibi remedium).* For this purpose an independent and impartial judiciary with a power of judicial review should be established under the Constitution of every democratic country. An independent judiciary is the custodian of the rights of citizens. Besides, in a federal Constitution it plays another significant role of determining the limits of power of the Centre and States.[4] Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favour. It is, therefore, very necessary that the judiciary should be allowed to perform its functions in an atmosphere of independence and be free from all kinds of political pressures.[5]

Due to the above reasons, an independent judiciary is called the cornerstone of a democracy. It is the true custodian of a democratic set up. Without an independent judiciary, a democratic set up cannot function properly. In a democratic country, protection of fundamental rights of the citizens is the prime concern of the State, which can only be possible by establishment of independent judiciary. Legislature can make tyrannical laws curtailing the fundamental rights of the citizens or sometimes can make oppressive laws by suspension of fundamental rights for prevention or suppression of crimes. In this respect, terrorism prevention laws can be mentioned, which sometimes take away human rights of the citizens. Every person is not a terrorist and as such, suspecting everyone as a terrorist is the gross violation of the Right to live with human dignity of the individual persons, which is a basic human right. At this juncture only an independent judiciary can be a recourse, because only it has the power to struck down such oppressive and suppressive laws taking the plea of ultra vires to the Constitution of a country. In

[4] Dr. J. N. Pandey, *Constitutional Law of India*, Central Law Agency, Allahabad, 40thEdn., 2003, P.28.
[5] *Id at pp.472-473.*

this sense, independence of judiciary is the custodian of human rights or fundamental rights of individual persons as well as the cornerstone of a democracy.

Moreover, in legal systems with a written constitution which mandates judicial reviews of the constitutionality of State action including, in appropriate cases, laws enacted by the legislature, the role of the judiciary cannot be limited to the orthodox function of dispensing justice in cases and controversies in the typical adversary setting. In the extended setting of judicial review, as delineated in the constitutional context, the court must also keep the charter of the Government in time with the times and not allow it to become anachronistic or out of step with the needs of the day. This task which demands of judicial review a progressive interpretation of the Constitution and the laws enacted there under presents certain interesting features of the judicial freedom sharply in contrast with those associated with the stare decisis rationale. Closely associated with this is the assumption based on the theory of separation of powers that judges only declare the pre-existing law and that their function is to administer the law as it is and not to say what it should be. However, in the United States, it has long since been acknowledged that neither the stare decisis model nor the declaratory theory of judicial function upon which it proceeds is itself a complete description of the decisional process in the judicial system. Stare decisis embodies an important social policy which is reflected in the considerations of certainty, continuity and stability in the law.[6] But, as succinctly noted in an American decision of respectable vintage, stare decisis is not a mechanical formula of adhering to the decisions, however recent and questionable, when such adherence involves collision with a principle of decision more embracing in scope, intrinsically sounder and verified by recent experience.[7] In the United States it is clearly recognized that stare decisis has little place in its Constitutional Law.[8]

Apart from the principle of judicial review, there is another principle of judicial process and that is prospective overruling. The power of the final appellate court in a legal system to overrule its prior decisions undoubtedly involves the authority of the judicial process to change the law or to adopt in response to

[6]A. Lakshmi Nath, *Precedent in the Indian Legal System*, Eastern Book Company, Lucknow, 1990, p.3.
[7]*Helvering v. Hallock, 309 US 106.*
[8]*Supra Note 6 at p.3.*

changing social needs. In order to evaluate the proper role of the judicial process in the exercise of the power of overruling a precedent in a given system of law it will be necessary to take into account the social position of the judiciary in that system, its relations with representative institutions of the legislature and the confidence it commands, if it is a non-elected judiciary, of the legislature, other groups and of the people, in the matter of making changes in the law in the attempt to relate it to the fabric of social life.[9] An informative critique of focussing attention on the role of the judiciary in reconciling the law with changing social needs has been written by *Arthur Von Mehren*[10]wherein he emphasizes the role of the legal profession and an enlightened legal education as invaluable aids to the judicial adaptation of law to social needs. *Mehren's* definition of the judicial process is interesting for its candid admission that judges do make new rules and principles in adapting rules of law as social circumstances permit.[11]

The acceptance enjoyed by the judicial process in any society depends mostly upon the historic role played by that process in the shaping of Lego-social institutions in that society. With the advent of Common Law and the judicial institutions employing common law techniques, Courts in the common law countries have played undeniably an important role in moulding legal concepts and institutions according to changing social circumstances. With a written Constitution providing for entrenchment of basic human rights and for division of legislative and administrative power in a federal context, the place for judicial review has gained greatly in value and importance. The prestigious position of judiciary in this respect has also focussed attention on greater creative involvement of judiciary in law reform and upon social accountability of judicial process for the said reform. Greater the creative opportunity for judges to make adaptations and innovations in the law, greater is the scope for legal profession to participate in this judicial law-making process for, in the adversary system of adjudication, judicial approach to law-reform is to a considerable extent determined by the extent of fruitful interaction judges have with counsel. No account of the judicial process engaged in the task of law

[9]*Id at p.80.*
[10]Arthur Von Mehren, "*Judicial Process with Particular Reference to the U.S. and India*", Journal of the Indian Law Institute, Vol.5, 1963, p.279.
[11]*Supra Note 6 at p.80.*

reform can be complete unless it is receptive to the implications of the lawyer-judge communication occurring in the context of adversary form of litigation.[12]

In regard to the approaches and habits that are generated by the courts in their work it is necessary to enquire to what extent do the courts show imaginative awareness of and wise insight into the various social and economic problems. If one accepts the premise that judicial process can and should play a creative innovative role in society, it follows that judges should and will change the law by enunciating new legal principles under conditions of social change since rigid adherence to precedent is not now recognised by the Supreme Courts of most of the democratic civilized countries.[13]The condition under which judicial activism can be legitimised as a valid constitutional application of judicial power to the resolution of complex legal problems will of course vary from one legal culture to another. Under written constitutions, which recognise judicial review, the scope for judicial overruling of precedents is undoubtedly admitted as a necessary component of judicial power. But even if the necessity for such a power of overruling is admitted, the latitude open to the highest applicable judiciary to make a pragmatic and creative use of this power will depend upon many variables. The Constitutional philosophy, the underlying political-social ethos, the relative dominance and leadership resources provided by democratised legislators in key areas of social change and the opportunities available for pressure groups, elitistic or otherwise, to articulate their positions and to make these available in a viable form to be taken cognizance of by the judicial process, are all important elements.[14]

Therefore, in a democratic civilized society, the role of judiciary is very important. It takes an important part in the process of law reform. If the judiciary is not given independency, then it is not possible for it to take important initiatives for law reform. Owing to social change and other reasons, when the old laws become obsolete to solve the new social problems, then law reforms are required. At this juncture, it is not possible for the legislature to frame new laws then and there. Again, due to political pressure or absence of unanimity, the legislature is not always in a position to frame new laws. Another problem may be the existence of a

[12]*Id at pp.80-81.*
[13]*Id at p.81.*
[14]*Id at pp.81-82.*

number of laws already, which cannot solve the new problems. In that situation, only recourse can be judiciary, who can take initiatives by suggesting new interpretation of the old laws, declaring new dimensions for the old laws and by framing guidelines to cope up with the new problems. Judicial activism and judicial creativity are the two hands of judiciary which are helpful at the verge of the social change. While doing with the activities of judicial review, it is not always possible for the judiciary to follow the doctrine of stare decisis, rather in most of the cases; it goes with the doctrine of prospective overruling. The main reason behind the imposition of the doctrine of prospective overruling is the limitation of the old precedents to suit the changing social scenario. In that situation, what the judges generally follow is the method of judicial creativity in order to bring law reform. In this sense, it can be said that, the role of judiciary in a democratic society is to bring social change with the help of judicial creativity and law reform. Only judiciary can be the pathfinder of social change, which can free the society from traditional orthodox beliefs. Hence, the role of judiciary in a democratic society cannot be disregarded.

5.3. Role of Judiciary for Development of Right to Privacy in U.S.A., U.K. and India

Right to Privacy has been a Customary and a Common Law right, either direct or in indirect manner in the countries of U.S.A., U.K. and India since the ancient period. But, the awareness for the protection of this right has not been there. It is only the modern period, in most of the cases, when the urge for protection of this right has come into being. With the development of society and the establishment of city-lives, people have felt the necessity of Privacy in their personal and family lives. In the rural based human lives, the society was mainly open society and people liked the interference of one another in their private lives. At that point of time, they never felt the necessity of Privacy, because their lives were dependent on one another and fee mixing among themselves were the requirement of the existence of their lives. But, with the passage of time, when people have become urban and habituated with the city-lives, then they have become independent in various aspects and as such, felt the necessity of privacy in their personal lives. Moreover, city-lives are basically competition oriented and one always tries to

become superior to the other. In this situation, people try to keep secret their matters of interest and wealth, hence they require Privacy.

Moreover, with the advancement of information and communication technology, another aspect of privacy has come into being and that is the protection of computerised personal data of the individuals. In a complex technology oriented society, we cannot go far without processing the huge amount of computerised personal data, wherein the most serious problem of data theft lies. Data theft creates many serious problems, which include the unauthorized purchasing of personal data by the direct marketing industries, who us to send us unsolicited direct mails and create direct calls with offers. Apart from that, data theft may be used for creating false identity cards in the name of one using the personal data of others. Prevention of such fraud is very tough and now-a-days countries are using biometric data scanning methods in order to stop the creating of fake identity cards. Therefore, violation of Privacy is mainly of two types – Physical Privacy and Data Privacy.

Apart from that, protection of Physical Privacy from intrusion by the Press is another important aspect. Journalists and Press photographers are unnecessarily peep into the private lives of the celebrities and public figures, whereas, their private lives should not come under the purview of the Press. In this respect, Press Councils, Broadcasting and Media Councils or Corporations of U.S.A., U.K. and India have prepared various guidelines and Journalistic Codes of Conduct, wherein extensive norms have been given for the protection of Privacy of the Celebrities and Public Figures. But, the main defects of those guidelines are that, those are basically moral codes of conduct and are not legally enforceable. The Countries are not having extensive legislations in this respect. As such, judiciary can become the only recourse in these cases of violation of Privacy of the Celebrities or public Figures.

In fact, there is no direct Constitutional protection of Right to Privacy under the written Constitutions of U.S.A. and India. In the absence of written Constitution, the situation of U.K. is worsening. At this juncture, the Supreme Courts of U.S.A. and India have taken steps for protection of various aspects of Right to Privacy. The courts have interpreted the Constitutional provisions of Bill of Rights or Fundamental Rights in liberal manner in order to incorporate within it, the protection of Right to Privacy. As such, various existing provisions of the U.S. or

Indian Constitution have been expanded to include various dimensions of Right to Privacy within themselves. Another problem in this respect is the absence of adequate Privacy protection legislations in all the three countries. Due to this reason, judicial activism and judicial creativity can be the only recourse for protection of Privacy therein. In this respect also, the Supreme Courts of U.S.A. and India as the Human Rights Courts of U.K. have taken active steps. Without the judicial intervention into the matter, the protections of various aspects of Right to Privacy have not been possible in these countries.

5.3.1. The Legal Position of U.S.A. : An Analysis

At the very beginning of the modern period, the U.S. Federal and State Legislatures have been reluctant to consider Right to Privacy as an important human right and as such, they have not enacted any Privacy protection legislation. At that point of time, only the U.S. Supreme Court has taken active steps to protect various aspects of Right to Privacy from unnecessary State intervention, Press or media encroachment or otherwise. Even the States have enacted various Privacy violating statutes taking the basic human rights of the U.S. citizens leading towards the serious curtailment of their Right to life and personal liberty. Such situation is not expected in a democratic civilized country. In this sense, it can be said that, U.S. Federal and State Legislatures have been, more or less, against the recognition of Right to Privacy therein. Another important aspect is the overstepping of Press into the human lives by the invention of Yellow journalism and investigative journalism. In all these cases, human right to Privacy has become seriously threatened. But, the legislatures have been reluctant to recognize the existence of Right to Privacy against the Freedom of the Press. Even the judiciary has also been reluctant to recognise and protect Individual Right to Privacy as against the Press intrusion at the very beginning. The basic theory has been the Freedom of the Press, wherein Press is the fourth estate or the fourth pillar of democracy and as such, Freedom of the Press should be protected at any cost. Nobody has supported the point of violation of personal liberty of the citizens by the unnecessary encroachment into the human lives by the Press. At this juncture, two *Boston* lawyers, *Samuel Warren and Louis Brandeis* have published a seminal article in the *Harvard Law Review in 1890*, titled *"Right to Privacy".* The article has dealt with the Yellow journalism and violation

of Individual Privacy. This article has shaken the then existing legal scenario of U.S.A. and everybody has understood the need for protection of Right to Privacy therein. Since then, U.S. Supreme Court has started to take initiatives for the protection of Right to Privacy in U.S.A.

5.3.2. The Legal Scenario in U.K. : An Appraisal

The scenario has been worsening in U.K., because there has been no written Constitution and the courts have to rely on the English Common Law for pronouncing its judgments. In the absence of written Constitution, it is also tough to protect the fundamental rights of the citizens. However, in the absence of written Constitution and other written laws, judiciary has far better scope in U.K. to show the judicial activism and judicial creativity therein. But, the English judges have always been rigid and orthodox, owing to which they have never tried to set new legal principles in every field of law. They have shown their judicial creativity in the fields of tort, contract, trust and property laws, but in the absence of written Constitution and Bill of Rights, they have never shown the creativity in the Constitutional law. In this sense, American law is far better than English law, because they have written Constitution and Bill of Rights. As such, it has been possible for the U.S. Constitutional jurists and judges to show judicial activism and creativity in the field of Constitutional law. What the English judges have done is that, they have followed the judgments pronounced by the U.S. Supreme Court later on, while pronouncing their judgments in the field of human rights.

However, it is noteworthy that, in the absence of written Constitution and statutory laws, English legal system has been based on the customary rules and judicial precedents, which in combined effect, called the English Common Law. As already noted, there is much more scope of the English judges to show judicial activism and creativity. They have shown such creativity in the field of development of tort and contract law. In continuance of this process, they have developed another branch of law, called the law of confidence. In fact, there was the existence of law of confidence in U.K. since the very beginning. The English judges have only enriched that branch of law by their judicial activism. Law of confidence has been such a branch which could be applicable to solve legal problems of a number of fields. It

has been expanded to such an extent by the English judges, so that it would be applicable in the matters of violation of human rights also.

In this respect, it is pertinent to mention that, Right to Privacy as a basic human right, has not been recognised in U.K. since the very beginning. Therefore, no remedy has been available therein for the cases of violation of Privacy. At this juncture, on important English case has come into being, called the *Prince Albert vs. Strange* case, wherein the decision has been given by the High Court of Chancery in *1849.* This case is considered as an important edifice in the era of development of law of confidence in England. In this case, the court has awarded *Prince Albert* an injunction, restraining *Strange* from publishing a catalogue describing *Prince Albert's* etchings. In this case, *Prince Albert* has taken the plea of violation of Privacy of himself and *Queen Victoria* regarding their private etchings, which violation has been committed by *Strange.* Though the case has been based on the violation of Individual Privacy, but the judgment has been given on the ground of breach of confidence committed by *Strange.* The main reason behind such application of law has been the absence of express statutory law on Privacy in U.K. Moreover, English judges have also been reluctant to consider the matter as violation of Privacy of *Prince Albert and Queen Victoria.* According to them, this has been the case of breach of confidence committed by *Strange.* As such, they have pronounced judgment on the basis of the law of confidence. But, it should be remembered that, whatever might be the judgment they have pronounced, the issue has shaken the English legal system on the point of violation of Privacy. Since then English judges have been forced to consider the aspects of violation of Privacy and to find out the remedy thereof. Due to these reasons, this case is considered as the foundation of the law of Privacy in U.K. Since this case, Right to Privacy has found a place in the English legal system. Later on, with the publication of the famous *Warren-Brandeis* article on *"Right to Privacy"* in U.S.A., this right has got a significant place in U.K. also and the English judges have started to pronounce judgements on the basis of this article.

5.3.3. The Legal Standpoint of India : An Overview

In India, the traces of Right to Privacy have been found since the ancient period, the existence of which has been continued in the medieval period, but to

some extent has been lost in the modern period. In a detailed study, it is established that, in India, the existence of Right to Privacy has been recognised since the ancient period. The *Vedic Grihyasutras or the Vedic injunctions of construction of houses, Manusmriti and Kautilya's Arthasastra* have prescribed extensive rules for maintaining Privacy in the various fields of human lives in the ancient period. Even the two great epics of *Ramayana and Mahabharata* contain the injunctions relating to observance of Privacy in the ancient period. Apart from that, there have been the customary rules of Privacy relating to the maintenance of easement rights, which have later been recognised under *Section 18 of the Indian Easements Act, 1882*. The recognition of norms of Privacy of the ancient period has been continued in the medieval period and the *Koranic injunctions* have also spoken in the same line with the *Vedic injunctions* regarding the observance of Privacy. Again, the observance of *'Purda' system by the Muslim Women* is another example of existence of Privacy of women in the medieval period. These instances clearly show the existence of the idea of Privacy in India similarly with U.S.A. and U.K.

Though it is generally believed that, judicial development of Right to Privacy has been started first in U.S.A. and then in U.K., but it is not true, because instances of judicial development of Right to Privacy have been found in India long ago before the publication of the *Warren-Brandeis* article in U.S.A. in *1890*. In this respect, it is pertinent to mention that, in *1855*, a case was decided by the Sadar Diwani Adalat of the North-Western Provinces in India, wherein the question of violation of Right to Privacy arose. The case was *Nuth Mull v. Zuka-Oollah Beg* case, wherein the customary Right to Privacy relating to the construction of houses and maintenance of Privacy therein, came into question. This case has been the clear example of judicial development of Right to Privacy in India earlier than the development of this right in U.S.A. and U.K.

With respect to the value of judicial development of Right to Privacy in India, it can be said that, practically, it is the product of judicial development in India. Though the traces of existence of Right to Privacy have been found in India in the ancient and medieval periods, but this right has suffered from certain amount of stagnancy in the modern period. A number of decisions relating to violation of Right to Privacy have been pronounced by the British Courts in India, which have

enriched the development of Right to Privacy in the pre-independence era. But, in the post-independence era, certain amount of stagnancy has come into being in the process of development of this right, because the Indian Constitution has not given express recognition to this right. Due to this reasons, violation of this right has not received remedies under the Indian Constitution. In this sense, it is the product of judicial development in the post-constitutional era. In the era of expanding horizons of *Article 21 of the Indian Constitution,* when a number of fundamental rights have been incorporated within the purview of Right to Life and Personal Liberty under *Article 21* by way of judicial interpretation, Right to Privacy has also secured a prominent place therein. The judicial development of Right to Privacy has been marked in India by the establishment of principle of protection of Individual Right to Privacy from the domiciliary police surveillance as has been decided in the case of *Kharak Singh v. State of U.P.* in *1963* under the auspices of the Supreme Court of India. Since then the right has been recognised in India and a series of judgements have been pronounced by the Supreme Court of India for protection of various components of Right to Privacy. Therefore, it can be said that, practically, Right to Privacy is the product of judicial activism or judicial creativity in India.

5.3.4. Judicial Interpretation of New Dimensions of Right to Privacy in U.S.A., U.K. and India

The above discussion provides the idea that, in all the three countries of U.S.A., U.K. and India, judiciary has played a very important role for the development of Right to Privacy. In this sense, judiciary is the main pillar for the establishment of this right in all the three countries. Gradually, with the passage of time and with the social change, various new dimensions of Right to Privacy have been emerged, like Privacy of matrimonial proceedings, Privacy of health and medical records, Privacy of Financial records, Privacy of credit reports, Privacy of computerised personal data, Privacy of public figures and many more. In the present social scenario, the governments of the all the three countries are concerned with the protection of these new dimensions of Right to Privacy. In this respect, apart from judicial interpretation, a number of legislations have been passed in U.S.A. and U.K., prominent among which are the *Privacy Act, 1974 in U.S.A. and the Data Protection Act, 1998 in U.K.* Regarding the enactment of *Privacy Act or Data*

Protection Act, India is lagging far behind U.S.A. and U.K., because it has not enacted such laws till now. Indian direct Privacy protection legislations are still in the Bill stage, like *the Privacy Bill, 2014 and the Personal Data Protection Bill, 2014.* As such, violation of Privacy in those areas in India is still under the purview of judiciary and if any violation of Right to Privacy occurs in those areas, parties have to depend upon the judicial interpretation of the aspect totally.

Moreover, enactment of various legislations in all the three countries has given rise to new controversies relating to the protection of Right to Privacy. Few examples of those legislations are *the Freedom of Information Act, 1966 in U.S.A., the Freedom of Information Act, 2000 in U.K. as well as the Information Technology Act, 2000 and the Right to Information Act, 2005 in India.* More or less, the purview of all these Acts are similar, because all these legislations provide public right of access to government records. Though the names of some legislations are freedom of information and some are right to information, but the practical functions of all these legislations are more or less, same. These laws have been enacted to provide the Right to Know to the general public regarding the governmental activities. As such, these laws provide the Freedom of Information or the Right to Information to the general public about the governmental secrets in order to maintain transparency and public accountability of the government. But, enactment of these laws has given rise to certain controversies relating to the protection of Right to Privacy, because governmental records contain personal information of the individual citizens also. As such, disclosure of those informations to the other members of general public brings the question of violation of Privacy of personal informations of the said individuals. In this sense, new controversy has been raised regarding the superiority of both the Right to Privacy and the Right to Information against one another. Hence, the enactments of new laws are giving birth to new controversies to everyday, which can only be solved by the judicial interpretation and not otherwise.

Apart from that, regarding the purview of the *Information Technology Act, 2000 in India,* it should be mentioned that, the Act has made violation of Privacy under the system of information technology an offence. Not only that, it has also made the tampering of computer source documents and disclosure of computerised personal records as offences permissible under the Act, which are all related to the

violation of Privacy under the system of Information Technology. But, due to the incomplete knowledge regarding what is violation of Privacy under the information technology system and what is not, the persons working under the system are not always violating the right in bad faith. It may be that, they have acted in good faith; still the right is violated without their knowledge. As such, it is not easy to establish the case always and due to this reason, this problem also attracts strong judicial interpretation and judicial creativity. Last but not the least, an increase of overstepping media and press in to the human lives in the present social scenario, is another reason for violation of Individual Right to Privacy. The Press laws are age-old and the Press Council or broadcasting corporation norms of journalistic codes of conduct are unenforceable in all the three countries. Hence, this problem also can only be solved by the judicial interpretation or judicial creativity in U.S.A., U.K. and India. In this sense, active judicial intervention for protection of Right to Privacy in all the three countries is the need of the hour.

In the previous chapter, Privacy protection legislations of U.S.A., U.K. and India have been discussed. But, the preliminary discussion of this chapter clearly portrays the idea that, enacting legislation is not enough for protection of any right in the contemporary social scenario; instead it may raise further controversies also. As such, establishment of an independent judiciary and active judicial intervention for protection of the personal liberties of the individual citizens is the urgent need of the hour. Same rule is applicable for the protection of Right to Privacy also and as such, all the three countries should take the help of the judiciary in this respect. Hence, this chapter will dwell upon the role of judiciary for enhancing the Right to Privacy in U.S.A., U.K. and India.

5.4. Judicial Activism of Right to Privacy in U.S.A.

In U.S.A., the courts have refused to be obsessed by the dignity and conservation of the English Law of Torts as circumstances where English law as yet offers no remedy, for example interception of telephonic or other conversations, publications of a person's photograph without his or her consent (irrespective of defamation or infringement of copyright) and so on.[15] The Supreme Court of U.S.A. has recognised Privacy as a constitutional right. In varying contexts, the American

[15]Kiran Deshta, *Right to Privacy under Indian Law*, Deep and Deep Publications Pvt. Ltd., New Delhi, 2011, p.209.

judges have found the roots of this right in the *First Amendment,*[16] *the Fourth and Fifth Amendments,*[17]in the *penumbras of the Bill of Rights*[18]and in the *Ninth Amendment* or in the concept of *liberty guaranteed by the first section of the Fourteenth Amendment.*[19] Privacy interests of the individuals are also protected under the law of torts in U.S.A. Evolution of Right to Privacy has taken place from case to case development and it appears that the doctrine of *"due process of law"* has largely helped the American Supreme Court to identify, recognise and protect different kinds of privacy interest.[20]

In fact, the U.S. Constitution has not recognised the existence of Right to privacy in U.S.A. since the making of the constitution in express manner. It is the U.S. Supreme Court, which has played an important role to recognise the Right to Privacy in U.S.A. by way of judicial interpretation. In this process, the U.S. Supreme Court has taken active steps to curve out the protection of Right to Privacy from different provisions of the *U.S. Constitution,* like the *First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, the Ninth Amendment and the concept of liberty guaranteed by the first section of the Fourteenth Amendment.* According to those provisions, the Right to Privacy is not absolute. The government intrusion into the private property is allowed in cases of search and seizure, if reasonable. Therefore, the Right to Privacy is available only against government action and that too for search and seizure cases. No such protection against privacy by individual action is found. This is the limitation of protection of Right to Privacy in U.S.A. However, the law relating to the Right to Privacy in U.S.A. has been developed through the various cases, important among them are *Grosjean v. American Press Co., 297 U.S. 233(1935), Beard v. City of Alexandria, 341 U.S. 622(1951), Griswold v. Connecticut, 381 U.S. 479(1965), Rowan v. Post Office Department, 397 U.S. 728(1970) and Cox Broadcasting Corporation v. Mortin Cohn, 420 U.S. 469(1975).*

Though the above-stated list of cases is not exhaustive, rather an inclusive one only and a large number of other cases should be accompanied with these in

[16] *Stanley v. Georgia, 394 U.S. 557(1969).*
[17] *Katz v. U.S., 389 U.S. 347(1967).*
[18] *Griswold v. Connecticut, 381 U.S. 479(1965).*
[19] *Meyer v. Nebraska, 262 U.S. 390(1923).*
[20] *Supra Note 15 at p.210.*

order to bring out the actual picture of judicial activism of Right to Privacy in U.S.A., but that does not curb the role of these cases in the field of such activism. In fact, these are the most important cases, which have created the basic framework of judicial activism of Right to Privacy in U.S.A. Since the emergence of the decisions of these cases, other judges of the U.S. Supreme Court have become attracted towards the development of Right to Privacy therein and have started to impart their roles in such developmental process. Therefore, a study of the judicial activism of Right to Privacy in U.S.A. should portray a number of decisions of U.S. Supreme Court in this respect. It should also be remembered that, each and every case has not highlighted the same component of Right to Privacy; rather different new components or dimensions of Right to Privacy have come into being from different cases. In this sense, component wise analysis of the judicial activism of Right to Privacy in U.S.A. is required. Next part of the study will concentrate in this area.

5.4.1. Privacy and the Fourth Amendment Protection against unlawful Searches and Seizures

*The **Fourth Amendment** of the U.S. Constitution* declares as follows:-

> *The right of the people to be secured in their personal houses, papers and effects against unreasonable search and seizures, shall not be violated and no warrant shall be issued, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.*

This is the declaration of the *Fourth Amendment of the U.S. Constitution* and this amendment clearly protects the right of the U.S. Citizens in their personal houses, papers and effects against unreasonable searches and seizures. In this sense, it protects the Right to Privacy of Personality, Home, Correspondence and Communication of U.S. Citizens from unreasonable searches and seizures. Though the term 'Privacy' is not mentioned therein in express manner, but the elements protected therein are the different components of Right to privacy and as such, this right is protected therein in implied manner. A discussion of the decisions pronounced in various U.S. Supreme Court cases would substantiate this projection. However, it is also pertinent to mention in this respect that, the origin of Right to Privacy is found in one of the *Warren Court's* foremost contribution to the *American Constitution Law,* which has created history by the discovery of

Constitutional Right to Privacy in U.S.A.[21] mentioning this point of view *Justice Douglas* said, *"indeed during the last two decades the Fourth Amendment Right to be free from unreasonable searches and seizures had become. In short hand terminology, 'right to privacy'."*[22] Therefore, *the Fourteenth Amendment* recognition of Right to Privacy has not been existed in U.S.A. since the very beginning, but has been the result of judicial creativity.

Prior to *1965*, references were frequently made to *"Privacy"* or *"Right to Privacy",* but these phrases were used only in the rhetoric sense. They added nothing to already existing rights. Legal researchers could look in vain for a case the outcome of which rested strictly upon privacy concepts. Not surprisingly, most references to privacy have occurred in *Fourth Amendment* litigation. In declaring the right of all *"to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures",* the constitution provides the primary support for a Privacy right.[23] In this sense, it can be said that, prior to *1965,* there has been no such noteworthy development of Right to Privacy in U.S.A. and the main development has been started after that. Another important point is that, *Fourth Amendment* of the *U.S. Constitution* is the centre stage of the Privacy protection cases, because by way of giving protection against unlawful searches and seizures, this amendment has protected various components of Right to Privacy. As such, it has been easier for the U.S. Supreme Court judges to expand it by way of judicial interpretation to touch the various aspects of Right to Privacy.

5.4.1.1. Boyd v. United States : The Starting Point of Privacy Protection under the Fourth Amendment of the U.S. Constitution

The development of Right to Privacy under the auspices of the U.S. Supreme Court in the light of the *Fourth Amendment of the U.S. Constitution* has been started from the *Boyd v. United States*[24] *case.* In this case, the Supreme Court recognised Privacy as the underlying principle of the *Fourth Amendment prohibition against unlawful searches and seizures. Justice Bradley* noted the inter-relationship between the *Fourth and Fifth Amendments;* his significant conclusion was that the purpose of

[21]Dilbir Kaur Bajwa, "*Right to Privacy – Its origin and Ramifications*", Civil and Military Law Journal, vol.26, 1990, pp.48-56 at p.51.
[22] *Frank v. Maryland, 359 U.S. 360(1959).*
[23] *Supra Note 15 at p.210.*
[24] 116 U.S. 616(1886).

the *Fourth Amendment* was to protect the security and Privacy of *"persons, houses, papers and effects",* as a corollary, police could seize only instrumentalities of a crime, but never an individual's papers as mere evidence of crime. *Justice Bradley's* conclusion followed from his construction of the reasonableness clause of the amendment. He argued that, the individuals have an indefeasible property right at Common Law and under the *Fourth Amendment,* which renders unreasonable any governmental search and seizure of private papers or other property for mere evidence of a crime. Accordingly, no warrant or subpoena could reasonably issued for items not already owned by or forfeited to the State.[25] In this connection ***Justice Bradley*** commented as follows:-

> *"The unreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment".*[26]

Therefore, the judicial interpretation of *Fourth Amendment* for providing protection to Right to Privacy of Person, Home, Correspondence and Communication has been started since *1886* with the decision of *Boyd v. United States* case. It provides evidence that, the judicial activism in this respect, has been started prior to *1965,* but this is not a general trend, rather exceptional circumstances. The actual practice has been started since *1965* by following the precedent set by the *Boyd v. United States* case in *1886.* The principle laid down in this case by *Justice Bradley* is very important, which has led the further development of Right to Privacy in U.S.A. In fact, unreasonable searches and seizures were practised by the police in U.S.A. in the criminal cases in order to force individuals to give evidence against himself or herself. The *Fourth Amendment* rights have been incorporated in order to prevent such misuse of police power and to protect the U.S. citizens against self-incrimination. In this sense, the *Fourth Amendment* is a provision for protection against self-incrimination, which is a part of personal liberty and a fundamental right in the Constitutions of a number of democratic civilized countries. U.S.A. is not an exception to it and as such, it has incorporated the *Fourth Amendment* rights to provide protection against self-incrimination in the criminal cases. But, it should also be remembered that,

[25]*Supra Note 15 at pp.210-211.*
[26] *Supra Note 24 at p.633.*

compelling persons for self-incrimination is also violation of the Right to Individual Privacy of the citizens of a country. In this sense, though the *Fourth Amendment* has been made to provide protection against self-incrimination, but the specific protections incorporated therein have been enlarged to protect various components of Right to Privacy in U.S.A. by way of judicial interpretation. The attempts taken in this respect are very good, which have been started since the inception of the *Boyd v. United States* case.

In fact, the existence of the elements of Right to Privacy under the *Fourth Amendment* and the necessity of its protection has been established in the *Boyd v. United States* case in *1886.* It has clearly shown that, the said amendment covers Right to Privacy and has interpreted it in liberal manner in order to extend the protection against unreasonable search and seizure to protect the Right to Individual Privacy. Accordingly, it has been held that, as the unreasonable search and seizure takes away Right to Privacy of the individual citizens, the said amendment should be used to prevent such unreasonable search and seizure in order to protect the Individual Right to Privacy. In the said case, *Fifth Amendment* has also been interpreted to extend the provision for protection of Individual Right to Privacy. The said amendment prohibits compelling self-incrimination in the criminal cases and provides protection against it. The *Boyd* case held that, forced self-incrimination also takes away Individual Right to Privacy and it should be prevented by liberal interpretation of the *Fifth Amendment.* As such, the case has extended to provisions of both the amendments towards the protection of Right to Individual Privacy.

In the published opinion of the ***Boyd v. United States*** case, after citing ***Lord Camden's*** judgment in ***Entick v. Carrington***,[27] ***Justice Bradley*** has said as follows:-

> *"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment".*[28]

[27] 19 How. St. Tr. 1029 (1765).
[28] *Supra Note 24 at p.630.*

Therefore, *Justice Bradley* has clearly expressed the existence of Right to Privacy in the *Fourth Amendment of the U.S. Constitution* in his opinion in the *Boyd v. United States* case by referring the opinion of *Lord Camden* in the *Entick v. Carrington* case. Accordingly, unreasonable search and seizure invades into the sanctity of home and Privacy of life of the individual human beings. As such, it amounts to violation of Individual Right to Privacy. It is also a serious threat on the personal liberty, security and property of the U.S. citizens, which should be prevented by extension of application of the *Fourth Amendment* to include the protection of Right to Privacy within its scope and ambit. The basic objective behind the incorporation of this amendment of U.S. Constitution is to protect the personal or civil liberty of the U.S. citizens, which remains incomplete without the protection of Individual Right to Privacy under this amendment. Therefore, it is the need of the hour to include this right within the purview of the *Fourth Amendment.* This has been the opinion of the *Boyd v. United States* as well as the *Entick v. Carrington* case.

5.4.1.2. Olmstead v. United States : Narrower Interpretation of Fourth Amendment Protection of Right to Privacy

Next important case is the *Olmstead v. United States,*[29] wherein the *Fourth Amendment* principle of Right to Privacy has been narrowed down by *Chief Justice Taft,* but the dissenting opinion has also been presented by *Justice Brandeis* on the basis of the *Boyd v. United States* case. In the *Olmstead v. United States* case, the U.S. Supreme Court has expressed its opinion regarding the use of wiretapped private telephone conversations obtained by federal agents without judicial approval and subsequent use of that material as evidence against the person whose telephonic conversation has been so wiretapped in the criminal proceedings initiated against him or her. In the said case, *Olmstead* has been convicted for violating the *National Prohibition Act* due to unlawful engagement in the possession, transportation and selling of alcohol. Bootlegging or the illegal business of transporting alcoholic beverages or in other words, smuggling has been prohibited by law at the then period. As such, *Olmstead* has been convicted for engaging in the illegal bootlegging business. But, the information regarding the engagement of *Olmstead* in

[29]277 U.S. 438 (1928).

the bootlegging business has been obtained by the federal agents through wiretapped private telephonic conversations, which has been produced against him as evidence.

The petitioner, *Olmstead* has challenged his conviction in the case on the basis of information obtained against him by wiretapping his private telephonic conversation. According to him, such wiretapping would amount to unreasonable and seizure of his private communication prohibited under the *Fourth Amendment* and also would amount to self-incrimination prohibited under the *Fifth Amendment of the U.S.Constitution.* He has sought remedy against such violation. Prior to *1914,* when the American judicial system was based on the English Common Law, the production of evidentiary materials in the criminal proceedings was the only important matter, but the process of obtaining such material was not so important. As such, whether the process of obtaining such material would constitute the violation of *Fourth Amendment of the U.S. Constitution* or not, that had never come into question. Moreover, the American judiciary had allowed those searches and seizures at the then period, which had later been constituted as illegal searches and seizures. In this sense, the American judicial system was not strong enough to show judicial creativity in order to interpret the existing provisions of the U.S. Constitution in the liberal manner. Due to that reason, many cases of search and seizure had taken place, which later on became illegal.

Also the judicial interpretation of the *Fourth Amendment* disfavoured the existence of Right to Privacy therein. In this respect, existence of the *Boyd v. United States* case was only an exception. However, the scenario has been started to change since *1914* with the inception of the *Weeks v. United States*[30] case. In the case, the U.S. Supreme Court has unanimously held that, the illegal seizure of items from a private residence would constitute a violation of the *Fourth Amendment of the U.S. Constitution* and has established the *Exclusionary Rule,* which would prohibit admission of illegally obtained evidence in federal courts. The *Exclusionary Rule* has been a legal rule based on the *U.S. Constitutional Law,* which has provided that, any evidence collected or analyzed in violation of the defendant's constitutional rights, would be inadmissible in a criminal persecution before a court of law.

[30]232 U.S. 383 (1914).

In the ***Olmstead*** case, ***Chief Justice Taft*** has examined both the ***Boyd v. United States*** and the ***Weeks v. United States*** cases. After examining both the judgments, ***Chief Justice Taft*** has pronounced his judgment as follows[31]:-

> **(i)** *Use in evidence in a criminal trial in a federal court of an incriminating telephone conversation voluntarily conducted by the accused and secretly overheard from a tapped wire by a government officer does not compel the accused to be a witness against himself in violation of the Fifth Amendment.*[32]
> **(ii)** *Evidence of a conspiracy to violate the Prohibition Act was obtained by government officers by secretly tapping the lines of a telephone company connected with the Chief office and the residences of the conspirators, and thus clandestinely overhearing and recording their telephonic conversations concerning the conspiracy and in aid of its execution. The tapping connections were made in the basement of a large office building and on public streets, and no trespass was committed upon any property of the defendants. Held, that the obtaining of the evidence and its use at the trial did not violate the Fourth Amendment.*[33]
> **(iii)** *The principle of liberal construction applied to the Amendment to effect its purpose in the interest of liberty will not justify enlarging it beyond the possible practical meaning of "persons, houses, papers and effects", or so applying "searches and seizures" as to forbid hearing or sight.*[34]
> **(iv)** *The policy of protecting the secrecy of telephone messages by making them, when intercepted, inadmissible as evidence in federal criminal trials may be adopted by Congress through legislation, but it is not for the courts to adopt it by attributing an enlarged and unusual meaning to the Fourth Amendment.*[35]

In this judgment, ***Chief Justice Taft*** clearly points out that, *"the amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants".*[36] Accordingly, he has expressed his opinion that, in case of wiretapping of a private telephonic conversation, the persons have been connected through wires, which have not been the parts of their houses or offices and the wiretapping has been conducted by committing no physical trespass into the offices or houses of the accused persons. As such, the wiretapping conducted in the *Olmstead* case would not constitute unauthorized search and seizure within the purview of *Fourth Amendment,* because

[31] www.supreme.justia.com/cases/federal/us/277/438/case.html, visited on 19.7.2017.
[32] *Supra Note 29 at p.462.*
[33] *Id at p.466.*
[34] *Id at p.465.*
[35] *Ibid.*
[36] *Id at p.438.*

no physical entry has been committed into the accused person's office or house, not physical search and seizure of the person, house, papers or effects have been conducted. In this sense, there has been no physical, material or tangible search and seizure. According to *Chief Justice Taft, Fourth Amendment of the U.S.Constitution* has included only physical or tangible search and seizure and has provided protection against unauthorized physical or tangible search and seizure. Any intangible or constructive search and seizure would not be prevented by the *Fourth Amendment*, however unauthorized. Due to this reason, he has concluded that, the wiretapping conducted against *Olmstead* would not constitute unreasonable search and seizure within the meaning of *Fourth Amendment of the U.S. Constitution.* He has also contended that, no such precedent has been found favouring such interpretation of the *Fourth Amendment* and as such, such liberal interpretation of the *Fourth Amendment* would be unusual. He has also suggested that, if the Congress would like to have such interpretation of the said amendment, it could do it by making a new legislation, but it would not be the duty of the court to interpret the said amendment in such unusual and enlarged manner.

The decision given by *Chief Justice Taft* in the *Olmstead* case has, itself, narrowed down the development of Right to Privacy within the purview of the *Fourth Amendment of the U.S. Constitution.* However, an important dissenting opinion has been provided in the *Olmstead* case by ***Justice Brandeis***, the forefather of Right to Privacy in U.S.A., which is also pertinent to mention in this respect. *Justice Brandeis,* at the time of expressing his opinion, has examined the background of incorporation of the *Fourth and Fifth Amendments of the U.S. Constitution.* Accordingly, keeping in mind the technological advancements and the social change, it should be remembered that, wiretapping might create more serious consequences on persons, houses, papers and effects and as such, prohibition of wiretapping should be included within the meaning of prohibition of unreasonable search and seizure as expressed in the *Fourth Amendment of the U.S. Constitution.* Such liberal interpretation of the *Fourth Amendment* would have been the need of the hour.

In order to ascertain the true meaning of the contention drawn by ***Justice Brandeis***, a few portion of it, is quoted hereunder:-

> *"The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails . . . In its past rulings, the Court has refused to read a literal construction of the Fourth Amendment, most notably in the Boyd case. Unjustified search and seizure violate the Fourth Amendment, and it does not matter what type of papers were seized, whether the papers were in an office or a home, whether the papers were seized by force, etc. The protection guaranteed by the Fourth and Fifth Amendments are broad in scope. The framers of the Constitution sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. It is for this reason that they established, as against the government, the right to be let alone as the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth".*[37]

Therefore, *Justice Brandeis* has contended that, while drawing any conclusion on the basis of the *Fourth Amendment*, the true meaning of the said amendment in the light of the mischief it has intended to suppress, should be taken into account; rather than the literal interpretation of it. The framers of U.S. Constitution have sought to protect the beliefs, thoughts, emotions and sentiments of the Americans within the meaning of the *Fourth Amendment* and as such, it has been broadened in its scope. They have intended to protect the Right to Privacy as the most comprehensive right within the meaning of the *Fourth Amendment*, which could never be overlooked. In this sense, every intrusion upon the Right to Individual Privacy should be considered as the violation of the *Fourth Amendment.* This viewpoint should be the proper interpretation of the said amendment, as has been done in the *Boyd* case and overlooking such interpretation or narrowing down such contention, would mean the narrowing down of the scope and ambit of the *Fourth Amendment*, which would also mean, going against the intention of the legislature. Hence, the contention drawn by *Chief Justice Taft* has narrowed down the true spirit of the *Fourth Amendment of the U.S. Constitution*, which would be unexpected. Due to this reason, the *Olmstead v. United States* case has been overruled in *1967* in the *Katz v. United States*[38] case and the opinion of *Justice Brandeis* has become a fruitful guideline in the field of Privacy Rights Jurisprudence in U.S.A.

[37]*Ibid.*
[38]389 U.S. 347 (1967).

5.4.1.3. Wolf v. Colorado : Privacy vs. Fourth Amendment Exclusionary Rule

Next important case in the era of recognition of Right to Privacy under the *Fourth Amendment of the U.S. Constitution* has been the *Wolf v. Colorado*[39] case. In that case, the plaintiff, *Julius A. Wolf* has been convicted in the *District Court of the City and County of Denver* for involving in the conspiracy to conduct criminal abortions. Such conviction has been allowed by the *Supreme Court of Colorado* on the appeal and then *Wolf* has further appealed the said conviction in the *U.S. Supreme Court.* The most important question before the U.S. Supreme Court in the case has been the bindingness of the *Fourth Amendment Exclusionary Rule* of exclusion of the use of illegally seized evidence from criminal trial in the States. The question has also been raised, whether the *Fourth Amendment* exclusionary rule would be applicable to the *Fourteenth Amendment* in order to make it applicable in the States. Therefore, the basic question has been the applicability of the Federal Courts' exclusionary rule into the States.

The question raised in the *Wolf v. Colorado* case, has been a basic question regarding the protection of Right to Privacy within the purview of the *Fourth Amendment,* because non-acceptability or non-bindingness of the exclusionary rule in the States would mean the use of illegally seized materials as evidence in the criminal trials as well as the allowance of such use by the State Supreme Courts. This situation would create a serious danger towards the Individual Right to Privacy of the U.S. citizens and the right would be seriously jeopardised. Moreover, if such exclusion of the exclusionary rule is permitted in the States, then the very existence of the *Fourth Amendment* would be shaken. Simultaneously, the *Fourteenth Amendment,* which has provided protection of personal liberty to the States, would also come into question. Due to these reasons, bindingness of such exclusionary rule has been adjudged in the ***Wolf v. Colorado*** case.

The decision of the Court in the case has been delivered by *Justice Frankfurter*. In this respect, the opinion of ***Justice Frankfurter*** is quoted below:-

> *"The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of ordered liberty', and, as such, enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search,*

[39]338 U.S. 25 (1949).

> *without authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English speaking peoples. Accordingly, we have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution".*[40]

Therefore, ***Justice Frankfurter***, in his opinion, has supported the protection of Individual Right to Privacy within the purview of *Fourth Amendment of the U.S. Constitution* and the urge of prohibition of unreasonable search and seizure in order to protect the sanctity and Privacy of the U.S. Citizens. But, he has rejected the enforcement of the exclusionary rule in the States with the help of the *Fourteenth Amendment* in order to provide remedy in case of violation of Right to Privacy within the scope of the *Fourth Amendment;* rather he has suggested the procurement of other remedies for such violation. On the basis of the above reasons, he has concluded his judgment by pronouncing that, in case of a prosecution under a State court for a State crime, the *Fourteenth Amendment* should not forbid the admission of evidence obtained by an unreasonable search and seizure. Again, this decision has narrowed down the recognition of Right to Privacy within the meaning of the *Fourth Amendment* and has also prevented the enforcement of this right in the States through the *Fourteenth Amendment.* Due to this reason, decision of the *Wolf v. Colorado* case has been overruled in the *Mapp v. Ohio*[41] case in *1961.*

But, there has been a dissenting opinion in the ***Wolf v. Colorado*** case, provided by ***Justice Douglas***, wherein he has rejected the plea of exclusion of exclusionary rule from enforcement in the States. According to his contention, the *Fourth Amendment* should be applicable to the States. He has agreed with the opinion of *Justice Frank Murphy,* while providing his opinion, that, the evidence obtained in violation of the *Fourth Amendment* must be excluded in State as well as federal prosecutions, because in the absence of such exclusion, the Amendment

[40] www.supreme.justia.com/cases/federal/us/338/25/case.html, visited on 22.7.2017, at pp.25-28.
[41] 367 U.S. 643 (1961).

would have no effective sanction.[42] On the basis of this contention, *Justice Douglas* has craved the reversal of the conviction of *Wolf.* Though his opinion has been a dissenting opinion, but this opinion has been given more importance in the later period and has created the path for application of the federal protection of *Fourth Amendment* Right to Privacy in the States. In this sense, this dissenting opinion has been a praiseworthy opinion favourable to the Right to Privacy in U.S.A.

5.4.1.4. Frank v. Maryland : Watering Down of Wolf v. Colorado

In the case of *Frank v. Maryland,*[43] an appeal has been heard from the *Criminal Court of Baltimore, Maryland,* wherein a Baltimore City health inspector seeking the inspection of sanitary conditions of Frank's home has been prevented by him due to the absence of search warrant. For refusing such entry, *Frank* has been convicted and fined for violating the *Section 120 of Article 12 of the Baltimore City Code,* which has provided for a free health examination of any house, the refusal of which entails fine and accordingly, *Frank* has been fined on the basis of that law. When *Frank* has challenged the conviction in the ***Frank v. Maryland*** case, ***Justice Frankfurter*** has delivered the opinion of the Court, wherein he has upheld the validity of the impugned legal provision as well as has sustained the conviction, stating that, the appellant's conviction for resisting an inspection of his house without a warrant has not violated the *Due Process Clause of the Fourteenth Amendment.* The reason has also been cited therein that, such inspection has not been a criminal investigation and as such, the *Fourth Amendment* prohibition of unreasonable search and seizure would be inapplicable there. On the basis of this reason, ***Justice Frankfurter*** has decided that, such inspection would be allowed in the public interest, wherein public interest would be more important than *Frank's* Right to Privacy and as such, he has contended that, there has been no violation of *Fourth Amendment of the U.S. Constitution.*

A dissenting opinion has also been found in the said case pronounced by ***Justice Douglas***, supported by *Chief Justice* and few other judges, which is quoted hereunder:-

> *"The decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage. We witness indeed an inquest over a substantial part of the Fourth Amendment*

[42] *Supra Note 39 at p.41.*
[43] 359 U.S. 360 (1959).

> *... The Due Process of the Fourteenth Amendment enjoins upon the States the guarantee of privacy embodied in the Fourth Amendment (Wolf v. Colorado, 388 U.S. 25) – whatever may be the means established under the Fourth Amendment to enforce that guarantee. The Court now casts a shadow over that guarantee as respects searches and seizures in civil cases. Any such conclusion would require considerable editing and revision of the Fourth Amendment. For, by its terms, it protects the citizen against unreasonable searches and seizures by government, whatever may be the complaint . . . The Court said in Wolf v. Colorado, supra, at 338 U.S. 27, that 'The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society'. Now that resounding phrase is watered down to embrace only certain invasions of one's privacy ... Moreover, the protection of the Fourth Amendment has heretofore been thought to protect privacy when civil litigation, as well as criminal prosecutions, was in the offing . . . The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions . . . We are pointed to nobody of judicial opinion which purports to authorize entries into private dwellings without warrants in search of unsanitary conditions ...'*[44]

Therefore, the dissenting opinion has been much relevant and appropriate regarding the protection of Right to Privacy in the States. In this case, *Justice Frankfurter* has, again, narrowed down the interpretation of the *Fourth and Fourteenth Amendments of the U.S. Constitution* on the issue of protection of Right to Privacy therein. Due to this reason, the *Frank v. Maryland* case has been overruled later on in the *Camara v. Municipal Court of City and County of San Francisco*[45] in *1967.* In this case also, the dissenting opinion provided by *Justice Douglas, Chief Justice and other judges*, has been proved to be more fruitful regarding the *Fourth and Fourteenth Amendments* protection of Right to Privacy. The dissenting opinion has explained the broad scope and ambit of the *Fourth Amendment* regarding its application in both civil and criminal prosecutions. In this sense, stating that, it would be applicable in criminal prosecutions only would only be a narrower application of the said amendment, which would be unexpected. The intention of the legislature behind the incorporation of the *Fourth Amendment* has always been the protection of Right to Privacy of the U.S. Citizens. As such, every interpretation curtailing the said right, could never be supported. Due to this reason, any person invoking such constitutional protection should never be imposed with

[44] www.supreme.justia.com/cases/federal/us/359/360/case.html#T2/2, visited on 23.7.2017, at pp.374-376, Footnote 2/2.
[45] 387 U.S. 523 (1967).

any penalty, which has been imposed in the instant case. As such, the dissenting opinion has not supported the affirmative opinion of the case. Hence, the dissenting opinion is, no doubt, praiseworthy in this respect.

5.4.1.5. Mapp v. Ohio : Reversal of Wolf v. Colorado

Next important case is the *Mapp v. Ohio,*[46] which has been a landmark case in the U.S. Criminal procedure, wherein the Supreme Court of U.S.A. has held that, the evidence obtained by way of unreasonable search and seizure in violation of the *Fourth Amendment of the U.S.Constitution* should not be used in the criminal prosecution carried on by the Federal Courts as well as the State Courts. In fact, this case has incorporated the *Fourth Amendment* principle of exclusionary rule, applicable to the Federal actions, into the State actions with the help of the *Fourteenth Amendment Due Process Clause.* The *Mapp v. Ohio* case is well-known for the formal and official inclusion of the exclusionary rule of the Federal Court into the State Courts. After the decision, there has been no controversy in U.S.A. regarding the enforcement of the *Fourth and the Fourteenth Amendments* as well as the application of the exclusionary rule in the States. In order to do so, the *Mapp v. Ohio* case has overruled the *Wolf v. Colorado* case and with the help of such overruling, the *Mapp* case has completed the incomplete task of the *Wolf* case. The *Mapp* case has just reversed the *Wolf* case and even the position of the judges for pronouncing the decision has proved that, because in the *Mapp* case, *Justice Douglas* has provided the majority opinion along with *Justice Clark, Chief Justice and other judges,* whereas, *Justice Frankfurter* has provided the dissenting opinion, which has just been the opposite situation of the *Wolf* case.

In the instance case, *Dollree Mapp* has been convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures and photographs in violation of *Section 2905.34 of the Ohio's Revised Code,* which according to the said provision of the code is an offence punishable with imprisonment upto seven years as well as liable for fine. As such, the *Supreme Court of Ohio* has found that, her conviction has been valid though *"based primarily upon the introduction in evidence of lewd and lascivious books and pictures*

[46] 367 U.S. 643 (1961).

unlawfully seized during an unlawful search of defendant's home . . ."[47] At the time of the trial, no search warrant has been produced by the prosecution, which has shown a clear evidence of absence of search warrant at the time of search of *Dollree Mapp,* making the search and seizure unreasonable within the meaning of the *Fourth Amendment.* The *Ohio Supreme Court* has clearly admitted the fact of unreasonable search and seizure in the said case, but has not admitted the exclusion of evidence obtained therein by applying the exclusionary rule of the *Fourth Amendment.* In order to admit the unreasonable seized evidence, the Court has cited the *Wolf v. Colorado* case and therefore, has given the judgment on the basis of the *Wolf v. Colorado* case and has convicted *Dollree Mapp,* against which *Dollree Mapp* has appealed in the *U.S. Supreme Court,* which has given birth to the historic *Mapp v. Ohio* case.

In the ***Mapp v. Ohio*** case, the decision of the court has been pronounced by ***Justice Clark***, who, in order to explain the situation properly, has reminded the viewpoint of the U.S.Supreme Court in the ***Boyd v. United States*** case by quoting therefrom the following lines:-

> *"The doctrines of these Amendments apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . .[of those Amendments]".*[48]

Again ***Justice Clark*** has pointed out the following observations made by the U.S. Supreme Court in the ***Boyd v. United States*** case:-

> *"Constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon".*[49]

After that, ***Justice Clark*** has mentioned few portions of the ***Weeks v. United States*** case, which is quoted hereunder:-

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[47] 170 Ohio St. 427-428, 166 N.E.2d 387, 388.
[48] *Boyd v. United States, op.cit., p.630.*
[49] *Id at p.635.*

> *"The Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws".*[50]

Justice Clark has also highlighted the viewpoint of the ***Weeks v. United States*** case regarding the use of the unconstitutionally seized evidence in any court proceedings in the following manner:-

> *"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavour and suffering which have resulted in their embodiment in the fundamental law of the land".*[51]

Therefore, by highlighting the viewpoints of the *Boyd v. United States* and the *Weeks v. United States* cases, *Justice Clark* has wanted to point out the intention of the legislature behind the incorporation of the *Fourth Amendment of the U.S. Constitution* as well as the viewpoint of the U.S. Supreme Court in order to find out such legislative intention. *Justice Clark* has also explained that, in the previous two important cases, the U.S. Supreme Court has suggested the liberal construction of the *Fourth and Fifth Amendments of the U.S. Constitution.* Both the amendments have been same in their essence, because without joint interpretation of them, the true spirit of both the amendments could not be understood. The basic outline of both the amendments has been to protect the Right to Privacy of the U.S. Citizens, which would remain incomplete without the application of the exclusionary rule in both the federal as well as the State courts. Mere prevention of unreasonable search and seizure within the purview of the *Fourth Amendment* would have no meaning, if the *Fifth Amendment* prohibition of self-incrimination with the help of exclusionary rule would be inapplicable.

Moreover, U.S. Citizens would mean both the Federal as well as the State citizens and as such, equal protection of the Right to Privacy of all of them would be

[50] *Weeks v. United States, 232 U.S. 383 (1914) at pp.391-392.*
[51] *Id at p.393.*

expected. Therefore, application of the exclusionary rule in the Federal Courts and the exclusion of it in the State courts would mean the incomplete guarantee of Right to Privacy in the States. It could be assumed that, such interpretation of the *U.S. Constitution* should never be the intention of the U.S. Constitution makers and as such, such interpretation of the *U.S. Constitution* should not be made by the U.S. Supreme Court. Due to this reason, it would be obvious that, the *Fourth and Fifth Amendments' protections* should be applicable to the States with the help of the *Fourteenth Amendment Due Process Clause.* Again exclusion of the exclusionary rule in the States would create the *Due Process Clause* incomplete, because other protections available at the then period for the protection of Right to Privacy as stated in both the *Wolf v. Colorado* and the *Frank v. Maryland* cases have been proved to be fruitless. In this sense, *Fifth Amendment* protection of exclusionary rule would be the only remedy for protection of Right to Privacy in the States with the help of the *Fourteenth Amendment Due Process Clause.* In this manner, the decision of the *Mapp v. Ohio* case has created history in the field of *Fourth and Fifth Amendments* recognition of Right to Privacy in U.S.A. by way of extension of application of these amendments in the States through the *Fourteenth Amendment.* This decision has reversed the judgment of the *Supreme Court of Ohio* and has overruled the *Wolf v. Colorado* case.

5.4.1.6. Katz v. United States : Overruling of Olmstead v. United States

Next important case is the *Katz v. United States,*[52] which is another landmark case in the history of Constitutional recognition of Right to Privacy in the light of the *Fourth Amendment* in U.S.A. Like the *Mapp v. Ohio* case, this case has also created historical significance in U.S.A. by refining the protection of Right to Privacy in new manner. Most important significance of this case has been that, it has overruled the *Olmstead v. United States*[53] case. In this case, the U.S. Supreme Court has discussed the nature of Right to Privacy and the legal definition of the term "search". The decision of the U.S. Supreme Court, in this case, has refined all previous interpretations of the unreasonable search and seizure clause of the *Fourth Amendment* in order to consider any intrusion on Right to Privacy with the help of technological advancements as a search. The decision of this case has extended the

[52] 389 U.S. 347 (1967).
[53] 277 U.S. 438 (1928).

Fourth Amendment protection to all areas where a person should have a "reasonable expectation of Privacy".

In the instant case, *Charles Katz* has used a public pay telephone booth for transmission of illegal gambling wagers from *Los Angeles* to *Miami* and has been recorded by *FBI* with the help of electronic eavesdropping device attached to the outer part of the telephone booth, of which *Katz* has been completely unaware. On the basis of those recordings, *Katz* has been convicted for violating the *18 U.S.C. Section 1084* and the *Court of Appeals* has allowed the conviction stating that; there has been no violation of the *Fourth Amendment of the U.S. Constitution*, because there has been no physical trespass into the area occupied by *Katz.* Such contention has been drawn on the basis of the decision given in the *Olmstead v. United States* case. *Katz* has challenged his conviction on the ground of violation of his Right to Privacy, stating that, the recording has been obtained by committing unreasonable search and seizure prohibited by *Fourth Amendment of the U.S. Constitution.* Consequent to such challenge, the historic ***Katz v. United States*** case has taken place.

In the ***Katz*** case, ***Justice Stewart*** has delivered the opinion of the Court, wherein he has not relied upon the decision of the *Olmstead* case and has not supported the contention of physical trespass necessary to constitute the unreasonable search and seizure within the meaning of the *Fourth Amendment of the U.S. Constitution.* Instead he has held that, Privacy of *Katz* has been violated in the instant case by way of unreasonable search and seizure within the purview of the *Fourth Amendment.* He has also held that, to constitute such unreasonable search and seizure, it would not always be necessary to commit physical trespass. In this respect, the relevant portion of his judgment is quoted hereunder:-

> *"We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus, constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance".*[54]

[54] *Supra Note 52 at p.353.*

Justice Stewart, in his judgment, has cited many more reasons, owing to which his conclusion in the case has been drawn. A few portion of which, has been quoted hereunder:-

> *"Secondly, the Fourth Amendment cannot be translated onto a general constitutional 'right to privacy'. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual States . . . For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected . . . No less than an individual in a business office, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication . . . Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law' . . . once this much is acknowledged,*
>
> *and once it is recognized that the Fourth Amendment protects people – and not simply 'areas' – against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure".*[55]

In this manner, *Justice Stewart* has held in the case that, no physical trespass would be required in order to constitute the unreasonable search and seizure within the meaning of *Fourth Amendment of the U.S. Constitution.* Such interpretation would narrow down the purview of the *Fourth Amendment.* The U.S. Constitution has not expressly guaranteed any general Right to Privacy, but the *Fourth Amendment* surely has protected the Right to Privacy from the unreasonable search and seizure as well as the other amendments have protected this right from other encroachments or invasions; as such, there has been no doubt about the protection of Right to Privacy under different provisions of the U.S. Constitution. Moreover, while interpreting different provisions of the U.S. Constitution, it should be

[55]*Id at pp.350-353.*

remembered that, such interpretation should always be provided, which would be favourable to the protection of Right to Privacy and any disfavourable interpretation should be rejected. Right to Privacy of the U.S. Citizens should be protected in such places, where they should generally expect to have Privacy and this interpretation should be provided, because *Fourth Amendment* has protected the Privacy of persons' and not the Privacy of places. Due to that reason, a person should carry his Right to Privacy always with him, he or she should expect his or her Right to Privacy at every place (except the place or situation, where or when he or she would like to disclose any personal information) and the *Fourth Amendment* protection of Right to Privacy should not vary from place to place. On the basis of these contentions, *Justice Stewart* has held that, wiretapping or eavesdropping, without prior permission or without adjusting the justifiability of those types of telephone tapping, would amount to violation of *Fourth Amendment of the U.S. Constitution.* Hence, *Justice Stewart* has delivered his judgment to reverse the judgment of the Court of appeals.

An analysis of the above-mentioned cases will portray the true picture of Right to privacy within the meaning of *Fourth Amendment of the U.S. Constitution.* This amendment is such an important provision, which has covered huge area of protection of Right to Privacy in U.S.A., because a number of components have been covered thereunder. Due to this reason, this amendment has attracted huge number of cases. The role of judiciary for protection of Right to Privacy in U.S.A. can be well-understood from the discussion of *Fourth Amendment* protection of Right to Privacy in U.S.A. Under this amendment, judiciary has played most vital role to interpret and re-interpret the protection of Right to Privacy and while continuing in its process, the judiciary has enlarged the purview of the *Fourth Amendment of the U.S. Constitution,* which has become valuable to portray the true nature of the said amendment. Without the help of an able judiciary, it would not have been possible and in this sense, the U.S. Supreme Court has played a great role.

5.4.2. Privacy and Use of Contraceptives

During the *1960s,* use of contraceptives has been prohibited in U.S.A. Though there has been no express provision in the U.S. Constitution to prevent the use of contraceptives, nor such federal statutes have been found in this respect, but

the states have been very much enthusiastic to enact laws prohibiting the use of contraceptives. In a democratic civilized society, use of contraceptives should be the personal choice of either the married couples or any single individual in order to control pregnancy according to the choice. In every modern society, it is considered as a part of civil or personal liberty and as such, in a country like U.S.A., which is the forefather of civil liberty, such restriction in the use of contraceptives is unexpected. However, the States of U.S.A. have not been agreed to go with this contention. A number of States have enacted strict legislations for prohibition of the use of contraceptives, the violation of which has attracted punitive measures. U.S.A., being a true federal country, States have not been under the control of the federal government and have not been bound to follow the U.S. Constitution totally. In order to enforce various provisions of the U.S. Constitution in the States, it has been necessary to ratify those laws within the meaning of *Due Process Clause of the Fourteenth Amendment.* State judiciary has also been the supporter of the State legislatures and as such, the State Supreme Courts have been reluctant to consider their laws as unconstitutional for violating various provisions of the U.S. Constitution. A number of States have also established strict state laws for taking away the personal liberty of the U.S. Citizens.

Right to Privacy as a constitutionally protected right or the question of violation of this right by violating different provisions of the U.S. Constitution, has not been recognised in the States in U.S.A. at the then period. Though the use of contraceptives should be considered as a part of personal liberty of the individual citizens and prohibition of such use might amount to violation of Individual Right to Privacy, but that contention has not been supported by a number of States in U.S.A. As such, after enacting legislations prohibiting the use of contraceptives by the citizens, the States have never thought that, they have violated the personal liberty of the U.S. Citizens. Moreover, this has been the period after the decision of the *Wolf v. Colorado* case, where it has been held that, discussions of the U.S. Supreme Court would not always be enforceable in the States through the *Due Process Clause of the Fourteenth Amendment.* Each and every decision of the U.S. Supreme Court would not come within the purview of the *Due Process Clause* and even the States might have their own interpretation of the said clause as well as they could have their own

remedy apart from the remedy suggested by the U.S. Supreme Court, in order to apply *Due Process Clause* in their own way. Accordingly, they could curtail the personal liberty of their citizens with the help of *Due Process Clause* in their own way. Due to these reasons, different State judiciary has pronounced different opinion on the same issue and different states have followed different rulings on a particular point. Same has happened in the case of use of contraceptives and the question of violation of Privacy. At this juncture, the *Griswold v. Connecticut*[56] case has come into being in order to solve the problem.

5.4.2.1. Griswold v. Connecticut : Establishment of General Constitutional Right to Privacy

Griswold v. Connecticut case has started a new era in the field of recognition of Right to Privacy under the U.S. Constitution. In fact, this case has presented the first judicial activist role of the U.S. Supreme Court in order to establish Right to Privacy as a constitutional right. In this case, the U.S. Supreme Court has invalidated a Connecticut Law prohibiting the use of contraceptives by a married couple and has held that, the governmental measure to prevent the use of contraceptives has violated the Right to Marital Privacy.[57] The *Griswold* case has originated as a prosecution under the *Connecticut Comstock Act, 1879,* which has made it illegal to use "any drug, medicinal article, or instrument for the purpose of preventing conception" and has also provided that, the violators of that law could be "fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned". This statute has been challenged in *Connecticut* and the *Connecticut Birth Control League* as well as the *Planned Parenthood Clinics* have been established. On *November 1, 1961,* the *Planned Parenthood League of Connecticut's* Executive Director *Estelle Griswold* and its medical volunteer *Dr. Buxton* have opened a birth control clinic in *New Haven, Connecticut.* The clinic has received overwhelming consensus from the married women in order to have birth control advice and prescriptions. Consequently, *Griswold and Buxton* have been arrested, tried, found guilty and each of them has been fined of one hundred dollars. The conviction has been upheld by the *Appellate Division of the Circuit Court* and by the *Connecticut Supreme Court.*

[56] 381 U.S. 479 (1965).
[57] *Supra Note 15 at p.212.*

Against the conviction, *Griswold* has appealed in the U.S. Supreme Court, arguing that the *Connecticut statute* has been enacted by violating the *Fourteenth Amendment of the U.S. Constitution* and consequently, the ***Griswold v. Connecticut*** case has taken place. In this respect, the ***Fourteenth Amendment*** *of the U.S. Constitution* needs specific mention, the text of which runs as follows:-

> *Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The *first section of the Fourteenth Amendment* is most important, because it deals with several clauses, like the *Citizenship Clause, Privileges or Immunities Clause, Due Process Clause and the Equal Protection Clause.* As this section of the said amendment includes several important elements relating to the protection of life and liberty of the U.S. Citizens, it has been the most litigating part of the U.S. Constitution. Under this section, most important parts are the *Due Process Clause* and the *Equal Protection Clause.* The *Due Process Clause* prohibits state and local government officials from depriving persons of life, liberty or property without legislative authorization. The U.S. Supreme Court has used this clause in innumerable times in order to protect the life, liberty and security of the U.S. Citizens, which have been curtailed by the State Supreme Courts. The *Due Process Clause* is the protector of democracy and civil liberty in U.S.A. Due to this reason; the victims of the State judiciary have taken the help of this clause for protection of their life and personal liberty. As such, the appellants in the *Griswold* case have taken the plea of violation of the *Due Process Clause of the Fourteenth Amendment of the U.S. Constitution* in order to protect their personal liberty from the unjustifiable state encroachment. The U.S. Supreme Court has dealt with the matter and has passed the judgment in favour of *Griswold* stating that, the *Connecticut Statute* has violated the Marital Right to Privacy of the State Citizens and thereby has violated the *Fourteenth Amendment of the U.S. Constitution.*

In the ***Griswold*** case, ***Justice Douglas*** has delivered the opinion of the Court. He has held that, *"Appellants have standing to assert the constitutional rights of the*

married people"[58] and that, *"The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights".*[59] In order to understand the viewpoint of ***Justice Douglas***, important portions of his judgment are quoted hereunder:-

> *". . . The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'. The Fifth Amendment, in its self-incrimination clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people' . . . We have had many controversies over these penumbral rights of 'Privacy and repose' . . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms' . . . Would we allow police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right to privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."*[60]

Therefore, *Justice Douglas* has reversed the decision of the Connecticut Court in the *Griswold v. Connecticut* case, stating that, the protection of Right to Privacy has been implied in every part of the U.S. Constitution, like the *First Amendment, Fourth Amendment, Fifth Amendment, Ninth Amendment and*

[58] *Supra Note 56 at p.481.*
[59] *Id at pp.481-486.*
[60] *Ibid.*

Fourteenth Amendment. In fact, Right to Privacy has been embedded in the penumbras of the *Bill of Rights of the U.S. Constitution,* because various amendments of the Bill of Rights have been constituted in such manner that, without the protection of such right, the guarantee of those amendment rights would be incomplete. Due to these reasons, the U.S. Supreme Court, in a number of cases, has upheld the protection of Right to Privacy in order to uphold various amendments of the U.S. Constitution. If the States would not allow protection of Right to Privacy, then the personal liberty of the State citizens would be seriously threatened.

In the *Griswold* case, while giving his decision, ***Justice Douglas*** has quoted the decision of ***Entick v. Carrington*** case as discussed in the ***Boyd v. United States*** case, wherein the U.S. Supreme Court has affirmed the protection of Right to Privacy under the U.S. Constitution. The most important part of the *Griswold* case has been that, it has broadened the scope and ambit of constitutional protection of Right to Privacy in U.S.A. by stating that, the Right to Privacy has been the essence of not only one amendment of the Bill of Rights, but also of a number of amendments. It has been evidential of the wide amplitude of protection of Right to Privacy under the U.S. Constitution along with various components, which has surely been a great initiative. Most important aspect of this case has been that, it has opened a new door of protection of Right to Privacy within the purview of the *Ninth Amendment of the U.S. Constitution.* In this respect, the ***Ninth Amendment*** is quoted hereunder:-

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*

The unique nature of the *Griswold* case could be assumed from this perspective, because the cases prior to it have been highlighted only the *Fourth and Fifth Amendments* as the Privacy protections. Since this case, the *Ninth Amendment* has been added to such contention. The construction of *Ninth Amendment* has shown that, it has a very wide interpretation, because it has guaranteed all those rights, which have not been expressly protected within any amendment of the U.S. Constitution, by bringing all those rights under the Bill of Rights. It has also given status to the rights retained by the people through the practice from the traditions and as such, it has given constitutional status to the customary and traditional human rights. This interpretation has included the Customary and Common Law Right to

Privacy within the purview of the *Ninth Amendment,* which have been present in America since its inception. This broad interpretation of Right to Privacy in the *Griswold* case has brought it in such a height, which could never be negated and it has set a strong principle for the future cases.

5.4.2.2. Eisenstadt v. Baird : Privacy vs. Birth Control Measures

Next important case in the field of Privacy and the use of contraceptives or the birth control measures has been the *Eisenstadt v. Baird*[61] case. In this case, the U.S. Supreme Court has been further elaborated the idea of Right to Privacy regarding the use of birth control measures. In that case, a *Massachusetts Statute* declaring the use of contraceptives by a single person for prevention of pregnancy as illegal has been challenged. The U.S. Supreme Court has held that, the statute has neither a health measure nor deterrent to pre-marital sexual relations, but a prohibition resting upon moral judgments. Furthermore, it has been said that, if the Right to Privacy would mean anything, it would be the right of individual, married or single to be free from unwarranted governmental instructions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[62]

In the *Eisenstadt v. Baird* case, the U.S. Supreme Court has established that, the right of unmarried people to possess contraception should be same as the married couples. In that case, a *Massachusetts Statute* criminalising the distribution of contraceptives to unmarried persons for the purpose of preventing pregnancy has violated the right to equal protection and the judgment of the Court of Appeals for the First Circuit has been affirmed. The U.S. Supreme Court has struck down the *Massachusetts* law prohibiting the distribution of contraceptives to unmarried people for the purpose of preventing pregnancy by ruling that, it has violated the *Equal Protection Clause of the U.S. Constitution.* In the said case, at first, *William Baird* has been charged with a crime for distribution of contraceptive foams after lectures on birth control and population control at Boston University. Under *Chapter 272, Section 21A of the Massachusetts law on Crimes against Chastity,* contraceptives could be distributed only by registered doctors or pharmacists and only to married persons. Due to this reason, *Baird* has been convicted for distributing contraceptives to unmarried persons not being a registered doctor or pharmacist. The conviction of

[61] 405 U.S. 438 (1972).
[62] *Supra Note 15 at pp.216-217.*

Baird by the *Massachusetts Court* has been dismissed by the *Court of Appeals,* but it has again, been appealed to the U.S. Supreme Court by *Sheriff Eisenstadt,* consequently the *Eisenstadt v. Baird* case has taken place.

In the instant case, ***Justice Brennan*** has given his historic judgment by extending the viewpoint of the ***Griswold*** case, in order to apply it in the ***Eisensdt v. Baird*** case. Accordingly, ***Justice Brennan*** has contended as follows:-

> *"If, under Griswold, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impossible. It is true that, in Griswold, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and hearty of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child".*[63]

Therefore, in the instant case, *Justice Brennan* has equated the Right to Privacy of married couples with that of the unmarried persons. Due to this reason, it has never been stated that, the case has been related to the protection of Right to Privacy, rather it has been related to the protection of Right to Equality. This case has been well-known for the enforcement of the Equal Protection Clause of the U.S. Constitution. Through the whole judgment, discussion has been made regarding such clause and the use of contraceptives. In the ultimate analysis, the question of protection of Right to Privacy has been taken into consideration and has been pronounced that, regarding the use of contraceptives, such right should be equal for married and unmarried persons. If that contention would not be drawn, then the Equal Protection Clause of the U.S. Constitution would be violated. Also regarding the protection of Right to Privacy and the use of contraceptives, it should be same for all. Again, the use of contraceptives should be an acute personal or private matter and should come within the purview of Right to Privacy, which should be equal for married and unmarried persons.

5.4.3. Privacy and Right to Abortion : Jane Roe v. Henry Wade

Right to Privacy found in the *Fourteenth Amendment's* concept of personal liberty and restrictions upon State action as well as in the *Ninth Amendment's*

[63]*Supra Note 61 at p.453.*

reservation of rights to the people, has been broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether, has been apparent. Specific and direct harm medically diagnosable even in early pregnancy might be involved. Maternity or additional offspring might force upon the woman a distressful life and future; psychological harm might be imminent. Mental and physical health might be taxed by child care. There has also been the distress, for all concerned, associated with the unwanted child, and there has been the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, the additional difficulties and continuing stigma of unwed motherhood might be involved. All these have been factors, the woman and her responsible physician necessarily would consider in consultation.[64] Owing to the presence of above factors, abortion or termination of pregnancy might be necessary for a woman, which would never be disregarded by the State or by any other individual. Again, abortion or termination of pregnancy might be the personal decision of a woman, because the woman alone has been carrying the foetus and none else. Also the physical, mental, moral, psychological, financial or other factors associated with the birth of the child would victimize the woman concerned above all. Due to these reasons, only a woman could be her own judge for taking the decision of abortion and no one should interfere into the matter.

Abortion would mean the termination of pregnancy by a woman, but the main question associated with it, has been that, whether the woman would be permitted to abort the foetus as and when would wish or not. Another important question in this respect has been that, whether the State could interfere into the matter of abortion or not. Also there has been the most important question that, whether Right to Abortion would come under the Right to Privacy of the pregnant woman or not. All these questions have come before the U.S. Supreme Court and the court has given the decision in favour of the pregnant woman declaring the Right to Abortion as the Right to Privacy of the pregnant woman. But, the Court's decisions recognising a Right of Privacy would also acknowledge that some State regulation in areas protected by this right would be appropriate. A State might

[64] S. K. Sharma, *Privacy Law – A Comparative Study*, Atlantic publishers and Distributors, New Delhi, 1994, p.330.

properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life. At some point in pregnancy, these respective interests would become sufficiently compelling to sustain regulation of the factors that would govern the abortion decision.[65]

The Right of Personal Privacy would include the abortion decision, but this right should not be unqualified and should be considered against important State interests in regulation.[66] The pregnant woman could not be isolated in her Privacy. She has carried an embryo and, later, a foetus. The situation, therefore, has been inherently different from marital intimacy, or bedroom possession of obscene material, or marriage or procreation, or education. It would be reasonable and appropriate for a State to decide that at some point in time another interest that of health of the mother or that of potential human life would become significantly involved. The woman's Privacy would be no longer sole and any Right of privacy, possessed by her should be measured accordingly.[67]

The relation between Right to Privacy and Right to Abortion has been a matter of discussion since long. But, the issue has got the limelight since the decision of the famous *'Abortion Case'* ***Jane Roe v. Henry Wade***[68] in U.S.A. In this case, an unmarried pregnant woman who has wished to terminate her pregnancy by abortion, has instituted an action in the United States District Court for the Northern District of Texas, seeking a declaratory judgment that Texas criminal abortion statutes, which have prohibited abortions, except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother, would be unconstitutional. The U.S. Supreme Court has said that, although the Constitution of the U.S.A. has not explicitly mentioned any Right of Privacy, the United States Supreme Court has recognised that, a Right of Personal Privacy, or a guarantee of certain areas or zones of Privacy, has been existed under the Constitution, and "that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and

[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] 410 U.S. 113 (1973).

in the concept of liberty guaranteed by the first Section of the Fourteenth Amendment" and that the "Right to Privacy is not absolute".[69]

In the instant case, ***Justice Blackmun*** has delivered the opinion of the Court, the relevant portions of which are quoted hereunder:-

> *"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of prediction. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitude toward the abortion procedure over the centuries".*[70]

Justice Blackmun, while pronouncing his judgment has criticized the reliability of the age-old Texas statutes criminalizing abortion and has tried to establish the justifiability of abortion with the passage of time and the changing social scenario. There might be the necessity of criminalizing abortion at certain point of time and as such, the Texas statutes have been enacted, but with the passage of time, such relevance have gone and there has been the urgent need of abortion in a number of situations for a woman, which if disallowed or criminalized, would surely hamper justice as well as would violate personal liberty of the U.S. citizens. This has been the main reason behind substantiating the challenge posed towards the Texas statutes and while giving the judgment, *Justice Blackmun* has analysed various aspects of human philosophy, human life, attitudes, values, moral standards and has examined the urge of constitutional measurement of the issue keeping in mind the medical and medico-legal history of the human attitude towards abortion since long past. In continuation of such process, he has uttered the above contention in order to examine the justifiability of abortion by a pregnant woman. Thereafter, he has pronounced his judgment, supporting his viewpoint and while doing so, he has conducted a survey of the history of abortion in order to find out the state

[69] *Supra Note 64 at p.329.*
[70] *Supra Note 68 at pp.113-117.*

purposes and interests behind the criminal abortion laws. After conducting the survey, he has held as follows:-

> *"These decisions make it clear those only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and childrearing and education . . .* [71] *Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute, and is subject to some limitations; and that, at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach. Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake".*[72]

Therefore, in the whole judgment, ***Justice Blackmun*** has considered the aspects of Right to Abortion as a part of Right to Privacy of the pregnant woman as well as the abortion preventing statutes contending the legitimate health interest of the mother and the Right to Life of the foetus. Finally, he has held that, Right to Abortion should be the Right to Privacy of the pregnant woman, because she has been carrying the foetus, but such right should not be absolute. Keeping in view the legitimate state interests regarding the health of the mother, Right to Life of the foetus and other socio-economic aspects, state could impose reasonable restrictions on such right by enacting abortion prohibiting legislation. But, in all these cases, the states have to prove the legitimate state interest; otherwise, the legislations would be struck down for violating the Right to Privacy of the pregnant woman as established under various provisions of the U.S. Constitution. In this respect, one determinant has been fixed by the case and that has been the first trimester, prior to which, abortion would be safe regarding the health aspects of the pregnant woman and Right to Life of the foetus would not come into picture. Hence, the court has finally held that, enactment of a state criminal abortion statute without regard to pregnancy stage and without recognition of the other interests involved would be violative of the *Due Process Clause of the Fourteenth Amendment of the U.S. Constitution* and on the basis of such contention, has held the impugned Texas statute as

[71] *Id at pp.152-153.*
[72] *Id at p.155.*

unconstitutional. In this respect, it is to be remembered that, *Roe v. Wade* has been proved to be a historic judgment in U.S.A. for establishing the Women's Right to Abortion therein, which has always been cited as a landmark judgment in other countries also on the issue of Right to Privacy and Right to Abortion.

5.4.4. Privacy and the First Amendment : Stanley v. Georgia

The *First Amendment of the U.S. Constitution* has been the protector and guarantor of a number of personal liberties of the U.S. Citizens, like the Freedom of Religion, Freedom of Speech and Press, Freedom of Peaceful Assembly and the like. This amendment prevents the Congress from making any legislation prohibiting and of the freedoms mentioned in the *First Amendment.* This amendment is the door of the Constitution and has created provisions for the protection of a democratic society. The most important part of this amendment has been the protection of Freedom of Speech and Press. Being the forefather of civil and personal liberties, U.S.A. has created the provision for protection of this right since its inception under the *First Amendment of the U.S. Constitution.* In this respect, the text of the ***First Amendment*** is quoted below:-

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The relation between Right to Privacy and the *First Amendment of the U.S. Constitution* has come into question in the ***Stanley v. Georgia***[73] case, wherein the U.S. Supreme Court has given a decision, which has helped to establish an implied "Right to Privacy" under the U.S. Constitution, in the form of mere possession of obscene materials. In that case, it has been held that, the *First Amendment,* as applied to the States under the *Due Process Clause of the Fourteenth Amendment,* has prohibited the making of mere private possession of obscene material a crime. In the case of *Stanley v. Georgia,* the *Georgia* home of *Robert Eli Stanley,* a bookmaker (gambler), has been searched by police with a federal warrant to seize the evidence of betting activities, but nothing has been found. Instead they have found and seized three reels of pornographic materials from a desk drawer in an upstairs bedroom. Consequently, *Stanley* has been charged with the crime of

[73] 394 U.S. 557 (1969).

possessing obscene materials under the Georgia Law. The conviction has been upheld by the Supreme Court of Georgia. Against that conviction, *Stanley* has appealed into the U.S. Supreme Court, which has resulted into the *Stanley v. Georgia* case.

In the instant case, *Stanley* has been convicted for possessing obscene materials under the *Georgia Obscenity statute,* which he has challenged before the U.S. Supreme Court contending that the said statute has been unconstitutional in so far as it has punished the mere private possession of the obscene matter. The U.S. Supreme Court, substantiating the claim of ***Stanley***, has held as follows:-

> *"The First Amendment as made applicable to the States by the Fourteenth prohibits making mere private possession of obscene material a crime[74] . . . The Constitution protects the right to receive information and ideas, regardless of their social worth, and to be generally free from governmental intrusions into one's privacy and control of one's thoughts[75] . . . The State may not prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct . . . distinguished, or proscribe such possession on the ground that it is a necessary incident to a statutory scheme prohibiting distribution."[76]*

In the instant case ***Justice Marshall*** has delivered the opinion of the U.S. Supreme Court. The relevant portions of the said judgment are quoted hereunder:-

> *"Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, setting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds".[77]*

Therefore, in the instant case, ***Justice Marshall*** has given his opinion in favour of the protection of Right to Privacy within the purview of *First Amendment of the U.S. Constitution.* In this respect, he has acquainted this right with the Right to Freedom of Speech and Press, stating that the Freedom of Speech would include the Freedom to receive Information. In fact, Freedom of Speech has been the first and foremost personal liberty of the U.S. Citizens and as such, it has acquired place in the *First Amendment.* This freedom would remain incomplete without the freedom to receive information, because no information would mean no speech. Accordingly,

[74] *Id at pp.560-568.*
[75] *Id at pp.564-566.*
[76] *Id at pp.566-568.*
[77] *Id at p.565.*

Freedom to receive information would become complete, when an individual would have the choice of studying everything depending upon one's emotional and intellectual needs. Obviously that would be possible, when one would have the Privacy at one's home to choose one's reading material and no state interference should be expected therein. People could read or watch anything according to the choice, which might include obscene material also. Reading or gathering information according to choice should be one's Right to Privacy and if, any one would read any obscene material within the Privacy of one's home without doing anything detrimental to the public interest, then State could have nothing to do with that. The *First Amendment* right to Freedom of Speech would be applicable to the states by the *Fourteenth Amendment* and the government should not be allowed to control the human minds, because that would be detrimental to the spirit of the U.S. Constitution.

5.4.5. Privacy and Marriage : Loving v. Virginia

Marriage is a social institution, the freedom of which should be the very basis of personal liberty of an ordered society. Marriage provides legalization of the relationship of husband and wife as well as legitimization to the paternity of children. It is a proof of social security. It is necessary to construct an ordered society based on legal relation. But, marriage is also conducted for companionship between two people, which would be destroyed, if unnecessary legal restriction is imposed on the freedom of choice of companion for marriage. Every adult citizen of a democratic civilized country should have the freedom to choose one's partner for marriage and state should not impose unnecessary restriction on that choice. In fact, every individual should have the Right to Privacy for choosing partner and conducting marriage, wherein restrictions imposed by State would be unreasonable. This contention has been first established in U.S.A. by the *Loving v. Virginia*[78] case.

Loving v. Virginia has been a landmark case on civil liberties in U.S.A., wherein the U.S. Supreme Court has invalidated the laws prohibiting interracial marriage, stating that, such prohibition would violate the *Equal Protection Clause of the U.S. Constitution.* This case has been filed in the U.S. Supreme Court by *Mildred Loving,* a black woman and *Richard Loving,* a white man, who have been

[78]388 U.S. 1 (1967).

punished for one year imprisonment in *Virginia* for marrying one another, violating the *Virginia Racial Integrity Act, 1924,* which has prohibited interracial marriage. They have appealed before the U.S. Supreme Court against the conviction of the Virginia Supreme Court taking the plea of violation of *Equal Protection Clause of Fourteenth Amendment of the U.S. Constitution.* In the instant case, U.S. Supreme Court has overruled the conviction of the *Lovings'* by the Virginia Supreme Court stating that, the *Virginia Statute* has violated the *Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.* ***Chief Justice Earl Warren*** has delivered the opinion of the Court, the relevant portions of which are quoted hereunder:-

> *"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."*[79]

Therefore, this decision has provided that, every individual should have the freedom of choice to marry or not to marry in U.S.A., which could not be infringed by the State. This right would be nothing but another name for Right to Privacy of marriage and as such, this decision has done a great job by establishing Freedom or Privacy of marriage in U.S.A.

5.4.6. Privacy and the Right to Procreation : Skinner v. Oklahoma

Right to procreation of children is a personal liberty of individual human beings, which is required for the continuance of the human race and no state can impose unreasonable restriction on it. However, State can impose reasonable restriction on this right on the ground of prevention of birth of huge number of illegitimate children or for population control in a hugely populated country. But, no state can criminalize the procreation of children by passing any statute, because that would violate the basic human rights of individual human beings. It is a natural right and thereby has become a part of personal liberty of the individual human beings,

[79]*Id at p.12.*

irrespective of any state and as such, unreasonable restriction imposed on it by any state is prevented by the law of nature. These are the basic reasons behind the prevention of imposition of legal restrictions on the Right to procreation of children. As the Right to procreation of children should be enjoyed according to one's choice, it should come under the Right to Privacy of Procreation of children. Every individual should enjoy the Right to Freedom or Privacy in the matters of procreation of children, which cannot be taken away by any unreasonable state interference. This issue has been raised for the first time in U.S.A. in the *Skinner v. Oklahoma*[80] case.

In the ***Skinner v. Oklahoma*** case, the U.S. Supreme Court has ruled that, the laws permitting the compulsory sterilization of criminals would be unconstitutional; so far those laws have been treated similar crimes differently. The relevant *Oklahoma Law* has been applied to "habitual criminals", but has excluded the "white-collar crimes" from its purview. Due to this reason, the U.S. Supreme Court has held that, treating similar crimes in different manner has violated the *Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.* In that case, *Jack T. Skinner* has been convicted once for theft and twice for armed robbery under the *Oklahoma Habitual Criminal Sterilization Act, 1935,* wherein the state could impose a sentence of compulsory sterilization against criminals, who have been convicted three or more times for crimes "amounting to felonies involving moral turpitude". *Skinner* has preferred on appeal in the U.S. Supreme Court against such conviction of the Oklahoma Supreme Court, consequent to which the said case has come into being, wherein the U.S. Supreme Court has opined the above contention. In the said case, ***Justice Douglas*** has delivered the opinion of the U.S. Supreme Court, the relevant portions of which are quoted hereunder:-

> *"This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari".*[81]

[80]316 U.S. 535 (1942).
[81]*Id at p.536.*

Therefore, in the instant case, ***Justice Douglas*** has not only struck down the impugned Oklahoma statute as violating the *Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution,* but also has held that, the said case has touched a very vital issue of procreation of children, which has been the essential element of perpetuation of a race. Though the main concern of the case has been the violation of the *Equal Protection Clause* by the impugned statute, but the issue of fear of extinction of human race by the said governmental action has been more serious than the main issue of the case and as such, the U.S. Supreme Court has struck down the impugned statute. Hence, the said case has not only been a landmark decision in the field of *Equal Protection Clause of the Fourteenth Amendment* but also in the field of protection of Right to Privacy of Procreation of children.

5.4.7. Privacy of Children and the Family Relationship : Prince v. Massachusetts

Family is the protector of society and family relationship is the most important element for building up the future of a child. A child borns and grows up within a family and as such, the family environment as well as the cultures of the family-members create great impact upon the mind of the child. Good family environment means the healthy child and bad means the unhealthy child. But, it should also be remembered that, child is not the property of the parents or guardians, so they should not impose their religion, culture or other ideology, by force, on the child. A child should have its own thought process, which should be nurtured to grow up naturally with due care and patience. Right to Privacy of the child comes into picture in this respect, because a child should have its freedom or privacy to develop its brain and mind. Such right should not be suppressed by the pressure of the family relationship. The conflict between Right to Privacy of children and the authority of family relationship has come into question for the first time in U.S.A. in the case of *Prince v. Massachusetts.*[82]

In the ***Prince v. Massachusetts*** case, the U.S. Supreme Court has held that, the government has broad authority to regulate the actions and treatment of children. Parental authority would not be absolute and could be restricted by the government

[82]321 U.S. 158 (1944).

in the interest and welfare of the child. In the instant case, *Sarah Prince*, a woman has used her nine years old girl child for selling religious literatures for money and has been convicted for violating the Child Labour laws of *Massachusetts.* She has appealed before the U.S. Supreme Court against the conviction of the Supreme Court of Massachusetts, stating that, such conviction has violated her *Freedom of Religion and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.* But, the U.S. Supreme Court has upheld the conviction as well as the *Massachusetts* Child Labour Laws, stating that, there has been no violation of the provisions of the *Fourteenth Amendment,* because exercise of Freedom of Religion of the parents would not mean the use of the child for that purpose. The impugned statute has not violated the Freedom of Religion of *Prince,* but it has only protected the girl child from the wrong of child labour. In every society, welfare of the child would be of paramount consideration and upholding that point, the U.S. Supreme Court has upheld the *Massachusetts* statute. In this case, Right to Privacy of child has been upheld over the family relationship.

5.4.8. Privacy versus Child Rearing and Education : Meyer v. Nebraska

A child borns and grows up in a family and as such, the family-members or the parents can better understand the process of child rearing as well as better decide about the education of a child. State can interfere into the welfare of the child or make laws in this respect. But, parents can never be obstructed from taking decisions about the child for the better interest of the child. In this respect, parents also have the Right to Privacy of child rearing and education, so far as they are reasonable. Right to Privacy of the parents regarding child rearing and education of the child have been considered in the case of *Meyer v. Nebraska*[83] in U.S.A.

In ***Meyer v. Nebraska***, the U.S. Supreme Court has held that, *Nebraska Statute, 1919* prohibiting the teaching of modern foreign languages to grade-school children has violated the *Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.* In that case, *Meyer* has been convicted for teaching German language in a school violating the *Nebraska statute,* against which he has appealed before the U.S. Supreme Court, wherein the conviction has been reversed. U.S. Supreme Court has held that, personal liberty of the U.S. citizens would not mean

[83]262 U.S. 390 (1923).

physical liberty only, but freedom to carry on various personal activities, like marriage, forming the family or home and upbringing the children, which would be essential for the happiness of the free men. In this sense, education of school children would come within the purview of upholding them and as such, parents could decide as to what language should be taught to them by whom and what not. Also mere studying German language would create no harm if parents have allowed teaching their children such language; *Meyer* has committed no wrong by teaching that. As choice of education should come under the personal liberty of the U.S. citizens, the *Nebraska Statute* has violated the *Due Process Clause of the Fourteenth Amendment of the U.S. Constitution* by prohibiting the foreign language teaching. In this manner, Right to Privacy of the parents of choosing education for their children has been upheld. It has been finally decided that, state could impose reasonable restrictions on the personal liberty of the U.S. citizens for their physical, moral and mental development, but not for mere curtailment of such liberty in unreasonable manner.

5.4.9. Privacy versus Freedom of Press : Cox Broadcasting Corporation v. Mortin Cohn

Freedom of Press is considered as an important freedom in a democratic society. As such, U.S.A. being a democratic country and the protection of civil liberties, has protected the Freedom of Speech and Press under *First Amendment of the U.S. Constitution* as well as has enforced it in the states through the *Due Process Clause of the Fourteenth Amendment.* Press is considered as *fourth estate* and the bulwark of the public opinion.[84] In this respect, it has been rightly observed in the ***Grosjean v. American Press Co.***[85] as follows:-

> *"A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves".*[86]

Therefore, the said case has clearly established the unfettered Freedom of Press in U.S.A., but the problem has arisen when there has been a conflict between freedom of press and Right to Privacy. The right of individual to be free from highly

[84] Dr. M. K. Bhandari, "*Right to Privacy versus Freedom of Press: A Comparative Conspectus of Legal Position in U.S.A., U.K. and India*", The Indian Journal of Legal Studies, Vol.XI, 1991, pp.178-191 at p.179.
[85] 297 U.S. 233 (1936).
[86] *Ibid.*

offensive publicity concerning their private lives has two aspects,[87] which have been highlighted below:-

(i) *Publicity which harms their reputation; and*

(ii) *Publicity which hurts their feelings by telling the public about their private lives without harming their reputation.*[88]

The first has been dealt with under the topic of "defamation" for which a legal remedy has been existed in almost all countries. The second has been usually discussed under the topic "breach of Privacy". This has been actionable in some countries, but not in all.[89] The problem has been accumulated by the availability of information relating to private affairs through the medium of expanding coverage of newspapers, in response to a popular demand for "lusty journalism". It has therefore, called for legislature and judicial intervention through newer avenues, to meet this serious problem of intrusion into Privacy.[90] In this respect, the U.S. Supreme Court has played an important role for balancing between the Freedom of Press and the Right to Privacy. Until *1965,* the U.S. Supreme Court has considered the Right to Privacy explicit in two contexts – *Libel and Fourth Amendment.*[91]In that year, in *Griswold v. Connecticut,*[92] a general constitutional Right to Privacy has been articulated for the first time. After *Griswold* and a prolonged and tenuous struggle with common law form of action to insert Privacy therein, many of the States in U.S.A., like *New York, Virginia, Utah and Oklahoma* have made invasion of Privacy a statutory wrong, which would be actionable per se without going through the tortuous process of establishing trespass, libel or the like. American Courts have extended the Right to Privacy from realm of private law into constitutional law and have recognised the protection of this right as a legitimate public interest for restricting the Freedom of Expression.[93]

Thereafter, a number of cases have come into being under the auspices of the U.S. Supreme Court, which have dealt with the issue of conflicting interest of

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[87]Justice E. S. Venkataraman, *Freedom of Press – Some Recent Trends*, D. K. Publishers, New Delhi, 1987, p.111.
[88]*Supra Note 84 at p.179.*
[89] *Supra Note 87 at p.111.*
[90] D. D. Basu, *Law of the Press*, Prentice Hall of India, New Delhi, 1980, p.68.
[91] *Supra Note 84 at p.181.*
[92] 381 U.S. 479 (1965).
[93] *Supra Note 90 at p.69.*

Freedom of Press and Right to Privacy. In ***Beard v. City of Alexandria***,[94] it has been generally observed that, however valuable a freedom might be, it could not be allowed to be used to defeat the corresponding or competing right of other persons, which have been equally valuable, e.g., the Right to Privacy and repose. Similar opinion has been reiterated later in ***Hynes v. Oradell***[95] case. But it has also been held that, freedom of press could be utilized to such events which would be "news-worthy" or of legitimate public concern. In such cases, the alleged breach of privacy or disclosure of embarrassing private facts would not be entertained as justifiable defence. The public's right to know has overruled the private individual's desire for seclusion and has been held that, constitutional law might also superimpose exceptions on liability that might otherwise arise.[96] Thus, in the United States, an exception has been recognised by the Supreme Court in ***Cox Broadcasting Corporation v. Mortin Cohn***[97]case. In that case, when the event would be of legitimate public concern, the Court has observed as follows:-

> *"We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for media to inform citizen about the public business and yet stay within law . . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records . . . Once true information is disclosed in public court documents open to public inspection, the press cannot be punished for publishing it".*[98]

But, the Supreme Court in the same case has warned against unwanted publicity in the press, in such matters which would be unrelated to public affairs. The Court has deprecated the role of press in the following words[99]:-

> *"The press is overstepping in every direction the obvious bonds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery".*[100]

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[94] 341 U.S. 622 (1951).
[95] 425 U.S. 510 (1976).
[96] *Supra Note 84 at p.182.*
[97] 420 U.S. 469 (1975).
[98] *Id at pp.491, 495-496.*
[99] *Supra Note 84 at p.183.*
[100] *Supra Note 97 at p.487*.

Prior to this case, in the famous ***mail case***,[101] the Supreme Court has tried to maintain adjustment between right to be let alone and right of other to communicate. Supreme Court's observations in the said case have been reproduced hereunder[102]:-

> *"The right of every person to be let alone must be placed in the scales with the right of others to communicate . . . We reject categorically the argument that a vendor has a right under the Constitution . . . to send unwanted material into the home of another . . . The asserted right of mailer stops at the outer boundary of every person's domain".*[103]

Therefore, the U.S. Supreme Court in the above cases, has tried to reconcile between the conflicting interests of Freedom of Press and Right to Privacy. It has contended that, both of them have been the personal liberties under the U.S. Constitution and as such, none of them could be curtailed in unreasonable manner. Again, overstepping of Press into the individual right to be let alone should not be allowed; on the contrary, people's right to know should also not be overruled on the ground of protection of Right to Privacy. In this respect, the line of demarcation, which has been decided, would be the "news-worthiness", which would mean that, the matter would be of legitimate public concern. As such, if the matter would be of legitimate public concern, then it would be newsworthy and could not be curtailed for violating the individual Right to Privacy. But, the pure gossips should not be allowed to publish violating the individual Right to Privacy. If the publication would harm the Right to Privacy of Reputation of the celebrities or public figures, then also it would not be allowed. In this respect, it should be remembered that, the press could not be punished for publication of the public documents or the documents open to public for inspection, because no Right to Privacy would be available there, owing to be in the public domain. Hence, the U.S. Supreme Court has done a good job for reconciling the conflicting interests of Freedom of Press and Right to Privacy, yet the matter has not been resolved till now.

5.4.10. Privacy and Homosexual Relationships

Homosexual relationships or making of same sex relationships and marriage within that relationship as well as to form family would be the acute private and personal matters of the persons concerned. No state could interfere into those

[101] *Rowan v. Post Office Department, 397 U.S. 728 (1970).*
[102] *Supra Note 84 at p.183.*
[103] *Supra Note 101 at p.728.*

matters, so far as those would be reasonable and have not caused any harm to the peaceful existence of an ordered society. In fact, these activities would come within the personal liberties of the individual citizens of the democratic countries. But, in the previous century, mind-set of the people has not been much developed for the social acceptance of the homosexual activities. As such, those activities have been considered as 'sin' and the persons engaged therein would be called 'sinners'. Not only the common people, but the states or governments have also been reluctant to provide social acceptance to those activities; rather they have tried to prohibit those activities by law. This situation has been prevailed in most of the democratic civilized countries and U.S.A. has not been an exception to it. As such, U.S.A. has also enacted legislations for prevention of homosexual activities during the 20th Century and U.S. Supreme Court has upheld those legislations by stating that, those have not been violative of Right to Privacy of marriage or sexual relationships and thereby held constitutional. But, in the 21st Century, mindset of the people as well as the government have been changed to provide social acceptance to those activities and as such, in the few recent decisions, the U.S. Supreme Court has validated the Right to Privacy of homosexual relationships, reversed its old decisions and struck down the age-old statutes prohibiting the making of such relationships. A few important judgments of the U.S. Supreme Court have been noteworthy in this respect.

5.4.10.1. Bowers v. Hardwick : Denial of Privacy of Homosexual Relationship

In the case of ***Bowers v. Hardwick***,[104] the U.S. Supreme Court has upheld the validity of a Georgia law classifying homosexual sex as illegal sodomy, because there has been no constitutionally protected right to engage in homosexual sex. In that case, the U.S. Supreme Court has denied the Right to Privacy of individual citizens to decide their sexual relations or marital relations freely according to their choice. The Court in this respect has quoted from the ancient roots of prohibition against homosexual sex and has held it as an infamous crime against nature, worse than even rape and a crime against the morality. Due to these reasons, the Right to Privacy to have homosexual sex has not been recognised by the court at that time. But, ***Justice Blackmun***, has given his dissenting opinion in the said case, stating

[104] 478 U.S. 186 (1986).

that, the point should be considered from the aspect of Right to Privacy, because marriage and sex would be the acute personal and private matters of the individual persons, which could not be controlled by state, by enacting statutes in the names of religion, antiquity or morality. But, the majority opinion has not gone with *Justice Blackmun* and Right to Privacy has been rejected therein.

5.4.10.2. Lawrence v. Texas : Turnaround of Bowers v. Hardwick

The contention of the U.S. Supreme Court has been changed in the recent period as evident from a recent decision of the said court, wherein seventeen years after the decision of ***Bowers v. Hardwick***, the Supreme Court has directly overruled its previous decision in the ***Lawrence v. Texas***[105] case in *2003* and has held that, anti-sodomy laws would be unconstitutional. In this sense, it has been a landmark decision, wherein the U.S. Supreme Court has struck down the sodomy law in Texas and has invalidated sodomy law in 13 other states, making same-sex sexual activity legal in every U.S. State and territory. As such, the Court in *Lawrence* case has held that, a Texas law classifying consensual, adult homosexual intercourse as illegal sodomy should be struck down as violative of the Privacy and liberty of adults to engage in private intimate conduct under the *Fourteenth Amendment of the U. S. Constitution.*

Therefore, the *Lawrence* case has established the Right to Sexual Privacy in U.S.A. with the hands of Right to Privacy of making homosexual relationships. Though it is a landmark decision and has opened a new door in the field of constitutional protection of Right to Privacy in U.S.A., but has also raised a number of controversies in the said field. A number of judgments have been pronounced by the U.S. Supreme Court and other State Supreme Courts after *Lawrence*, wherein a number of individuals have tried to establish same-sex relationship taking the advantage of the *Lawrence* decision. However, the decision of *Lawrence* has opened a new door for further discussions which has given birth to the *Obergefell v. Hodges* case.

[105] 539 U.S. 558 (2003).

5.4.10.3. Obergefell v. Hodges : Right to Marriage of Same-Sex Couples

In the ***Obergefell v. Hodges***[106] case, the U.S. Supreme Court has given a landmark decision, wherein it has held that, the fundamental right to marry is guaranteed to same-sex couples by both the *Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.* The final decision of the case has held that, the *Fourteenth Amendment* requires a State to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State, that should be necessary. A number of appeals have come before the U.S. Supreme Court during *2014* against the state-level bans on same-sex marriages and questions have been raised regarding the constitutionality of those state-level statutes. *Obergefell* case has been one of those cases, all of which have been jointly heard by the U.S. Supreme Court. The case has been decided during *2015* and the decision of the case has required all the states to issue marriage licenses to same-sex couples and to recognise same-sex marriages validly performed in other jurisdictions. This decision has legalized the same-sex marriages throughout the U.S.A. and its possessions and territories.

The foregoing discussion has clearly portrayed the judicial development of Right to Privacy and its various components in U.S.A. The U.S. Supreme Court has played a great role in this respect. In fact, it has taken the main initiative for such development, because in the last century, the states have not been agreed to recognise Right to Privacy as a constitutional as well as a legal right protected in U.S.A. Most of the states have enacted statutes curtailing various components of Right to Privacy and even the state judiciary has supported those legislative initiatives. At this juncture, the U.S. Supreme Court has played the vital role by interpreting various provisions of the U.S. Constitution in liberal manner in order to recognise Right to Privacy within its scope and ambit. Thereafter, the case by case development of Right to Privacy has been seen in U.S.A. Among all these cases, *Griswold v. Connecticut* case has been the most important case, which has established a general Right to Privacy in U.S.A. in the constitutional parameters.

[106] 576 U.S. _ (2015).

The process is still continuing in the present century, the *2015* case of *Obergefell v. Hodges* is the living example of such process.

5.5. Judicial Interpretation of Right to Privacy in U.K.

U.K. has continued its conservative and orthodox attitude till the *20th Century* and has shown its reluctance to develop Right to Privacy therein. The main reason behind this has been the existence of Unwritten English Common Law, absence of written Constitution and Bill of Rights. The orthodox mentalities of British legislature and British judges have been other reasons for such non-recognition of Right to Privacy in U.K. In fact, the English legislature and judges have unanimously said since the very beginning that, there has been no general Right to Privacy in U.K. As there has been no written constitution, there has been no question of existence of Constitutional Right to Privacy. What has been available there, has been the existence of Common Law of Torts, which has been used in case of violation of individual right in U.K. In the absence of any written constitution or written laws, it has not been easy to redress the violation of any legal right. Only two remedies have been available – one under the Common Law and other under the law of equity. Any breach of law has to come either under the Common Law or under the law of equity and no other remedy has been available. In the absence of express written legal provisions, the duty of the Courts has been increased to interpret the matters in the light of the existing case laws. In this sense, the values of judicial precedent and judicial creativity have been increased. But, the courts have wanted to redress any violation of right within the meaning of breach of confidence. They have not recognised the existence of Right to Privacy; they only have relied on the existence of right to property. No such values have been given for the emotional and mental sufferings due to violation of any right. As such, only the law of defamation and breach of confidence have been available to redress the cases similar with the nature of violation of Right to Privacy.

The main reason behind the non-recognition of Right to Privacy in U.K. has been non-recognition of civil liberties in an unlimited manner. In U. K., Government has always tried to control human lives through its laws and a somewhat totalitarian state concept has always been existed therein. Right to Privacy is the face of civil and personal liberty, it is the element of freedom and as such, is that right is granted,

freedom in every aspect of life is granted to individual citizens. In U. K., government has been reluctant to grant such freedom to individual citizens, because when that freedom would be granted, individual citizens would be in a position to criticize the governmental activities. In U. K., government has always tried to avoid such situation and as such, has never recognised a general Right to Privacy. Due to this reason, inspite of the Parliamentary initiatives of drafting of a number of *Private Members' Bills* and the presentation of the *Younger Committee Report, 1972,* the government has taken no initiatives to recognise a general Right to Privacy; rather it has tried to suppress the suggestions of establishment of a general Right to Privacy every time. Consequently, the *Younger Committee* has also been subjected to governmental control to make it a toothless committee and ultimately, it has been forced to speak in favour of the government and against the establishment of a general Right to Privacy. Therefore, the right has suffered a lot in U.K. in the last century in order to get a legal recognition and ultimately, has not got such recognition.

Though there has not been the existence of Right to Privacy in U. K., but the English Courts, have time to time, recognised the existence of this right therein. However, the right has not found such a place under the English Common Law to become legally enforceable. Another reason for it has been the over-emphasis of the British Government on Freedom of the Press. It has given the Press unfettered freedom to enter into every sphere of human life and Right to Privacy has not been considered above it. The individual Right to Privacy has always been overruled by the Freedom of Press and the tabloid Press has always entered into the private lives of the individual citizens; even the private lives of the celebrities and public figures. The unfortunate death of *Lady Diana* has been the example of biggest encroachment of the tabloid Press into human life and more specifically, into the private life of the celebrities. Nonetheless the Press has been controlled by the government after that. Similar wrongs have been still continuing, but the viewpoint of the government has been changed to some extent in the present century. Gradually the study will move into that direction.

Inspite of the fact that, Right to Privacy has not been legally enforceable under the English Common Law, the English Courts have acknowledged it several

times. As for example, *Lord Denning* has said in *Schering Chemicals v. Falkman*[107] case that, *"while freedom of expression is a fundamental right, so also is the right to privacy".* Similarly, *Lord Scarman* has said in *Morris v. Beardmore*[108] case that, *"the right to privacy is fundamental".* Also *Lord Keith* has said in *AG v. Guardian Newspapers Ltd. (No.2)*[109] that, *"the right to personal privacy is clearly one which the law of confidence should . . . seek to protect".* Also the traces of awarding of damages for violation of Privacy have been found in U.K. in certain exceptional circumstances, since the olden days, wherein the damages have been awarded for emotional and mental sufferings owing to violation of a legal right, without mentioning about the Right to Privacy. One such example has been the *Entick v. Carrington*[110] case, wherein *Entick* has won his case and has been awarded damages, because the King's officers have failed to establish any legal authority for the trespass into his house. Though this has been the case of prohibition of illegal search and seizure, but what has been violated due to illegal search and seizure, has actually been the Right to Privacy and sanctity of one's home. Practically, the damages have been awarded for such violation without expressly mentioning about that right.

Inspite of the existence of a decision, like *Entick v. Carrington* since *1765* in U.K., the concept of Right to Privacy has not been developed much prior to the establishment of the *United Nations in 1945* and the adoption of a number of international human rights instruments under its auspices. U.K. has became a party to all those instruments, like the *Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966.* Also a number of regional human rights instruments have been adopted during this period, among which the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* has been entered into in the European region and U.K. has become a party to it. Since then, a new era has been started in U.K. regarding the protection of human rights. But, the unfortunate situation about U.K. has been that, though all these international human rights instruments have recognised Right to Privacy as an important human right, U.K. being a party to all

[107] (1982) QB 1 at 21.
[108] (1981) AC 446, 464.
[109] (1990) 1 AC 109, 255.
[110] (1765) 19 St. Tr. 1029.

that, has not recognised the Right to Privacy. The *European Convention* has not recognised Right to Privacy in express manner; rather it has recognised the Right to Respect for Private Life. Though both have not been the same things, but the Right to Respect for Private Life has been broad enough to encompass within its ambit, the Right to Privacy. Since then, U.K. has started to recognise Right to Privacy as a human right in somewhat haphazard manner.

The *European Convention* has been operating in the field since *1950,* but elapsing a long time after that convention, U.K. has not been ready to incorporate it in its domestic law. The convention has been operating in the field of international law and has established the *European Court of Human Rights* in *Strasbourg, France* to take the complaints on violation of human rights. In case of any complaint on violation of human rights, U.K. has to go to that court and if U.K. would be found guilty of such violation therein, the court could allow monetary compensation against U.K. It has adopted the said convention in its domestic law in *1998,* by enacting the *Human Rights Act* in *1998,* which has come into force in *2000,* in order to enforce the *European Convention* rights in the field of domestic law in U.K.

But, the *Human Rights Act, 1998* has not been proved to be a full-proof remedy for the cases of violation of human rights in U.K. According to the provisions of the Act, if any provision of any Parliamentary legislation of U.K. would be found to be inconsistent with the *European Convention,* the Act has not given power to the U.K. Human Rights Courts to strike down that law. It could only express the inconsistency of the said law and give the decision in incomplete manner. As such, U.K. has kept the Parliamentary sovereignty above the judicial review, which would be unexpected in a domestic civilized country for the sake of protection of personal liberties. However, the *Human Rights Act, 1998* has created provisions for the enforcement of human rights against the public authorities including the government, but has not created provisions for enforcement of those rights against the private individuals.

It has been contended several times that, U.K. has no general Right to Privacy and the remedy for breach of Right to Privacy has been available only under the Common Law action for Torts of Trespass, Defamation and Breach of Confidence. The situation has not been changed even after the passing of the *Human*

Rights Act, 1998 and the incorporation of the Right to Respect for Private Life therein. However, attempts have been taken in U.K. several times to define Right to Privacy in concrete manner. In this respect, one important definition of Privacy provided by the *Calcutt Committee* in U.K. is noteworthy, which is presented below:-

> *"The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information".*[111]

Inspite of the fact that, there has been no constitutional or other legislative protection of Right to Privacy in U. K., more specifically, prior to the enactment of the *Human Rights Act, 1998*, *Lord Denning* has forcefully argued for the recognition of Right to Privacy in U.K. Few important portions of his argument is presented hereunder:-

> *"English law should recognise a right to privacy. Any infringement of it should give a cause of action for damages or an injunction as the case may require. It should also recognise a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance it is a balancing exercise for the Courts. As each case is decided, it will form a precedent for others. So a body of case-law will be established".*[112]

In the foregoing paragraphs, *Lord Denning* has expressed the urge for establishment of a Right to Privacy and confidentiality of correspondence and communication in U.K. The remedy for violation of such right should be either damages or injunction accordingly. But, the right should not be absolute and should be curtailed by the state in the legitimate public interest. Most important part of his viewpoint has been the judicial development of Right to Privacy. He has contended that, U.K. judiciary should be the protector of Right to Privacy and a body of case-law should be established for this purpose. According to him, formation of a series of precedents like U.S.A. would be required in U.K. for the purpose of recognition and protection of Right to Privacy therein. Following the contention of *Lord Denning*, U.K. judiciary has started to develop Right to Privacy therein, though not

[111]David Calcutt, *Report of the Committee on Privacy and Related Matters*, QC, 1990, Cmnd. 1102, London, HMSO, p.7.
[112]Lord Denning, "*What Next in Law?*", 1982, p.219.

in full-proof, but in partial manner. In the present century, the trends of English Courts in the light of the *Human Rights Act, 1998,* have become positive towards the recognition of Right to Privacy therein. A detail discussion of the judicial interpretation of Right to Privacy in U.K. will clearly portray the exact situation. Next part of the study will concentrate on the issue.

5.5.1. Privacy and Breach of Confidence

Age-old law of the English courts has been the law of confidence, wherein damages or injunction has usually been awarded for breach of confidence. The Law of Confidence has usually been applicable to the cases of disclosure of confidential information, wherein the relationship has been induced by confidence. In this sense, when anyone has entrusted someone with certain information out of confidence, then that person should not be allowed to disclose such confidential information. Such disclosure would amount to breach of confidence and has been remedied under the law of confidence. In U. K., in the absence of express recognition of Right to Privacy, the cases of violation of Privacy have been remedied under the law of confidence. The English Courts have recognised the violation of Privacy in informal manner, but have clothed the matter with breach of confidence formally and have granted the remedy under the law of confidence, by formally recognising the absence of law of Privacy. In this respect, they have provided broader interpretation of the law of confidence to include the breach of Privacy within its scope and ambit, but while doing so, sometimes they have stretched the law so far, so that, it has become unreasonable. An analysis of a number of decisions of the English Courts will clearly prove the matter.

5.5.1.1. Prince Albert v. Strange : Originator of Right to Privacy in U.K.

The relationship between the law of confidence and Right to Privacy has been first established in the case of *Prince Albert v. Strange,*[113] which has been the oldest English case on the issue. Though the U.S.A. has a highly developed law of Privacy far better than U.K., but the foundation of that elaborate edifice of the law of Privacy has been the old English case of *Prince Albert v. Strange.* The decision of this case has encouraged two Boston lawyers, *Samuel Warren and Louis Brandeis* to write their article on Right to Privacy and they have written as well as formulated

[113] (1848) 2 De G & Sun 652.

the said right accordingly, which has created a history in U.S.A. and since then, the era of development of Right to Privacy has started therein. As such, the said case has not only been relevant for U. K., but U.S.A. also, because the ever-increasing and developing modern American law has found its roots in the English law.

In the ***Prince Albert v. Strange*** case, *Price Albert* and *Queen Victoria* have sketched their family portraits and later on have engaged an engraver to turn the drawings into etchings for easy duplication. But, the etchings have fell into the wrong hands of a person, called *Strange*, who has bought the etchings through the offices of the palace printer. Then he has produced a printed Catalogue of the etchings and has announced a forthcoming exhibition of those. Knowing fully about that, *Prince Albert* has sought an injunction to stop the exhibition from being held and also to prohibit the publication of the said catalogue.[114] In that case, the Solicitor General appeared for the *Prince*, ***Sir John Romilly*** has contended that, *"The principle is that the court will restrain any person from making use of the property of another, contrary to the will and disposition of the owner".*[115] This view has been endorsed by the Court throughout the case and in the appeal. But, the question has been raised regarding the meaning of the term 'property', which has been answered by *Romilly* stating that, the property rights talked about in the case has nothing to do with copyright and that there has been *"the abstraction of one attribute of property, which was often its most valuable quality, namely privacy".*[116] In that case, *Romilly* has clearly used the term 'Privacy' and has argued in favour of the protection of Right to Privacy of *Prince Albert and Queen Victoria* by contending that, the right which has been violated in the instant case, has been nothing but the Right to Privacy. Though it has been a part of the Right to Property, but it could never be called a copyright and could only be defined as Right to Privacy. As such, he has sought the injunction for violation of the said right.

In this case, the final decision has been given by ***Lord Cottenham LC***, the relevant portion of his judgment is quoted hereunder:-

> *". . . this case by no means depends solely upon the question of property, for a breach of trust, confidence or contract, would of itself*

[114] Michael Arnheim, *The Handbook of Human Rights Law: An Accessible Approach to the Issues and Principles*, Kogan Page Ltd., London, U.K. and Sterling, U.S.A., 2004, p.177.
[115] *Ibid.*
[116] *Ibid.*

> *entitle the plaintiff to an injunction . . . an intrusion – an unbecoming and unseemly intrusion . . . offensive to that inbred sense of propriety natural to every man – if, intrusion, spying, into the privacy of domestic life – into the home (a word hitherto sacred among us) . . . privacy is the right involved".*[117]

Therefore, the learned judge has contended that, the intrusion occurred in the case has been an unbecoming and unseemly intrusion offensive to the natural right of every man, because it has invaded the sanctity of one's home by conducting spying thereon. As such, it could not be described otherwise, except by saying that, it has violated one's Right to Privacy of home by making an intrusion into it. In this sense, this intrusion would not come under the breach of trust, confidence or contract. In fact, the court has recognised that, the violation of right has been in the nature of Privacy and the Right to Privacy has been violated straightly. But, in the absence of express laws on Privacy, the court has expanded the law of confidence to reach into the areas of Right to Privacy and has granted injunction on the ground of breach of confidence. Though the judgment is given in the instant case on the ground of breach of confidence, but it has recognised the violation of Right to Privacy therein. Due to this reason, this case has been considered as the origin of Right to Privacy in U.K.

5.5.1.2. Wyatt v. Wilson : Oldest English Case on Law of Confidence

The viewpoint of the English Courts regarding the law of confidentiality and its application on Right to Privacy could be ascertained from a discussion of case by case development of the issue in U.K. The oldest viewpoint in this respect has been found in the case of ***Wyatt v. Wilson***,[118] which has been a very old English case relating to the engraving of *King George III* 'during his illness.' In that case, the ***Lord Chancellor, Lord Eldon*** has opined in his judgment that, *"If one of the late King's physicians had kept a diary of what he heard and saw, this Court would not, in the King's lifetime, have permitted him to print or publish it."*[119] ***Lord Denning*** has commented on the decision of the said case as follows:-

> *"That observation is significant. It is the first instance I know of a right of privacy as distinct from a right of confidence. The King had not given any confidential information to the physician. But by publishing the diary the physician would infringe the King's right of privacy. King George*

[117] *Prince Albert v. Strange, (1849) 1 Mac & G 25.*
[118] 1820 – unreported.
[119] *Supra Note 114 at p.189.*

> *III, as you will remember, went off his head. Suppose the physician had written in his diary: 'The King walked into the garden and behold, like the Emperor in the fable, he had no clothes' and he proposed to publish it. Lord Eldon would, I am sure, have granted an injunction to restrain the publisher. To bring it to modern times: Suppose a photographer with a long-distance lens took a picture of a prominent person in a loving embrace in his garden with a woman who was not his wife. Surely an injunction would be granted to stop it being published. The only cause of action, so far as I know, would be for infringement of privacy".*[120]

Therefore, while commenting on the instant case, *Lord Denning* has highlighted a very important issue. He has been ready to give birth to a tussle between the law o confidentiality and Right to Privacy. He has recognised that, although there has been a good deal of overlap between confidentiality and Privacy, there would come a point where confidentiality would no longer be applicable but Privacy rights would still need protection.[121] In fact, the *Wyatt v. Wilson* has been the example of such a case, wherein no confidential information has been shared, but the case still has needed the protection of Privacy. This has been an important question on the point of application of law of confidence for the protection of Right to Privacy, because in case of sharing of confidential information, the law would be applicable to protect the Privacy of the information, but where no such information has been shared, still the information itself has been so private so that, its Privacy would be protected, the law of confidence would be inapplicable. This point has been forcefully highlighted by *Lord Denning* several times. He has also suggested that, in those cases, the courts should develop the law of Privacy by extension of the common law rights like *U.S.A.* with the help of the *Prince Albert v Strange* case, but the English Courts have always reluctant to do that.

5.5.1.3. Pollard v. Photographic Co. : Unnecessary Expansion of Law of Confidence

The meaning of breach of confidence has been further elaborated in the case of ***Pollard v. Photographic Co.***,[122] wherein *Mrs. Pollard* has engaged a photographer to prepare her portrait for her private use. But, later on, she has found that, the photographer has printed her photo in Christmas cards for selling to the general public. Consequently, she has sued the photographer for breach of contract

[120] *Supra Note 112 at p.222.*
[121] *Supra Note 114 at p.189.*
[122] (1889) 40 Ch D 345.

as well as breach of confidence. It has been held by the court that, there has occurred a gross breach of faith. In fact, the main reasons behind such a viewpoint have been the making of portraits by *Mrs. Pollard* privately in her house and the question of loss of her reputation due to the use of her photo on the card owing to the thinking of the general public about her taking of money for that purpose. The fact of making the portraits privately has shown the intention of keeping those private and as such, has given birth to the relationship of confidence between *Mrs. Pollard* and the photographer. According to the court, there has been an implied relationship of confidence and as such, it has given the judgment on the basis of the breach of confidence. But, practically what has been violated here has been the Right to Privacy and not confidentiality. In this sense, use of the law of confidence here, has placed tremendous strain on the concept of confidentiality.

5.5.1.4. Saltman Engineering v. Campbell Engineering : Clarification of the Meaning of Confidential Information

Next in the case of ***Saltman Engineering v. Campbell Engineering***,[123] ***Lord Greene MR*** has explained the meaning of 'information having the necessary quality of confidence about it' in the following words:-

> *"The information, to be confidential, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge".*[124]

Therefore, in the above case, the main elements of confidentiality have been held as the absence of public property and public knowledge. That means, if the information would not be a public property or would not have been in the public knowledge, then it could be called confidential information. But, this view could be criticized by saying that, these two elements would necessarily be the elements of Privacy and confidentiality. What would not be a public property or would not be in the public knowledge would surely be a private property and would be the subject of private or personal knowledge. Hence, it should be considered as the Right to Privacy and not confidentiality, because every private property or knowledge should not necessarily be confidential information. In this sense, this view of the English Courts has again been proved as vague and insufficient like the other views. It has

[123] (1948) 65 R PC 203 at p.215.
[124] *Supra Note 114 at p.188*.

also been the unnecessary stretching of the meaning of confidentiality and not recognising the Right to Privacy. The views of the English Courts, in all these cases, have been proved to be far away than U.S.A.

5.5.1.5. Coco v. AN Clark (Engineers) Ltd. : Criteria for Action under Breach of Confidence

The criteria for action for breach of confidence has been fixed by ***Justice Sir Robert Megarry*** in the case of ***Coco v. AN Clark (Engineers) Ltd.***[125] in the following words:-

> *"In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene MR . . . must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the part communicating it."*[126]

The above mentioned judgment has been important for fixing the criteria for taking an action under the general ground of breach of confidence. The first criterion has not been fixed by *Justice Sir Robert Megarry*, but has been taken from the words of *Lord Greene MR* in the *Saltman Engineering v. Campbell Engineering* case. Other two criteria have been fixed by *Justice Megarry* in the instant case. Therefore, the three criteria have been the necessary quality of confidence, should have the circumstances importing the obligation of confidence and the unauthorized use of the information to the detriment of the person concerned. While explaining the criteria *Justice Megarry* has stressed upon the element of reasonableness of the aspect. Accordingly, if it would have been reasonable to expect that, the information has been given in confidence, that should be sufficient enough to impose the equitable obligation of confidence. Though it would be a good factor for taking action for breach of confidence, but it should not be the ultimate factor, because other side could also take the same plea.

5.5.1.6. A v. B : Guidelines for Consideration of Confidence or Privacy

Next important case in this respect has been the *A v. B,*[127] wherein the issue of extramarital affairs of a well-known football player with two women, has been involved. In that case, both the women have offered their stories for sale to the

[125] (1969) RPC 41.
[126] *Id at p.47.*
[127] (2002) 2 All ER 545.

tabloid press and the footballer has taken an interim injunction to stop the publication in order to prevent his wife from finding out the matter. The injunction has been set aside by the Court of Appeal.[128] In the instant case, the question before the Court of Appeal has been, whether the adulterous relationships impose a duty of confidentiality on the parties involved or not, the Court has explained it by stating as follows:-

> *"(47) We do not go so far as to say that relationships of the class being considered here can never be entitled to any confidentiality. We prefer to adopt (the) view that the situation is one at the outer limits of relationships which require the protection of the law. The fact that it attracts the protection of the law does not mean, however, that an injunction should be granted to provide that protection. In our view to grant an injunction would be an unjustified interference with the freedom of the press.*
>
> *(48) Once it is accepted that the freedom of the press should prevail, then the form of reporting in the press is not a matter for the courts but for the Press Complaint Commission and the customers of the newspaper concerned."*[129]

The most important aspect of the *A v. B* case has been that, in the said case, the Court of Appeal has set out an elaborate set of guidelines for use in cases involving considerations of Confidence or Privacy. The sixth guideline has been noteworthy in this respect, which runs as follows:-

> *"(vi) It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the 1998 (Human Rights) Act came into force, an action for breach of confidence now, will, where this is appropriate, provide the necessary protection. This means that at first instance it can be readily accepted that it is not necessary to tackle the vexed question of whether there is a separate cause of action based upon a new tort involving the infringement of privacy."*[130]

Therefore, in the instant case, the Court of Appeal has set aside the injunction stating that, such extramarital adulterous activities shall not be protected by the law of confidence, because those matters themselves would be wrongful activities and no law could protect any wrong. Next regarding the question of protection of Privacy, the Court of Appeal has set out an extensive guidelines for such protection, but the most unexpected part of the guidelines has been the

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[128] *Supra Note 114 at p.185.*
[129] *Ibid.*
[130] *Id at p.552.*

reluctance of the court to recognise a new tort of 'Privacy' to provide remedy in the like cases concerned here. According to the Court, there have been adequate remedies under the law of Confidence to protect the Right to Privacy, and after passing of the *Human Rights Act, 1998,* such law has been morefully established. Due to these reasons, there would be no necessity to create a new tort of Privacy based on a separate cause of action, wherein adequate protection has been available under the law of confidence. Hence, these guidelines, in fact, have created uncertainty about the law of Privacy as well as have raised question regarding the circumstances for justification of the protection of Right to Privacy. In totality, these guidelines have created negative impact on the development of law of Privacy in U.K. In this respect, the definition of 'Confidence' provided in the instant case would be noteworthy, which runs as follows:-

> *"A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected."*[131]

This definition has ended all hopes for the creation of a new law of Privacy as well as has also limited the scope of law of confidence by stating that, the question of confidence would arise only in the cases of reasonable expectation of Privacy. Now, this should not be the approach of law of confidence nor should be the law of Privacy. As such, this definition has created more misdemeanours in the field of protection of Privacy in U.K. by ending all the rays of hope for a new law of Privacy in U.K. Therefore, in contrast with U.S. judiciary, U.K. judiciary has played no role for the development of a separate law of Privacy in U. K.; rather they have discouraged and have tried to end the matter.

5.5.1.7. Theakston v. MGN : Protection of Private Life

Reflection of the same viewpoint has been found in the ***Theakston v. MGN***[132] case with a slight difference, wherein the issue has been whether *Jamie Theakston's* visit to a brothel had the quality of confidence about it. In that case, the prostitute in question had offered her story to a Sunday tabloid, together with candid photographs taken at the brothel without *Mr. Theakston's* knowledge or consent. *Mr. Theakston* has been a television presenter and he has sought an injunction to restrain

[131] *Id at p.553.*
[132] (2002) EWHC 137.

publication of the said photographs. The application has been successful and the judge at trial has granted the injunction holding the opinion that, injunction would be an appropriate remedy for restraining publication of the said photographs.[133] Therefore, it is found that, the facts of both the *A v. B* and *Theakston v. MGN* cases have been same, but results of both the cases have been different. As such, it is very hard to understand the reasons for different decisions of the then English Courts in the similar cases. In the *Theakston* case, particularly it has been held that, even though a brothel could hardly be regarded as a private place, but publication of the pictures would be particularly intrusive into *Jamie Theakston's* private life. It was also relevant that, the photographs had been taken without his knowledge, let alone his consent, and that a brothel was not the sort of place where a man could reasonably expect to be photographed without his express consent. Moreover, it has been held, there was no public interest in publishing the photographs. So far as the pictures were concerned, therefore, *Mr. Theakston's* rights under *Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms, 1950* have outweighed the newspaper's right of Freedom of Expression under *Article 10 of the European Convention.*[134]

In the *Theakston* case, facts and circumstances have been more or less similar with the *A v. B* case, but the decisions have been different. In fact, no reasons have been found for such different opinions of the two English Courts and the reasons, which have been shown therein, could also not be supported due to the absence of strong justifications. In fact, the reasons, which have been shown thereunder, the relevance of those, have not been found in the present social circumstances. Moreover, the difference which has been created between the brothel visit and extramarital adulterous relationship has also been found absurd. In this sense, if the Press would be prevented from publishing private photographs of a public figure in the brothel, therefore, it should also be prevented from publishing the stories of extramarital adulterous relations of a public figure. The Court creating difference between publication of story and picture and thereby sometimes granting injunction, but sometimes refusing it, would seem meaningless in the contemporary social scenario. The difference which has been created between spending a night in

[133] *Supra Note 114 at p.186.*
[134] *Id at pp.186-187.*

the brothel and having extramarital adulterous relationship, by the courts, has been based on common sense and not law. As such, such reasoning could not be supported from the legal point of view. Due to this reason, it has been felt that, the meaning of 'confidence' has been unnecessarily stretched in the *Theakston* case also.

5.5.2. Privacy and Trespass : Kaye v. Robertson

Trespass has been the ancient tort under the English Common Law, the remedy against which has been available under the oldest law, called the law of Trespass. When unauthorized interference is caused to a person either physically or mentally, it can be called trespass to a person. Trespass to person can be related to a matter of Right to Privacy, because Privacy means prevention of any unauthorized interference into one's life. Now in that case of violation of Privacy, action can also be taken in the name of trespass to person. Breach of Privacy has been remedied under the law of trespass in U.K. It is important to note that, Right to Privacy has not only been related to the law of confidence in U. K., but to the law of trespass also. The English Courts have told several times that, there has been no existence of the law of Privacy in U.K. and as such, they have not only stretched the law of confidence, but also the law of trespass to remedy the cases of breach of Privacy. The relationship between Privacy and Trespass could be drawn in this manner, which could be morefully explained with the case of ***Kaye v. Robertson***.

In the case of *Kaye v. Robertson,*[135] *Mr. Gordon Kaye,* an well-known actor, when, has been driving his car on a road in London, has faced an accident. Consequently, he has suffered severe injuries to his head and brain and has been hospitalised. The hospital authorities have placed notices to restrict the visiting of *Mr. Kaye* in the interest of his health and speedy recovery. But, ignoring the said notices, a newspaper reporter and a photographer have entered into his room, interviewed him and have taken his photographs according to the instructions of the said newspaper editor *Mr. Robertson. Mr. Kaye* has apparently agreed to talk to them and has not objected to them from taking his photographs showing the substantial scars to his head. But, the medical evidence has shown that, *Mr. Kaye* has not been fit for giving any interview and later on, *Mr. Kaye* has not re-collected

[135] (1991) F.S.R. 62.

the incident. Thereafter, *Mr. Kaye* has sought an injunction for restraining the publication of the said news and photographs of him. In the lower court, the injunction has been granted to him, but the Court of Appeal has reversed the said injunction stating that, *Mr. Kaye* has given the consent for interviewing and photographing at the first instance.[136]

The very question which has been raised in the instant case has been the question of violation of Right to Privacy. In fact, what has been violated in the said case has been the Right to Privacy of Reputation of *Mr. Kaye.* But, the judges have unanimously held that, there has been no existence of Right to Privacy under the English law. In this sense, though the case has involved a serious violation of Right to Privacy, but the remedy could not be provided on that ground owing to the absence of such law. Therefore, the remedy in the instant case has been provided on the grounds of libel, malicious falsehood, trespass to person and passing off. Most importantly, it has been considered as a case of malicious falsehood, because the defendants have taken the advantage of the Plaintiff's unableness to understand the nature and consequences of the activities and have tried to make profit out of that. Also it has been a case of trespass to person as well as trespass to property, because they have entered into the Plaintiff's room by ignoring the notices of the hospital authorities and have used the plaintiff without his knowledge by taking the advantage of his unfit situation. Hence, this case has been an important example of the extension of the law of trespass for application into the case of a breach of Privacy.

Finally, the judges have expressed their helplessness for not having the law of Privacy in the English law, due to which they have been unable to provide adequate remedy in the like cases. But, they have lighted the rays of hope for the future creation of the law of Privacy in U.K. Hence, the *Kaye v. Robertson* case has been an important English case, which has established the need for a law of Privacy in U.K. in the recent period, based on which, further developments have been made in the light of the *Human Rights Act, 1998.*

[136] Tony Weir, *A Casebook on Tort*, Sweet & Maxwell, London, 8thEdn., 1996, pp.22-23.

5.5.3. Right to Privacy under the Human Rights Act, 1998 : Douglas v. Hello!

In the next phase of development of Right to Privacy in U. K., after the decision of the *Kaye v. Robertson,* question has been raised regarding the availability of the Right to Privacy under the *Human Rights Act, 1998.* As the said Act has incorporated various rights of the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950,* such question has been raised therefor. Most important fact, in this respect, has been that, the *Human Rights Act* has incorporated *Article 8 of the European Convention,* which has dealt with the *'Right to respect for private and family life'* as well as *Article 10 of the European Convention,* which has dealt with the *'Right to Freedom of Expression'.* In this sense, enactment of the *Human Rights Act, 1998* has created more controversy and debatable issues in U. K., because it has protected both the convention rights under *Articles 8 and 10.* Therefore, the question has come into being as to which right would be given priority over the other within the purview of the *Human Rights Act, 1998,* because both the rights have been convention rights and the *Human Rights Act* should give priority to both. As such, the most important question has been that, in case of a conflict between the two, which one would survive. Such conflict has been raised in a number of cases in U. K., among which ***Douglas v. Hello!*** is an important case.

In the *Douglas v. Hello!*[137] case, *Michael Douglas and Catherine Zeta-Jones* have married at the Plaza Hotel – New York in November 2000, of which they had already sold the exclusive rights to photograph their wedding to *OK!* Magazine. Under the contract, bride and groom have been paid a lumpsum amount and also have been given the right to choose their own photographers paid for by themselves as well as copyright in the photographs, together with the right to select the photographs for publication and the right to approve the captions and accompanying text.[138] As such, the wedding guests all have received a notice with their invitation reading: 'We would appreciate no photography or video devices at the ceremony or reception'. There has also been a security checkpoint through which all the guests have to pass and guards have kept a look out for any guests armed with cameras, video recording machines or transmitting machines. Specifically, six cameras have

[137] (2001) 2 All ER 289.
[138] *Supra Note 114 at pp.178-179.*

been actually confiscated during the reception.[139] Despite all these precautions, a freelance photographer has managed to slip into the reception and secretly has taken his own pictures, which he has sold to *Hello!* Magazine, *OK!'s* bitter rivals. The nuptial pair and *OK!* have sought an urgent injunction to stop *Hello!* from publishing these 'unauthorized' photographs.[140]

This case has been an important example of the conflict between Right to respect for private life and Freedom of Expression. But, this contention has not been accepted by all at that time, because the *European Convention* has made the rights contained therein, enforceable only against the public authorities and not against the private authorities. In this respect, the convention rights could not be made enforceable against *Hello!*, which has only been a private organisation. As such, it has become tough for the *Douglases and OK!* to enforce their claims against *Hello!* Though the judge of the lower court has granted the injunction, but the Court of Appeal has refused to do so, citing the reason of *Hello!* not being a public authority as well as the same old contention of absence of Right to Privacy in U.K. As such, the same old negative attitude has again been shown in the instant case. But, one positive attitude has also been seen there in the contention of ***Ld. Justice Sedley*** of the Court of Appeal, wherein he has contended that, *Douglases* has a *'powerful arguable case to advance at trial'.*[141] He has also suggested that *'we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy'.*[142]

Therefore, the Court of Appeal has shown both positive and negative attitudes in the ***Douglas v Hello!*** case. Most important point has been the contention of ***Ld. Justice Sedley***, wherein he has tried to increase the scope and ambit of *Article 8 of the European Convention*. As such, he has contended that, though the Convention rights would be enforceable against the public authorities only, which have been a great negative attitude, but the emphasis which the Convention has given to the Right to respect for private and family life, has increased its scope and ambit so much, that it could be enforceable against private individuals also. Of course, it has not been written expressly in the language of the Convention, but it

[139] *Id at p.179.*
[140] *Ibid.*
[141] *Supra Note 137 at p.316.*
[142] *Ibid.*

could be implied from the intention behind the making of the said Convention and it could also be added to it by the judicial interpretation, because without such interpretation, practical application of *Article 8 of the European Convention* would be incomplete. But, simultaneously *Ld. Justice Sedley* has also talked about *Section 12 of the Human Rights Act, 1998,* which has given protection to Freedom of Expression, the right most likely to come into conflict with Privacy, as for example in cases of media intrusion, 'doorstepping', long-lens photography and other forms of what the press rather loosely term 'investigative journalism'.[143] In this respect, *Ld. Justice Sedley* has opined that, like *Article 8, Section 12* has also multidimensional effects and that, it should not simply 'prioritise' the freedom to publish over other Convention rights.[144] As such, according to him, *'everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court'.*[145]

Therefore, in the *Douglas v. Hello!* case, a conflict between *Article 8 of the European Convention and Section 12 of the Human Rights Act* has also been raised and both the rights have been established at the same footing, even by *Ld. Justice Sedley.* Due to this reason, it is contended, that it would be difficult to say which right should prevail over the other. Based on these contentions and owing to the non-recognition of the fact of existence of Right to personal Privacy under English law as contended by *Ld. Justice Sedley,* injunction has not been granted by the Court of Appeal in the *Douglas v. Hello!* case. But they have been succeeded to get compensation on the ground of breach of confidence, because they have applied for both the remedies. In this sense, this case has again proved the reluctance of the English Courts to recognise the Right to Privacy under English law and even after the passing of the *Human Rights Act, 1998* and the application of the *European Convention;* the scenario has not been changed. Hence, in the era of *Human Rights Act, 1998* in U. K., no such positive developments have been found in the field of Right to Privacy.

[143] *Supra Note 114 at p.180.*
[144] *Ibid.*
[145] *Supra Note 137 at p.316.*

5.5.4. Privacy and CCTV Footage : Peck v. U.K.

CCTV or Closed Circuit Television is a system of controlling crime and identifying a criminal in the justice delivery system. Such television is generally placed in a public place in order to record public activities and whenever any crime occurs within the periphery of that CCTV, its footage helps to identify the incident as well as the criminal. But, it should be remembered that, it can be placed in the public areas only, like lobbies or entrance of a hotel, in a shop, entry point of a station or airport, marketplace, check post, toll plaza, thoroughfare areas of a shopping mall etc. and even at the entrance of a private house. But, such CCTV cannot be placed in the private places, like the hotel rooms, public toilets or lavatories, changing rooms in the shopping malls, private houses etc. The purpose of CCTV should always be the detection of crime or prevention of terrorism or the like activities, but never to take advantage of any compromising situation of private individuals when their private parts of the body are exposed. If that is done, then that should be the violation of their Right to Privacy, which should be an important personal liberty in a democratic civilized country.

It is true that, in the pre-second world war era, uncontrollable use of CCTV has been seen in the Western countries, wherein CCTV or its prior technological set up has been used even in the private houses in order to detect spying. At that point of time, totalitarian system of states has been prevalent, wherein personal liberty of the individual citizens has been restricted. As such, setting up of CCTV in such manner has been allowed, but in the present social scenario of welfare states, wherein the personal liberty of individual citizens is utmost important, such unlimited use of CCTV is not permitted. Therefore, there is a close relation between CCTV usage and Right to Privacy. This area needs specific attention and next part of the study will concentrate on the issue.

In U. K., a typical situation has been emerged in the recent past relating to the CCTV usage and Right to Privacy, which has given birth to a new dimension of the CCTV usage in relation to Right to Privacy of the individual citizens. Such situation has been cropped up in the ***Peck v. U.K.***[146] case, wherein the *Strasbourg Court* has upheld a complaint against the United Kingdom brought by an applicant

[146]ECtHR 28/01/2003, no.44647/98.

whose image, picked up on close circuit television (CCTV), has been widely disseminated by the media.[147] In the said case, *Geoffrey Peck* has been filmed late one night holding a large knife in his hand in the centre of *Brentwood, Essex,* just after he had attempted to commit suicide by slashing his wrists. The CCTV operator has called the police, who has given *Mr. Peck* medical assistance, has detained him briefly under the *Mental Health Act, 1983* and then has driven him home. In short, the presence of the CCTV Camera and the efficient monitoring of the film footage have saved *Mr. Peck's* life.[148] But, the problem has begun later on with the press release of the matter by the *Brentwood Borough Council* in order to publicize the success of its CCTV system. The first such release has included still photographs from the CCTV footage showing *Geoffrey Peck* holding the knife and the heading has been *'Defused – the partnership between CCTV and the police prevents a potentially dangerous situation'.* The most important aspect of such press release has been that, there has been no indication of the purpose for which *Mr. Peck* had the knife, although the article has made it clear that, he had not been looking for trouble.[149]

As such, *Geoffrey Peck* has filed a complaint in the *Broadcasting Standards Commission,* which has upheld his complaint of unwarranted invasion of his Privacy and his allegation of unjust and unfair treatment. It has also contended that, *Mr. Peck's* later on speaking publicly has not taken away his right to complaint or has not diminished his infringement of Privacy in any manner. He has also complained in the *Press Complaints Commission,* which has rejected the complaint on the ground of first filming of the footage in open public and has contended that, such first filming would be the justification for any subsequent publication.[150] It has meant that, as it has been published openly for the first time, any subsequent publication of the matter would not amount to first publication and thereby not actionable. Thereafter, *Geoffrey Peck* has applied for judicial review of *Brentwood Council's* decision of disclosing the CCTV footage on the ground of declaring it as either illegal or irrational, but his application for leave to appeal has been dismissed therein. As such, *Mr. Peck* has been unsuccessful in the domestic court and has filed

[147]*Ibid.*
[148]*Supra Note 114 at p.181.*
[149]*Id at pp.181-182.*
[150]*Id at p.182.*

an appeal against that in the *Strasbourg Court,* wherein he has become finally successful. In that court, it has been held that, his *Article 8 of the European Convention* rights have been infringed and no effective domestic remedy has been provided to him, which has further violated his *Article 13* rights.[151]

It has been a good incident that, *Mr. Peck* has become succeeded in his claim, which has resulted into the enforcement of the Right to respect for private life, though not Right to Privacy, in U.K. Of course, it has not been enforced by the U.K. domestic courts, but has been by the *Strasbourg Court* against U. K., still this success could not be overlooked in the field of development of Right to Privacy in U.K. Recognition of *Article 8* rights in the case of violation of Privacy would definitely mean the recognition of Right to Privacy within the purview of *Article 8 of the European Convention,* which would, no doubt, be a positive contribution in this respect. Moreover, the decision has been given against U.K. and as such, U.K. Courts would also be bound by this decision thereafter.

Though the result of the *Peck* case has been good for the enforcement of *Article 8* rights, but it has been strongly questioned by media in U.K. on the ground of infringement of their Freedom of Expression under *Article 10 of the European Convention and Section 12 of the Human Rights Act, 1998,* because if publication of CCTV footage taken publicly has been prevented, then nobody would be allowed to take innocent photographs in the streets and thereafter publishing it. In this respect, it is also pertinent to mention that, *Mr. Peck* has always shown his indebtedness to the CCTV in the matter of his rescue and he has shown no objection regarding the reasonable publication of the matter. But, the *Brentwood Council* has stretched the matter too far beyond the reasonable publication by making the advertisement of their CCTV system, in which *Mr. Peck* has shown his objection and accordingly the *Strasbourg Court* has held it as a serious interference with *Mr. Peck's* Right to respect for private life.

Mr. Peck has also become successful in claiming that, his *Article 13* rights have been violated on the ground that there has been no remedy available to him in the English Courts for the infringement of his *Article 8* rights. In the instant case, the decision has been given in favour of Right to respect for private life, which has

[151] *Supra Note 114 at p.182.*

become an important guide for the development of Privacy law in U.K. and as such, it has been quite unusual according to the past trends of judicial interpretation of the matter. Whatever may be the reason, but the case has led to the birth of Right to Privacy in U.K. in relation to the matters of usage of CCTV footage.

5.5.5. Privacy and the Freedom of Expression : Campbell v. MGN Ltd.

Privacy and Freedom of Expression are two conflicting rights, because both are staying at two sides of a river. If Right to Privacy is to be protected, Freedom of Expression is to be curtailed and the vice versa. Since the very beginning of democratic civilized countries and the emergence of the Press Freedom, a conflict has been raised between the protection of Right to Privacy and the Freedom of Expression of the Press. This conflict has morefully been applicable in case of Right to Privacy of the celebrities or Public Figures and the Freedom of Expression of the Press to publish news about them in order to satisfy the Right to Information of the general public. U.K. has not been an exception to such conflict, because it has protected the Right to respect for private life under *Article 8 of the European Convention for the Human Rights and Fundamental Freedoms, 1950* and the Freedom of Expression under the *Article 10 of the European Convention* as well as under *Section 12 of the Human Rights Act, 1998.* Right to Privacy though has not been protected directly in U.K., but has been protected under the Right to respect for private life in indirect manner. As such, the conflict has been raised between the two convention rights, *Article 8 and Article 10* rights, regarding which one would be superior to the other, because both the rights have been given equal status under the *European Convention.*

In this respect, many times controversies have been raised in the English Courts and the courts, in most of the cases, have upheld the Freedom of Expression of the Press. As regards the line of demarcation, the courts have opined that, in case of a conflict between a public and a private interest, always the seriousness of the interest at stake as well as the nature and gravity of the interest interfered with, should be taken into consideration. Based on such contention, the viewpoint of the English Courts has been changed, to some extent, in the present social scenario and

in some recent cases; the courts have upheld the *Article 8* rights over the *Article 10* rights. One such example has been found in the case of ***Campbell v. MGN Ltd.***[152]

In the case of ***Campbell v. MGN Ltd. (Mirror Group Newspapers Ltd.)***, the House of Lords have given a decision regarding human rights and Right to Privacy in the English law. In that case, a well-known model *Naomi Campbell* has been photographed while leaving a rehabilitation clinic, following the public demands that she has been a recovering drug addict. The photographs have been published by the *MGN* and *Campbell* has filed suit against *MGN* seeking damages under the English law. The suit has been filed for breach of confidence engaging *Section 6 of the Human Rights Act, 1998,* which has required the court to operate compatibly with the *European Convention on Human Rights.* The court has granted the common law action for the tort of breach of confidence as well as has upheld the Right to respect for private and family life according to the *European Convention on Human Rights.* The court has also recognised the private nature of the information and has held that, there has been a breach of her Privacy.

As such, at the first instance, *MGN* has been made liable, against which order, *MGN* has filed an appeal in the *Court of Appeal,* which has reversed the order and against that, *Campbell* has preferred an appeal in the *House of Lords,* which has finally spoken in favour of *Campbell* and has created history by recognising Right to Privacy in U.K. as a part of the rights contained in *Article 8 of the European Convention on Human Rights.* In the instant case, ***Lord Baroness Hale****,* has not only allowed the appeal in favour of *Campbell,* but has also granted remedies in view of the *European Convention* along with the grant of remedy on the ground of breach of confidence. In that case, remedy has been granted after considering the convention rights of Private life as well as the Freedom of Expression. No doubt it has been a positive development in the field of Privacy law in U. K., which has helped enormously to create a balance between Right to Privacy and Freedom of Expression.

In this respect, the viewpoint of the ***Lord Nicholis of Birkenhead*** is also noteworthy, which runs as follows:-

"Breach of confidence: misuse of private information

[152] (2004) UKHL 22.

> *2. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression, and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But, it too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state".*[153]

Therefore, this viewpoint in the instant case has also been very important, because it has given recognition to Right to Privacy and has asserted the importance of Right to Privacy similarly with the Freedom of Expression. It has contended that, both the rights would be equally important at the heart of liberty in a modern state and as such, none of these could be disregarded. It has also recognised the need or establishment of a proper degree of Privacy in a well-built society and for that, imposition of restriction on the government, for prevention of prying into the citizens' personal life, would be very important. As such, it has recognised the necessity of a well-built system of Right to Privacy in U. K., which is praiseworthy in the present social scenario.

5.5.6. Privacy and Information Technology : AMP v. Persons Unknown

With the advancement of the information and communication technology, various threats on individual Right to Privacy have been increased. As the threats have been increased, new measures should also be needed for protection of this right. In this respect, it is to be remembered that, in a country like U. K., where the recognition or existence of Right to Privacy has not been full-proof or unanimous, such threats could even be more serious. The reason being that, non-recognition of the right would mean non-enforcement also, which chance could be taken by the evil doers to commit more evils. In this sense, the daily lives of the individual citizens could be more threatened owing to the advancement of the information and communication technology. As such, the recognition and protection of Right to Privacy has become utmost important in U.K. in the present era of information and communication technology. In the absence of such recognition, how far the

[153] *Id at para 2.*

wrongdoers could go to threaten the individual Right to Privacy that could be ascertained from the ***AMP v. Persons Unknown***[154] case.

In the *AMP v. Persons Unknown* case, the *Technology and Construction Court in London* has given a decision, wherein a woman has been involved, who has experienced blackmail and harassment after sexually explicit pictures of her taken on a mobile phone camera have been uploaded to *Bit Torrent* file-sharing websites. In the said case, when the woman, who has been referred to by court as *AMP*, has been at university during *June 2008,* her mobile phone has been lost or stolen. Prior to that, sometimes in *August 2007,* the camera on her phone has been used to take certain sexually explicit pictures of her, exclusively for her personal use. Thereafter, shortly after losing the phone, the woman has been contacted by a person on *Facebook,* identifying himself as *'Nils Henrik-Derimot'.* That person has threatened her to expose her identity, post the images widely online and tell her friends about the images, against which he has forced her to add him as her *Facebook friend.* The woman, then and there, has deleted the messages and has blocked the sender. Simultaneously, more or less at the same time, her father's business public relations team have also been contacted as well as threatened and blackmailed for publishing certain images, however, it has not specified them that, those have been her images.

The story has not been ended there. Later on during sometimes at *November 2008,* those images have been uploaded to a *Swedish website* hosting *Bit Torrent* files. Consequently, the link to those *Bit Torrent* files has appeared at the top of the list of search engine, which would search for her name. Then *AMP* has contacted the solicitors, who have used the *Digital Millennium Copyright Act,* for removing some of the links from U.S. based search engine results. The woman has filed the case in the *Technology and Construction Court,* wherein the ***Hon. Mr. Justice Ramsey*** has granted anonymity to the woman and has ordered that, the *Persons Unknown,* who have uploaded those files in the said website, have broken the law. The Judge has also ordered to trace the *IP Address* of the wrongdoer. Finally, the Judge in the case has contended that, there has been a violation of *Article 8 of the European Convention on Human Rights,* which has guaranteed the Right to respect for private and family life as well as the violation of the *Protection of Harassment Act, 1997.*

[154] (2011) EWHC 3454 (TCC).

The decision in the instant case has been found to be landmark decision in U.K. It has been published in the newspapers that, it has been a first case, wherein the court has granted an injunction for prohibiting the downloading of specific files uploaded through *Bit Torrent* technology. As such, it has been a new approach for regulating the online contents of an individual. In this sense, no doubt the decision has been praiseworthy, because it has created history for protection of online contents of an individual within the meaning of *Article 8 of the European Convention.* The extension of the meaning of Right to respect for private life has been noteworthy in this respect, because it has been extended to cover the online contents of an individual which would be absolutely important in the era of advanced information and communication technology.

Though websites are generally called public places, but each and every website including every portion of it, should not be considered as public. There have been private places protected by passwords in a number of websites, wherein the personal information of individual persons would be stored. Access to those areas by hacking is illegal and unauthorised. Moreover, the uploading of private information of a person taken wrongfully should be unauthorised, because publication of private contents without the consent of the person concerned should be the violation of one's Right to Privacy. Right to respect for private life should mean the respect for private life in every sphere, be it physically or virtually. In the present era, when the virtual world has increased enormously and includes huge private information of individual persons, protection of Right to Privacy in that world, is the urgent need of the hour. Hence, this case is a landmark case in relation to the present social circumstances as well as for the protection of private life in the internet and for the protection of Privacy or private life of women in U.K.

The foregoing discussion has clearly picturized the development of Right to Privacy in U.K. by way of judicial interpretation. In fact, U.K. judiciary has been reluctant to recognise Right to Privacy therein since the very beginning. Since the very beginning, English Courts have not recognised the existence of Right to Privacy in U.K. and according to them; law of confidence would be the adequate remedy in the cases of violation of Privacy. As such, they have considered all the cases of violation of Privacy as the cases of breach of confidence and have provided

remedy under the law of confidence. *Prince Albert v. Strange, A v. B, Theakston v. MGN, Pollard v. Photographic Co.* – all the cases have been the examples of such initiative. Few exceptions have also been available, wherein the violation of Privacy has been considered as trespass and has been remedied accordingly, like *Kaye v. Robertson*. The situation has been changed, to some extent, after the passing of the *Human Rights Act, 1998,* since when the Right to Privacy has been started to conceive as a part of the Right to respect for private life under *Article 8 of the European Convention for Protection of Human rights and Fundamental Rights, 1950.* But, such view has not been accepted unanimously and the *Douglas v. Hello!* case has failed to establish the claim of violation of Privacy, as such, they have got remedy on the ground of breach of confidence again. Only the *Peck v. U.K.* case has made it possible to get the remedy under *Article 8 of the European Convention.* Since then, Right to Privacy has got certain significance therein. This viewpoint has been firmly established in the last few years with the help of the *Campbell v. MGN Ltd. and AMP v. Persons Unknown* cases, which is no doubt praiseworthy regarding the recognition of Right to Privacy in U.K.

5.6. Judicial Review of Right to Privacy in India

Indian Legal system is a unique legal system based on both the U.S. and U.K. legal systems as well as the culmination of many other legal systems. Though it is based on various legal systems of the world, but its uniqueness lies in its own originality, the essence of which is mixed in the Indian legal system, owing to which, it has created its own legal system blended with various other legal systems. Such uniqueness can be seen from its liberal interpretation of the Indian laws and in the independence nature of the Indian judiciary. In case of justice delivery system, it has never created any compromise by showing any rigid attitude. The judicial development of Right to Privacy in India has not been any exception to such liberal attitude of the Indian judiciary.

In India, Right to Privacy has been traced back since the ancient period and in the medieval period also, good amount of traces of Right to Privacy have been found. But, in the modern period, certain amount of deterioration has been cropped up in the development of Right to Privacy in India. In the ancient and medieval periods, there have been well-established customary laws of Privacy in India. But in

the modern period, those customary laws have not been further developed and only a few portions of those have got statutory recognition under the *Indian Easements Act, 1882.* Moreover, Right to Privacy has not got express constitutional recognition as a Fundamental Right in the *Indian Constitution.* As such, the development of Right to Privacy in the modern period in India has not been possible in the Constitutional and statutory level. But, at this juncture, the Indian judiciary has performed a great role for providing judicial recognition of Right to Privacy in India. The judicial interpretation of Right to Privacy in India has led to the recognition of this right as a fundamental right within the meaning of *Article 21 of the Indian Constitution.*

There has been no direct recognition of Right to Privacy either under the Indian Constitution or under any written statute in India. But, the Right has got indirect recognition under s number of statutes in India, wherein the right has been protected without mentioning term 'Privacy', but in different other names. Apart from these statutory provisions, Indian Constitution has also protected Right to Privacy as a Fundamental Right under *Article 21,* but that recognition has not been made directly nor has been declared expressly between the lines of the language of the Constitution. It has only been the mercy of the Indian judiciary or the Supreme Court of India that, Right to Privacy has been recognised as a Fundamental Right within the meaning of *Article 21* of the Indian Constitution.

But, Privacy being a multidimensional right, each and every component of this right has not got protection under *Article 21* by way of judicial interpretation. Moreover, there has been a controversy regarding the declaration of this right as a full-fledged Fundamental Right. Such contention is very true in the light of the recently highlighted *Aadhaar-Privacy* case, wherein the constitutionality of Right to Privacy as a Fundamental Right has been challenged. However, it is also pertinent to mention in this respect that, every component of Right to Privacy has not been adequately protected under the auspices of the Supreme Court of India and only few components, like police surveillance, customary rights, matrimonial relations, sexual autonomy, health records etc. have been protected. Also some rights, similar to Right to Privacy, like Right to live with human dignity, Right to free enjoyment of life, Right to sleep etc. have been granted as a personal liberty under *Article 21* of

the Indian Constitution by the Supreme Court. In this sense, the Indian judiciary has tried its best to recognise Right to Privacy as a Fundamental Right.

The judicial interpretation of Right to Privacy in India can be traced back since the very old period, more specifically, from the British period. From this perspective, Indian law of Privacy has been older that the American law of Privacy. There have been numerous evidences which prove that, Right to Privacy has been broadly recognised in India at least half a century before the conception of this right in U.S.A. in *1890.* There have been several cases decided by British Indian Courts, which have recognised Right to Privacy in India. Most prominent among those, has been the *Nuth Mull v. Zuka-Oollah Beg*[155] case, which has been decided in *1855* by the *Sadar Diwani Adalat of the North-Western Provisions.* In that case, the question of violation of Right to Privacy has arisen and the Hon'ble Justices *Begbie, Smith and Jackson* have decided an appeal from the decree of the principal *Sadar Amin of Delhi.* The Justices have held that, the erecting by the defendant of a new house has made it possible for the plaintiff's premises to be overlooked from the roof of the new house and thereby the plaintiff's Privacy has been interfered with. As such, the Justices have given the plaintiff a cause of action against the defendants.[156]

The decision in the above-mentioned case has shown that, Indian law of Privacy has been enriched by both the English and American laws. The judges in India have followed the U.K. and U.S. precedents while giving decisions in cases of violation of Privacy. During British India, courts have been established by the British government and the judges have been British personnel. As such, they have followed the English principles of Law of Torts while deciding the Privacy cases. Later on, after Indian independence and making of the Indian Constitution in *1950,* the whole constitutional set up has been established in the light of the U.S. legal system. Moreover, Indian Constitution has also incorporated the Fundamental Rights in the pattern of the U.S. Bill of Rights. Since then, the judges of the Supreme Court of India have followed the U.S. Supreme Court precedents for giving decision in any matter of violation of Fundamental Rights. Cases of violation of Right to Privacy have been no exception to that rule and the judges have followed U.S. precedents in those matters also. There has been the absence of statutory

[155] Sr. D. A. N. W. P. R. 1855 at p.92.
[156] Kiran Deshta, *op.cit*., p.224.

recognition of Right to Privacy till now and the only recourse has been provided by the Indian judiciary. This situation enunciated a limited protection of Right to Privacy in India. An analysis of the case-by-case development of Right to Privacy in India will clearly portray the scenario. The next part of the study will concentrate on this area.

5.6.1. Privacy and Customary Right to Easement

Right to Privacy has been considered as a Customary Right in India as a part of the Easement Right since the ancient period. Later on, it has got statutory recognition under the *Section 18 of the Indian Easements Act, 1882.* Indian judiciary has shown respect to such Customary Easement Right to Privacy and has provided remedy accordingly, in case of violation of Privacy. Customary and Easement Right to Privacy should be a matter of consideration at the very first instance, because the oldest judicial recognition of Right to privacy has been found in that field in India. In this respect, the first case has been the ***Nuth Mull v. Zuka-Oollah Beg*** case, which has already been discussed.

5.6.1.1. Gokal Prasad v. Radho : Sequel to Nuth Mull v. Zuka-Oollah Beg

Next important case on Privacy and Customary Right to Easement has been the ***Gokal Prasad v. Radho***,[157] wherein ***Chief Justice Edge*** has referred the ***Nuth Mull*** case and has observed as follows:-

> *"Owing to the destruction of records during Mutiny of 1857 I am unable to ascertain whether the existence of custom of a privacy in this part of India had ever been proved or called in question prior to 1855; and owing to the same cause and to the absence from the report of the case Nuth Mull v. Zuka-Oollah Beg and Kureem Oollah Beg of information on the point, I am unable to ascertain whether the Judges of the Sadar Diwani Adalat of the North-Western Provinces were in that case following the law as they found it existing, or were deciding the case on the facts found*[158] *. . . Having given the best consideration which I can to this question, I am of the opinion that such a right of privacy as that to which I have already referred exists and has existed in these provinces, apparently but usage, or to use another word, by custom and that substantial interface with such a right of privacy . . . affords a good cause of action".*[159]

[157] ILR 10 All 358 (1888).
[158] *Id at p.384.*
[159] *Id at p.387.*

In order to give judgment in favour of Right to Privacy, ***Chief Justice Edge*** has referred to a number of cases [160] in the ***Gokal Prasad*** case. Moreover, ***Justice Mahmood*** has also concurred with the opinion of *Chief Justice Edge* in the said case. Finally, it has been held in that case that, all the above observations in this area would establish the fact that, in a middle of the *19th Century*, Privacy in India has been a public issue and could be enforced through the courts of law with whatever little contents privacy has been known in those days.[161] Therefore, in the *Gokal Prasad* case, *Chief Justice Edge* and other judges have clearly recognised the existence of Right to Privacy in the *19th Century* India. They have no doubt about the existence of that right at the then period. Moreover, they have felt that, there might be the existence of this right long before the Sepoy Mutiny, but owing to that Mutiny old records have been lost, which has made them incapable to find out the antiquity of the matter. Due to that reason, they have cited the *Nuth Mull* case as the first case in this regard.

5.6.1.2. Bholan Lal v. Altaf Hussain : Customary Right to Privacy in the Female Occupied Apartments

In the *Gokal Prasad* case, the most important thing, which has occurred, has been the recognition of Customary Right to Privacy in India. Also the case has recognised the existence of this right since the olden days. This tradition has been continued in the later cases and a number of cases have been decided by the Supreme Court of India and various High Courts in this respect. The next important case has been the ***Bholan Lal v. Altaf Hussain***,[162] wherein it has been held that, the Customary Right to Privacy could be claimed only in respect of apartments which might have been occupied by females. The court has categorically observed that, the Customary Right would usually be claimed in respect of houses or apartments generally occupied by females and should not extend to apartments ordinarily used by males.[163] The judges have found that, the Right to Privacy has been well established in this country as laid down in the *Indian Easements Act, 1882, Section 18, Illustration (b)* and has also been supported by several judicial decisions. But,

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[160]*Gunga Pershad v. Salik Pershad, S.D.A.N.W.P. Rep. 1862 Vol.II, 217; Goor Dass v. Manohaur Dass, N.W.P.H.C. Rep. 1868, 253; Matta Prasad v. Behari Lal, S.A. No.8 of 1886 (unreported).*
[161] Kiran Deshta, *op.cit*., pp.225-226.
[162] AIR 1945 All 335.
[163]Kiran Deshta, *op.cit*., p.226.

this right should not be carried to an oppressive length. There must be a substantial and material infringement of the Right to Privacy before the courts would interfere.[164]

5.6.1.3. Shri Krishna Murthy v. U. Ramlingam : Customary Right to Privacy in the Post-Independence Era

Therefore, not only the *Gokal Prasad* case, but also the other cases have established the Customary Right to Privacy in India in the strong footings. The above stated decisions have been pronounced by the courts in the pre-independence era, but the same tradition has been continued in the post-independence era and even after the passing of the Indian Constitution. Such contention could be evidenced from the ***Shri Krishna Murthy v. U. Ramlingam***[165] case. In that case *Andhra Pradesh High Court* has held that, a custom in order to be valid should be ancient, certain and reasonable besides being enjoyed openly and peaceably. There has been no such thing as a natural Right to Privacy and such a right could be acquired only as a customary easement. So, where a person has alleged that, another has infringed his Right to Privacy, he has to establish that a customary Right to Privacy has been existed in the neighbourhood in which he has been living and that he has been individually or as a member of a particular class, would be entitled to claim such a right on the basis of custom before he could be heard to complain that it has been infringed.[166] Therefore, the Court has insisted on plaintiff showing that the customary right of Privacy has not only existed in a locality, but also that the plaintiff has been actually enjoying the right.[167] As such, in the absence of all these requirements, a Customary Right to Privacy could not be claimed, but could be claimed under other laws, which have been established later on under the Constitutional Right to Privacy.

5.6.1.4. Basic Principles for denoting Customary Right to Privacy in India

A number of contentions have been drawn by ***Prof. Govind Mishra*** in his book ***"Right to Privacy in India"*** after studying a number of cases on Customary Right to Privacy decided by a number of High Courts in India. It is very true that, all the cases have not created any uniform platform for recognition of Customary Right

[164] G. Mishra, *Right to Privacy in India*, Preeti Publications, Delhi, 1st Edn., 1994.
[165] AIR 1980 Andhra Pradesh 69.
[166] Kiran Deshta, *op.cit*., p.231.
[167] *Padumadas v. Smt. Parwati, AIR 1985 All 648.*

to Privacy in India, but the main point, wherein all the High Courts have been unanimous, has been the need for protection of Privacy of the female occupied area of a house. In fact, protection of Privacy of those areas has been more important than the male occupied areas and in this sense, this contention drawn by the High Courts has been appropriate. Another important issue in this respect has been the contention of non-granting of Privacy in the areas already exposed to the neighbours. In all the cases, the most important element which has been decided to cover the protection of Privacy has been the element of "substantial and material" infringement of Right to Privacy. This has been the most important criteria in the Privacy violation cases and if, that infringement has occurred, then only it would be considered as a violation of Privacy and not otherwise. Moreover, there has been no fixed guideline for deciding whether there has occurred a "substantial and material" infringement of Right to Privacy or not. It would vary from case to case and would depend upon the nature and circumstance of each case as well as it would necessarily be proved on the basis of the evidence. Apart from that, it has also been held that, while deciding the aspect of "substantial and material" infringement of Right to Privacy that right should not be carried into oppressive length. In order to explain the meaning of "oppressive length", the courts have fixed the precise application of Customary Right to Privacy in its role, which should necessarily be proved for remedial measures.

Therefore, *Prof. Govind Mishra* has highlighted very important aspects of Customary Right to Privacy in India, which have become fruitful for its further development. In this respect, it is to be remembered that, the aspect of "oppressive length" has been very important. Right to Privacy, being a private right, should never be absolute. It should also be curtailed in the public interest. The concept of "oppressive length" directs towards that dimension and prevention of carrying the Right to Privacy towards "oppressive length" means the imposition of restriction on Right to Privacy. The viewpoints of the High Courts in this respect, means the creation of Customary Right to Privacy as a limited right. Obviously, it has been a very important step, which has later become the predecessor of a Right to Privacy, limited in its scope ambit. In this sense, the High Courts in India, at the then period, have created history for the constitutional development of Right to privacy in India in the later period. There have also been certain other aspects of Customary Right to

privacy, like the houses where protection of Right to Privacy has been available, have good market and the others where no such right has been available, have less market value. Moreover, Right to Privacy being a personal right and not a property right, has been attached only to the houses where some persons have resided and not with the vacant houses. The reason has been very simple; no person would mean no Privacy, because a house would not need privacy. There have also been the traces of different other types of Customary Right to Privacy, like a particular religious community in South India would not eat or drink in public and if required, they could make temporary enclosure with a cloth in order to avoid public exposure. As such, it has also been an example of Customary Right to Privacy, though in local level, where eating and drinking have been considered as a part of Right to Privacy and public exposure is avoided. Therefore, in India, there have been huge instances of observance of Privacy in various forms since the olden days, which have been a clear proof of existence of good amount of Right to Privacy therein.

5.6.2. Privacy and the Purdah System

Purdah system is an aspect of Right to Privacy. Among the Muslim women, throughout the world, a special type of custom is prevalent and that is the custom of 'Purdah'. In this sense, 'Purdah' is a Customary Right. Now it is also necessary to understand the nature of 'Purdah' system. 'Purdah' system is created in order to prevent the public exposure of the faces of Muslim women. In this sense, it denotes the existence of Right to Privacy within the 'Purdah' system. Prevention of public exposure means, remaining in seclusion or Privacy as well as prevention of outside exposure. Prevention of public exposure is a very important element of Right to Privacy, which has necessarily included in the 'Purdah' system within the purview of Right to Privacy. But, 'Purdah' system is practised as a part of Customary Right and as such, it would be a part of Customary Right to Privacy. Though it is a part of Customary Right to Privacy, but it is different from the Customary Right to Privacy dealing with the construction of houses. Due to this reason, it has been discussed under a separate head in order to ascertain the true significance of this right.

5.6.2.1. B. Nihal Chand v. Bhagwan Dei : Privacy based on Social Custom

Customary Right to Privacy of 'Purdah' system has been considered in a number of cases by different High Courts in India at the same time with the

Customary Right to Privacy of construction of houses. In this respect, a few judgments are noteworthy. In the case of ***B. Nihal Chand v. Bhagwan Dei***,[168] ***Justice Sulaiman*** has interpreted that, the Right to Privacy which has been based upon social custom and purdah system would be quite different from the Right to Privacy based on natural modesty and human morality. According to him, the latter would not be confined to any class, creed, colour or race and it would be the birth right of a human being and would be sacred and should be observed, though the right should not be exercised in an oppressive way. It would automatically lead to the conclusion that, even if the Right to Privacy based upon purdah system would be discarded, this right could survive as based upon natural modesty and human morality. Therefore, the recognition of Right to Privacy based upon natural modesty and human morality would seem to be more fair wider in its operation, because it has not been based upon narrow considerations, like class, creed, colour, race etc. It could be uniformly applied to everybody whether they would be subject to purdah system or not. Further, natural modesty and human morality would not only relate to women, but also to men folk. It would mean, in purdah system, Right to Privacy would be exclusive right to women, whereas, this based upon modesty and morality would be available to everybody.[169]

5.6.2.2. Gulab Chand v. Manikchand : Privacy based on Natural Modesty of Women

Later on, in the case of ***Gulab Chand v. Manikchand***,[170] the court has opined that, the right based on purdah has entitled the owner of one property to compel the owner of another to modify the design of architecture of his property, so that the women residing in the dominant tenement could be protected. According to the court, the right has been based on natural modesty of human morality. The court, however, has held that, the Customary Right to Privacy could be claimed only in respect of apartments, which would be generally occupied and used by females and would not extend to apartments ordinarily used by males, the basis of the Customary Right to Privacy being the purdah system, which has been confined to the protection of purdahnasin women and those parts of a house, which have been ordinarily

[168] AIR 1935 All 1002.
[169] Kiran Deshta, *op.cit*., p.226.
[170] AIR 1963 MP 63.

occupied by females. The court has ruled that, new constructions could not be made to overlook apartments, which have been generally occupied and used by women and have been so occupied and used for a period sufficiently long to establish a Right to Privacy. It might be that, the custom once established would not extend only to women who have been in the habit of observing purdah, because women of all races would be entitled to a certain degree of Privacy beginning on the custom of their class and even those who would expose their faces in pubic, would expect to have their Privacy respected in their more private apartment.[171]

In the above stated two cases, *Allahabad and Madhya Pradesh High Courts* have highlighted two important aspects of Customary Right to Privacy of Purdah system. It has been held that, Purdah system of Muslim women has been a part of their religious custom and culture and as such, it should always be respected. Each and every religious community would generally have their own customary and cultural rules and regulations. Other persons belonging to different religious communities should pay respect to these customs and cultures and should not violate these. Purdah system has been a similar customary and cultural right, which should also be respected. Moreover, this system has been created to prevent the public exposure of faces of Muslim women. In this sense, Right to Privacy of Muslim women has been associated with this, which should also be respected. Moreover, Privacy means freedom and every religious community should have the freedom to enjoy its customary rules and regulations. Purdah system of Muslim women has been the part of that Customary Right and as such, Muslim women should be given that freedom or Privacy to enjoy their Purdah system. This custom has also been a part of human dignity of Muslim women and for this purpose; also the Privacy of Purdahnasin Muslim women should be protected. Privacy of Purdahnasin women would also be a part of their natural modesty and morality and as such, if social custom of Privacy would not be upheld, it would obviously be upheld on the ground of natural modesty and morality of women. In this sense, courts have done a good job by recognising the Customary Right to Privacy of Purdah system.

[171]Kiran Deshta, *op.cit*., pp.227-228.

5.6.2.3. Privacy based on Purdah System : Positive and Negative Side Effects

But, there has also been the other side of Privacy of Purdah system, based on which judges have denied to recognise the custom of Purdah system as Right to Privacy. There has been a fallacy lying in the fact that, the custom of Purdah, in its ultimate analysis, would manifest a social value of keeping the women-folk secluded from the male stranger's gaze, which would also be a by-product of Privacy. It would therefore, be called that Privacy has come before Purdah or in other words, the purdah system has been created in order to keep the women in private field as well as for the prevention of their public exposure. As such, some judges have felt that, the instrument of 'Privacy' has been used practically for suppressing the women and to keep them only within the domestic field. Due to this reason, the Purdah-system as the basis of Right to Privacy has been questioned by the several High Court judges at the then period.[172]

Therefore, Right to Privacy should always not be based upon the purdah system, because of its forceful use to prevent the public exposure of women. But, simultaneously, it has also been observed that, certain amount of Privacy should also be needed by women in their domestic life, otherwise the everyday activity of a family life would be jeopardized. A few examples of cases, where observation of Privacy would be required, have also been cited by the above judgment. It has also been contended that, certain women having religious inhibitions for appearance in public and would like to remain secluded by observing purdah, their Right to Privacy should be considered as a customary Right to Purdah. But, that should not be equally applicable to all and obviously should not be supported, where women have been forcefully kept in purdah for prevention of their public exposure. In this sense, Right to Privacy as a part of purdah system of Muslim women, should not be uniform to all and should vary from case to case.

Therefore, the Right to Privacy based on purdah system of the Muslim women, has both positive and negative side effects. If the system is used for exercising religious freedom of those women based on their exclusive choice, then there would be no problem and it would be the positive effect or application. But, if it is used for forcing the women to remain privately outside the public exposure,

[172] *Supra Note 164 at p.115.*

then it would be negative effect or application. Obviously, the positive effect should always be welcome and the negative effect should be rejected. In this respect, the courts have also been divided into two parts supporting the two opinions. But, in most of the cases, courts have supported the positive effects and have rejected the negative effects. In this respect, courts have also shown positive attitude towards the recognition of Right to Privacy based on purdah system of Muslim women. Hence, the active intervention of the courts in this respect, has established the right into strong footing.

5.6.3. Fundamental Right to Privacy under the Indian Constitution

The Indian Constitution has never recognised expressly the Right to Privacy as a Fundamental Right. But, the Indian judiciary has taken active steps for such recognition of Right to Privacy within the meaning of *Right to Life and Personal Liberty* as denoted by *Article 21 of the Indian Constitution.* In fact, Right to Privacy has been established clearly as a Fundamental Right under *Article 21 of the Indian Constitution.* In this respect, it is also to be remembered that, it is not an absolute right and reasonable restrictions could be imposed on it on the grounds similar to *Article 21 of the Indian Constitution.* Judges have been the difference of opinion regarding the inclusion of various dimensions into this right. If that is done, then it could be stretched into "oppressive length". Here also the question of "oppressive length" has come into consideration, because Right to Privacy is a limited right and could be curtailed into public interest and reasonable restrictions could always be imposed on this right. Due to these reasons, all components of Right to Privacy have not been declared as Fundamental Rights under *Article 21*, only few components like search and seizure, marital relations, Privacy of women, Privacy of health records, Privacy of police surveillance, Privacy of freedom of press and Telephone Tapping, Privacy and Defamation, Privacy of HIV/AIDS infected people etc. have been incorporated. All these rights have been recognised by way of judicial interpretation in the same manner like U.S.A. In this respect, the Supreme Court of India has followed the steps of U.S. Supreme Court and has recognised each and every component through case by case development in India. Now with the passage of time and social change, many new dimensions of Right to Privacy have been emerged or in other words, new problems have been cropped up regarding the

violation of Right to Privacy in the changing social scenario, which should be adequately redressed by judicial interpretation. Therefore, inspite of the existing components of Right to Privacy, new components have come into being in the forefront, which have posed new challenges before the Indian judiciary. In this backdrop, it is necessary to examine the existing and new judicial viewpoints of Right to Privacy in the light of the Indian Constitution. Next part of the study will concentrate on this.

5.6.3.1. Privacy and Search and Seizure : M. P. Sharma v. Satish Chandra

Search and seizure has been an important issue regarding the violation of Right to Privacy under the U.S. Constitution, which has taken into account in the light of the *Fourth Amendment of the U.S. Constitution.* The U.S. Supreme Court has pronounced a number of important judgments in order to consider the unauthorised search and seizure cases as the violation of Right to Privacy of the individual citizens. Thereafter, the right has been established in U.S.A. as an important fundamental right. Based on the U.S. guideline, Indian judiciary has tried to establish Right to Privacy as a Fundamental Right in India in view of the unauthorized search and seizures cases. In this respect, the first case has been the ***M. P. Sharma v. Satish Chandra***,[173] wherein the Supreme Court of India has an opportunity of considering the Constitutional status of the Right to Privacy in the context of state power of search and seizure, but a very narrow view of constitutional provisions has been taken in the said case. Unfortunately, the opportunity has been missed and the Right to Privacy could not be put into the public law.[174]

In the instant case, the question has been raised that, whether a search warrant issued under *Section 96(1) of the Code of Criminal Procedure, 1898* would violate *Article 19(1)(f) of the Indian Constitution* or not and thereby could be declared ultra vires or not. The question has also been raised whether the search and seizure of documents under *Sections 94 and 96 of the Code of Criminal Procedure, 1898* would amount to compelled production within the meaning of *Article 20(3) of*

[173]AIR 1954 SC 300.

[174]Shrinivas Gupta and Dr. PreetiMisra, "*Right to Privacy – An Analysis of Developmental Process in India, America and Europe*", Central India Law Quarterly, vol.18, 2005, pp.524-552 at p.532.

the Indian Constitution or not. ***Justice Jagannadhadas****,* who has given the decision in the instant case, has held as follows:-

> *"A power of search and seizure is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to Privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction".*[175]

Therefore, in the instant case, ***Justice Jagannadhadas*** has examined the *Fourth and Fifth Amendments of the U.S. Constitution* as well as the cases of the U.S. Supreme Court in the related matters, and has pronounced his judgment. After examining all the U.S. Supreme Court judgments and facts of the instant case, he has spoken in favour of the search and seizure within the meaning of *Sections 94 and 96 of the Code of Criminal Procedure, 1898.* He has upheld the state power of search and seizure for the purpose of protection of social security as well as upheld the necessary regulation of that power in the public interest. But, has also held that, as the Constitution makers have not regulated such power by the use of Constitutional control, the judiciary has no power to regulate it. In this sense, it has been totally different situation from U.S.A. and would not be similar to the *Fourth Amendment of the U.S. Constitution.* As the Constitution makers have not used such provision as violative of Right to Privacy by recognising it as a Fundamental Right, imposition of constitutional limitations to regulate the impugned sections would amount to unnecessary straining of the provisions of the Indian Constitution. In this sense, the Supreme Court has not elaborated the Right to Privacy as a Fundamental Right in the instant case in line with the *Fourth Amendment of the U.S. Constitution,* rather has deviated from that viewpoint. The Court has upheld the constitutional validity of the impugned sections and thereby has dismissed the application, which has shown the reluctance of the Supreme Courtof India to consider Right to Privacy as a Fundamental Right under the Indian Constitution. It has not developed the unreasonable search and seizure cases as violation of Privacy like the U.S. Constitution, which has been very unfortunate.

[175]1954 SCR 1077-1078.

In this sense, it has been clear that, the Supreme Court of India, at the then period, has been reluctant to recognize Right to Privacy as a Fundamental Right as against the unreasonable search and seizure. Not only in the instant case, but also in other cases, the Supreme Court has continued with the same contention by upholding the statutory protection of search and seizure as well as limiting and restricting Right to Privacy against such search and seizure. In all these cases, the contention of the Supreme Court behind the upholding of statutory provision of search and seizure has been the control of crimes. Though it would be a very narrow interpretation for the purpose of recognition of Right to Privacy, but unfortunately such interpretation has been prevalent in India since the *M. P. Sharma v. Satish Chandra* case during *1950s* and has been continued till *1970s* upto the case of *Kharak Singh v. State of U.P.* wherein the Right to Privacy has been considered again from a new perspective.

5.6.3.2. Privacy and Police Surveillance

Right to Privacy and Police Surveillance both are closely associated, because in most of the modern countries, inspite of the existence of civil and personal liberties, police has been in the habit of exercising its control over the citizens without any prior notice. The police surveillance has been in strict position and has been exercising strict control over the individual lives of the citizens in the totalitarian states during pre-Second World War era in the western countries. These states have also been called Police States or Sovereign States, because only sovereign functions have been performed by the Governments in those states. As such, Government has only been busy with ruling the people and for strict enforcement of the law and order with the help of the Police. But, with the passage of time and with the social change, this situation has been changed since the post-Second World War era. Since then, the Sovereign State concept has been replaced by the Welfare State concept, wherein the main function of the government would be the welfare of the people. In the Police states, Police power has been supreme and people have no civil or personal liberty, but in the Welfare States, welfare of the people has become supreme and as such, civil and personal liberty of the individual citizens has become most important. Consequently, in the present social scenario, use of extreme Police Power has been questioned as violation of personal liberty of

the individual citizens both in U.S.A. and in India. In the absence of express Constitutional provisions in this respect, such matter has been taken by the judiciary, which has given birth to the question of violation of Privacy thereunder.

5.6.3.2.1. Kharak Sing v. State of U.P. : Privacy vs. Domiciliary Police Surveillance

In India, the question of violation of Right to Privacy owing to domiciliary police surveillance has been first raised in the case of ***Kharak Sing v. State of U.P.***[176] In that case, the petitioner has been charged and tried for committing decoity and he has been subjected by the police to domiciliary visits and surveillance. While determining the validity of such visits and surveillance by the police, the Supreme Court has examined whether the Right to Privacy has formed a part of personal liberty. It has observed that, personal liberty has been a compendium of rights that has gone to make up the personal liberty of an individual and that the Right to Life in *Article 21 of the Indian Constitution* has been similar to the *Fourth and Fifth Amendments of the U.S. Constitution.* Further the Supreme Court has relied on *Wolf v. Colorado*[177] and has held that, the Common Law maxim of *"Every man's house is his castle"* has expounded a concept of personal liberty which has not rested upon a theory that has ceased to exist now and therefore, the domiciliary visit has been repugnant to personal liberty and hence, would be unconstitutional.[178]

In the instant case, the *Regulation 236 of the U.P. Police Regulations,* which has contained detailed provisions for domiciliary police surveillance and allied matters, has been challenged for violating the Right to Freedom of Movement under *Article 19(1)(d),* Personal Liberty under *Article 21* and Enforcement of Fundamental Rights under *Article 32*. While deciding the matter, ***Justice Ayyangar***, who has delivered the majority judgment in the case, has held as follows:-

> *". . . Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Art.19 (1) (d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Art.21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is*

[176]AIR 1963 SC 1295.
[177]338 U.S. 25 (1949).
[178]*Supra Note 174 at pp.532-533.*

> *merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*
>
> *The result therefore is that the petition succeeds in part and Regulation 236(b) which authorises "domiciliary visits" is struck down as unconstitutional. The petitioner would be entitled to the issues of a writ of mandamus directing the respondent not to continue domiciliary visits . . ."*[179]

In the instant case, a dissenting opinion has also been presented by ***Justice Subba Rao***, the relevant portion of which is presented below:-

> *". . . Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where lie lives with his family, is his "Castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado (1), pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, noting is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right to personal liberty in Art.21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under, Regulation 236 infringe the fundamental right of the petitioner under Art.21 of the Constitution".*[180]

Therefore, in the *Kharak Singh* case, *Justice Ayyanger* has denied any violation of *Article 21 of the Indian Constitution* as well as has refused to consider Right to privacy as a fundamental right, because of the reason that, Indian Constitution has not expressly recognised it as a fundamental right. In this sense, *Justice Ayyanger* has spoken in the same line with *Justice Jagannadhadas* in the *M.P. Sharma v. Satish Chandra* case. In both the two cases, Supreme Court of India has shown a traditional orthodox attitude of strict interpretation of the law regarding the protection of Right to Privacy. As such, the Supreme Court of India, in these two cases has followed the path of the U.S. Supreme Court, at the very beginning, during

[179] 1964 SCR (1) 332 at p.351.
[180] *Id at p.359.*

the period of cases like *Olmstead v. United States* and has become a constraint for the development of Right to Privacy in India.

But, the praiseworthy thing has been that, a dissenting opinion of *Justice Subba Rao* has also been found in the *Kharak Singh v. State of U.P.* case in line with the opinion of *Justice Frankfurter* in the *Wolf v. Colorado* case. Such dissenting opinion has been, in fact, the main point of *Kharak Singh* case, because it has contributed towards the judicial development of Right to Privacy under the Constitutional set up in India. It has highlighted the Common Law maxim of *"Every man's house is his castle",* which should have equal application in U.S.A. and in India. As such, *Justice Subba Rao* has contended that, this maxim has led to the rise of Right to Privacy of Home, the sanctity and Privacy of which could never be overlooked irrespective of time, place and person. On the basis of this contention, *Justice Subba Rao* has explained the importance of Right to Privacy as a fundamental right within the purview of *Article 21 of the Indian Constitution* and has also contended that, it has been rested in the spirit of personal liberty under *Article 21,* without the guarantee of which, the guarantee of personal liberty under *Article 21* would remain incomplete. Hence, the *Kharak Singh* case has been remembered for the incorporation of Right to Privacy under the constitutional set up for the first time in India as well as a remarkable judicial development of Right to Privacy in India and the entry of this right for the first time in this country.

5.6.3.2.2. Govind v. State of M.P. : An Outcome of Kharak Sing v. State of U.P.

The contention drawn by *Justice Subba Rao* in the *Kharak Singh* case has been further elaborated in the ***Govind v. State of M.P.***[181] case, which has been the next important judgment in India regarding the judicial development of Right to Privacy. In that case, the minority opinion of *Kharak Singh* case has become the majority opinion and has paved a long way for the development as well as establishment of Right to Privacy in the light of the Constitutional set up in India. In *Govind v. State of M.P.*, once again the question has been raised before the Supreme Court as to whether domiciliary visits and surveillance have been constitutionally valid and the court speaking through ***Justice Mathew***, has observed that, fundamental rights have been enshrined in our Constitution, only to secure such

[181] AIR 1975 SC 1378.

considerations that would be favourable to the pursuit of happiness of the individual and that personal dignity and privacy should be examined with care and if at all could be denied only when a very significant interest would seem to be superior. However, in this case, he has not held that right to personal liberty would embrace right to Privacy. He has said, *"Assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute".*[182]

In the instant case, the *M.P. Police Regulations, 855 and 856, made under Section 46(2) (c) of the Police Act, 1961* has been challenged as violation of *Articles 19(1) (d) and 21 of the Indian Constitution.* In this case, domiciliary surveillance has been challenged as violation of Right to Privacy under the Indian Constitution. ***Justice Mathew*** has delivered the opinion of the court in the said case, the relevant portion of which regarding the protection of Right to Privacy has been quoted hereunder:-

> *"There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the court does find that acclaimed right is entitled to protection as a fundamental privacy right a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is an interest-sufficient to justify the infringement of a fundamental right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of state.*
>
> *Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our constitution by explicit constitutional guarantees: "In the application of the constitution our contemplation cannot only be of what has been but what may be". Time works changes and brings into existence new condition Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yes too broad a, definition of privacy raises serious questions about this propriety of judicial reliance on a right that is not explicit in the constitution of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept, of liberty. The most serious advocate of privacy must confess that there are, serious problems of defining the essence and scope of the right. Privacy*

[182]*Supra Note 174 at pp.533-534.*

> *interest in autonomy must also be placed in the context of other right and values.*
>
> *Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously, not as instructive as it does not give analytical picture of that distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty ...*
>
> *There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might engaging in such activities that such 'harm' is not constitutionally protectable by the state. The second is that individual, need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the Image they want to be accepted as themselves, an image that may, reflect the values of their peers rather than the realities their natures."*[183]

Therefore, in the instant case, ***Justice Mathew*** has highlighted a very vital point. He has extended the viewpoint of Right to Privacy as expressed in the dissenting opinion of the *Kharak Singh* case in order to establish Right to Privacy as a fundamental right within the Indian constitutional framework. In this sense, it has been the conversion of a dissenting opinion into the opinion of the court, no doubt which has been a positive development in the field of Right to Privacy in India. While pronouncing his judgment, *Justice Mathew* has not expressly considered Right to Privacy as a part of personal liberty, but he has recognised the existence of this right in the essence of *Article 21 of the Indian Constitution.* He has also contended that, without the guarantee of this right, the right to live with human dignity would remain incomplete. He has also contended that, any interpretation of Privacy should be given according to the pursuit of happiness of an individual human being and as such, every consideration of Privacy and Dignity should be favourable to the happiness of the individual citizens. He has also upheld the privacy and sanctity of one's home, wherein any unauthorized interference should not be permitted. In this respect, he has followed the dissenting opinion of the *Olmstead v. United States* case and has opined in the same line regarding the urge of protection of Privacy for the sake of protection of man's spiritual nature, his feelings,

[183]1975 SCR (3) 946 at pp.953-955.

sentiments, emotional and intellectual qualities. No doubt, this initiative has been praiseworthy.

But, simultaneously he has also contended that, Right to Privacy has only been related to certain private affairs of the individual persons, like, home, family, marriage, motherhood, procreation, child rearing etc. and it has nothing to do with the public matters. In this sense, it has only been a limited right and could never be absolute. Though the urge of protection of Privacy would be in the moral and emotional feelings of the individual citizens, thereby its protection would be essential. But, such protection should not go against the public rights of the individuals, like the Right to Life or Right or Property. In this sense, *Justice Mathew* has not taken bold steps like the U.S. Supreme Court in order to establish Right to Privacy as an unfettered right, but has established it as a limited right. The main reason behind this has been the absence of express Constitutional recognition of Right to Privacy in India. He has also asserted that, every domiciliary surveillance should not be illegal or unauthorized nor should be considered as violation of Privacy. This contention of the *Govind v. State of M.P.* has created a remarkable development in the field of Constitutional protection of Right to Privacy in India, which has paved a long way thereafter, for the further development of this right.

5.6.3.3. Privacy and Dignity of Women

Dignity of women is an important aspect to be considered in any civilized society. Women are the mothers of the race and as such, if women are disrespected, a race cannot go far. Therefore, dignity of women is utmost important for the progress and development of a society as well as a race. This statement is equally true for every society, be it past, present or future. Again, for upholding the dignity of women, protection of Privacy of women is also very important. Privacy means freedom and if women are not getting adequate freedom to take decision about their marriage, family, motherhood, child-birth, child-rearing and other private matters, then their dignity as well as empowerment would remain incomplete. Women empowerment is a basic necessity for the protection of rights of women and to provide them with dignity. Dignity of women would be recognised, when the safety and security of women would be ensured in the society from every angle. When the women would feel free and secured in the social and family environment, they

would feel free to take decision according to their choice without the dominant control of the so-called patriarchal society and then the women empowerment could be achieved. It would also necessarily be upheld the Privacy of women, because Privacy and dignity are synonymous and without the protection of Privacy, dignity remains incomplete. This point is required to be illustrated through analysis of judicial intervention in the matter. Next part of the study will concentrate on the issue.

5.6.3.3.1. In Re: Ratnamala and Another v. Unknown : Privacy and Dignity of a Prostitute

The question of dignity of women and violation of their Privacy has arisen in an important case of the *Madras High Court* in India, called ***In Re: Ratnamala and Another v. Unknown***.[184] In this case, *B.S. Babu* and his sister *Ratnamala* have been convicted under *Section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956* and have been sentenced to imprisonment thereby. In this case, the main question which has been raised before the *Madras High Court,* has been the issue of violation of dignity and Privacy of a woman, even if a prostitute. The Assistant Commissioner of Police Vigilance has the information, in the said case, that the appellants have been running a brothel in their house and thereby the Assistant Commissioner of Police has created a trap to catch the activity of prostitution carried on thereby by providing a surprising visit without any prior intimation. Consequently, when the Assistant Commissioner of Police, along with other police officers, have reached the place and opened the door, have found the activity of prostitution carried on by *Ratnamala* with a person. When the door has been opened, both *Ratnamala* and the person involved have been found almost total undressed. As such, the question has been raised regarding the knocking of door by the police before entry and to maintain the minimum civic sense by the police. The question has also been raised, whether a prostitute, being a woman should have the dignity and Privacy like other women or not. The *Madras High Court* has also answered the question in the said case.

In that case ***Justice Anantanarayanan*** has delivered the opinion of the court, wherein he has highlighted the issue of violation of dignity and Privacy of women as

[184] AIR 1962 Mad 31.

well as the issue of dignity and Privacy of a prostitute, being a woman. The relevant portion of the judgment, in this respect, is quoted hereunder:-

> *"In the present case, the record shows a further consideration of interest and significance, as it affects the rights of the individual. The learned Public Prosecutor does not dispute that even a prostitute is entitled to the protection of her person; certainly, she is as much entitled to protection as the most respectable women, for instance, with regard to such offences as indecent assault or rape. Under S. 509 of I.P.C., the intrusion upon the privacy of a woman with an intention to insult her modesty, is an offence ... But I am quite unable to agree that this exemption could be utilised to conduct a search, in disregard of elementary decencies, even if they be decencies relating to a prostitute, in the manner disclosed, and most unfortunately disclosed by the record in this case. Here, we have an instance of the officer, accompanied by witnesses, proceeding into the bedroom of a young girl and pushing open a closed door without even the civility of a knock or warning to her to prepare for the intrusion. Such conduct would be quite inexcusable, unless the officer thereby hopes to gather the evidence which is essential for proof of any charge ...*
>
> *There can be no doubt that such conduct implies an outrage on the modesty of the girl; and I must reiterate that the modesty of a prostitute is entitled to equal protection, with that of any other woman. The technique of such raids must be totally altered; otherwise, grave abuses of the law might enter into the very attempt to enforce the law. I put it to the learned Public Prosecutor whether the officer would similarly think himself justified, in proceeding into a bathroom, where a young girl suspected to be a prostitute was having a bath, in the hope of finding incriminating evidence; the learned Public prosecutor was compelled to concede that, as raids were conducted at present, such an incident could conceivably occur. The implementation of this Act will hence become an evil, unless it is not merely accompanied by tact and delicacy, but regard is also paid to the true spirit of the legislation, and the technique of implementation is revolutionised, giving a very subordinate part, if part need be given to it at all, to the unfortunate practice of designing traps and using decoy witnesses . . ."*[185]

Therefore, in the instant case, the dignity and Privacy of the women have been specifically highlighted and especially *Justice Anantanarayanan* has talked about the dignity and Privacy of a Prostitute, being a woman. He has held that, every Prostitute should be entitled to the Rights to dignity and Privacy equally with any other woman. There should be no difference, in this respect, between a prostitute and any other woman. A woman has become a prostitute that would not mean that, she has lost her dignity and Privacy; thereby anybody could enter into her bedroom without even showing the civility of knocking. In this sense, the Learned Judge has vehemently objected to the attitude of the special police officer, in the instant case, who has entered into the room of a prostitute without knocking for the purpose of

[185] www.indiankanoon.org/doc/227496.html, visited on 2.9.2017.

gathering evidence of criminal activity. According to the Learned Judge, such activity has shown the rejection of minimum civic sense, which could never be supported.

5.6.3.3.2. State of Maharashtra v. Madhukar Narayan Mardikar : Privacy of a Woman of Easy Virtue

Next important case in this respect has been the ***State of Maharashtra v. Madhukar Narayan Mardikar***,[186] wherein the Supreme Court of India has held that, even a woman of easy virtue would be entitled to Privacy and no one could invade her Privacy as and when one likes. So also it would not be open to any and every person to violate her person as and when he would wish. She would be entitled to protect her person, if there would be an attempt to violate it against her wish. She would be equally entitled to the protection of law. Therefore, merely because she has been a woman of easy virtue, her evidence could not be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution upto himself before accepting her evidence.[187]

In the instant case, the respondent, *Madhukar Narayan Mardikar,* who has been a Police Inspector, has visited the house of one *Banubai* in uniform and has demanded to have sexual intercourse with her. On her refusing, he has tried to have her by force. She has resisted his attempt and has raised a hue and cry. When he has been prosecuted, he has told the court that she has been a lady of easy virtue and therefore, her evidence would not be relied. Thus, the Court has rejected the argument of the respondent and has held him liable for violating her Right to Privacy under *Article 21 of the Indian Constitution.*[188]

Therefore, in the *State of Maharashtra v. Madhukar Narayan Mardikar* case, the Supreme Court of India has spoken in the same line with the Madras High Court in the *Re Ratnamala* case. In fact, the high sounding phraseology of the Madras High Court has been resounded in the wordings of the Supreme Court of India. In both the cases, same principle has been adopted, which would mean that, even the woman of an easy virtue or a prostitute should have the Right to Privacy and dignity regarding the womanhood. Privacy of a prostitute could not be taken away in the

[186]AIR 1991 SC 207.
[187]www.indiankanoon.org/doc/524900.html, visited on 3.9.2017.
[188]*Supra Note 186 at p.207, para 8.*

name of criminal investigation without prior intimation or search warrant. Also the woman of an easy virtue should have her dignity and sexual autonomy, owing to which nobody could force her to have sexual intercourse with him. Evidence of a woman of easy virtue could not be negated on the ground of her merely being a woman of easy virtue. Unchastity of a woman could not be a ground for rejection of locus standi as a witness before the court. In whatever circumstance, the dignity and Privacy of every woman should be maintained, which should be equal to every woman irrespective of any condition. Hence, the Indian judiciary has taken a good initiative in this respect.

5.6.3.4. Privacy and Natural Modesty of Women : Neera Mathur v. Life Insurance Corporation of India

Right to Privacy of women should have certain special significance, be it would relate to dignity of women or natural modesty of women. Natural modesty of women has been the basic human right of women, which should never be disregarded by any civilized state. Natural modesty of women would be a part of the dignity of women and if natural modesty is violated, dignity would also be automatically violated. As such, every civilized state has tried to provide legal protection to this right and India has not been an exception to it. It has incorporated *Section 509 of the Indian Penal Code, 1860,* which has provided punishment for intruding upon the natural modesty and Privacy of women. In this respect, it is also pertinent to mention that, Privacy is also a part of natural modesty of women. Natural modesty of women would include Privacy of women within its scope and ambit, because it would provide the freedom to every woman to decide what information about her she would keep secret and what she would disclose. Protection of natural modesty would mean the protection of Privacy of women and vice-versa. It has been held by the Indian judiciary in a number of cases that, disclosure of any private fact about a woman, which would violate the natural modesty of that woman, would amount to the violation of her Fundamental Right to Privacy under *Article 21 of the Indian Constitution.* Next part of the study would provide examples in this respect.

The Supreme Court of India has highlighted the issue of violation of Right to Privacy of women owing to the violation of natural modesty of women in the case of

Neera Mathur v. Life Insurance Corporation of India.[189] In that case *Life Insurance Corporation Service Rules* has been challenged, on the basis of which *Neera Mathur* has been appointed as assistant in Life Insurance Corporation and has been discharged during the probation period stating no reasons. Later on the Life Insurance Corporation has revealed that, the appellant *Neera Mathur* has withheld the disclosure of the fact of her being in family way in the medical declaration. On the basis of such non-disclosure of the fact of her being pregnant the Life Insurance Corporation found her working capacity as unsatisfactory and thereby has discharged her from the service without mentioning any reason. When the case has reached the Supreme Court of India, the court held that, the information required to be furnished in the medical declaration of the LIC would affect the modesty and self-respect of woman and thereby has held to be the violation of Right to Privacy of the appellant.

In the instant case, the opinion of the Court has been delivered by ***Justice Jagannatha Shetty***, the relevant portion of which is quoted hereunder:-

> *"While we are moving forward to achieve the constitutional guarantee of equal rights for women, the Life Insurance Corporation of India seems to be not moving beyond the status quo. In the instant case there is nothing on record to indicate that the petitioner's work during the probation was not satisfactory. The reason for termination was only the declaration given by her at the stage of entering the service, though the petitioner was medically examined by the lady doctor and found her medically fit to join the post. [148D, E, 151 C]*
>
> *The real mischief though unintended is the nature of the declaration required from a lady candidate specially the particulars required to be furnished under columns (iii) to (viii) which are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems. The corporation would do well to delete such columns in the declaration. If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service, the corporation could subject her to medical examination including the pregnancy test. [151 D-F]"*[190]

Therefore, in the instant case, the Supreme Court of India has clearly highlighted the need for protection of natural modesty of women and has held that, for the sake of such protection, disclosure of any private information embarrassing to the woman concerned should be prohibited. The Supreme Court has upheld the

[189] AIR 1992 SC 392.
[190] 1991 SCR Supl. (2) 146 at pp.147-151.

natural modesty of women as their Right to Privacy and has prevented any unreasonable interference thereby. The LIC would not be allowed to ask irrelevant embarrassing private facts of the women employees, because these have nothing to do with the employment concerned and also the LIC has been ordered in the instant case to delete from the forms, the columns containing information regarding the irrelevant embarrassing facts about the women employees. Hence, the Supreme Court of India, in the instant case, has taken a bold step by declaring that, any information adversely affecting the natural modesty and self-respect of women should be prohibited as violating of Right to privacy of the women.

5.6.3.5. Privacy, Defamation and Freedom of Expression : R. Rajagopal v. State of Tamil Nadu

Privacy and Defamation are not two isolated concepts. There are other factors controlling the movements of these two concepts, two such concepts are Freedom of Expression and Right to Information. Right to Reputation and its protection from Defamation or invasion of Privacy, is an individual right. On the contrary, Freedom of Expression of the Press or Media and Right to Information of the general public, both are social rights. In a modern democratic society, creation of balance between individual and social interests, is utmost important. As such, balance of Freedom of Expression, Right to Information, Right to Reputation and Right to Privacy is obvious. In a modern democratic society, the Press or the Media enjoys the Right to Freedom of Expression for the sake of the public's right to know or Right to Information. But, that does not mean that, they can publish any information and as such, they are prohibited to publish false and defamatory statements. Also, they are prohibited to publish true, but embarrassing facts, which cause invasion of Individual Privacy. In this sense, the balance between all these rights is the touchstone of democracy.[191]

The role of Judiciary in India is utmost important for the development of both the laws of Privacy and Defamation. Both of these laws are lacking express statutory enactments covering aspect of these two interests. As such, it is obvious for the Judiciary to take up the matters and to provide its opinions to cope with various dimensions of these two subjects. In India, the Judiciary has played this role in well-

[191] Sangeeta Chatterjee, "*Privacy and Defamation: A Legal Analysis in the Indian Context*", JCC Law Review, Vol.V (1), 2014, pp.99-117 at p.109.

balanced manner.[192] The Supreme Court of India has recognised Right to Privacy as a fundamental right by considering it as a part of Right to Life and Personal Liberty under *Article 21 of the Indian Constitution,* but it has not recognised the invasion of Privacy as a tort. As such, it has not been possible to limit the boundaries of Privacy and to relate it with the tort of Defamation. It has also not been possible to determine where Defamation ends and invasion of Privacy starts or to decide whether every Defamation amounts to invasion of Privacy or vice-versa or not. Attempts have been taken in the year *1994* to solve all these problems by pronouncing landmark judgment in the case of ***R. Rajagopal v. State of Tamil Nadu***,[193] which is popularly known as ***'Auto Shankar'*** case. The facts of the case have revolved around the autobiography of *'Auto Shankar',* a condemned prisoner.[194]

In fact, a Tamil magazine *'Nakheeran'* has proposed to publish the said autobiography with a prior announcement that, the autobiography would contain information about the close relationship between *'Auto Shankar'* and different public officials like police and jail authorities. As such, the Inspector General of Prisons had tried to stop the publication of the magazine. At this juncture, the editor of the magazine *R. Rajagopal* has filed a suit against the *State of Tamil Nadu* to restrain the Tamil Nadu government from interfering with the publication of the magazine. During the hearing of the suit, the *State of Tamil Nadu* has expressed its fear about the defamatory materials contained in the autobiography regarding the high public officials of the State and on the basis of this reason has prayed to stop the publication. By dismissing that appeal, the Supreme Court has delivered a historic judgment that, the government has no authority to impose a prior restraint on publishing an autobiography, because it is going to be defamatory or violation of Right to Privacy of the high public officials. The Court has also opined that, if it is found to be defamatory or violative of Right to Privacy after publication, then remedy can be availed of under the Law of Torts according to the ordinary law of the land.[195]

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[192] *Id at p.113.*
[193] AIR 1995 SC 264.
[194] *Supra Note 191 at p.114.*
[195] A. Lakshminath and M. Sridhar, *Ramaswamy Iyer's The Law of Torts*, Lexis Nexis Butterworths Wadhwa, Nagpur, 10th Edn. (2nd Reprint), 2010, p.401.

In this historic judgment, the Supreme Court of India has evolved a number of broad principles, which are stated below:-

(i) Freedom of the Press and Right to Privacy -

A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical.

(ii) New Exception under Article 19(2) -

Supreme Court has suggested an addition to the list of exceptions under *Article 19(2) of the Indian Constitution* to restrict the press freedom.

(iii) Matter of Public Record –

Once a matter becomes a matter of public record or court record, the Right to Privacy no longer subsists and the publication of the same by press or media becomes unobjectionable. However, in the interest of decency an exception should be provided to this rule under *Article 19(2).*

(iv) No Privacy for Public Authority –

In the case of public officials, Right to Privacy or for that matter, the remedy of action for damages is not available with respect to their acts and conducts relevant to the discharge of their official duties.

(v) State cannot sue for Defamation –

So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(vi) Applicability of Other Statutes –

Inspite of the rules stated above, the *Official Secrets Act, 1923* or any other similar enactment or provision having the force of law continues to bind the press or media.

(vii) No Prior Restraints –

There is no law empowering the Sate or its officials to prohibit, or to impose prior restraint upon the press or media.[196]

Finally, the Supreme Court has reached the conclusion that, the petitioner has the right to publish the autobiography or life story of *'Auto Shankar'* as it is

[196] *Id at pp.402-403*.

found from the public records, even without the consent or authorization of *'Auto Shankar'.* But, if anything is published beyond the public records, then the prior consent is required, otherwise, it would amount to the invasion of Right to Privacy of *'Auto Shankar'.*[197] Therefore, it is a case of Privacy, Defamation and Freedom of Expression of the Press or Media. In this case, the Supreme Court has tried to create a balance between the Defamation of public officials, Right to Privacy of *'Auto Shankar'* and Freedom of Expression of the Tamil Nadu Magazine. By evolving the broad principles in this case, the Supreme Court has tried to determine a boundary for Privacy and Defamation. Also it has tried to specify what information or record should be published and what not. Moreover, it has tried to specify the limitations of the press freedom. As such, the Supreme Court has tried to harmonize the conflicting interests of Privacy, Defamation and Freedom of Expression for the establishment of an egalitarian social order.[198]

5.6.3.6. Privacy and Telephone-Tapping : People's Union for Civil Liberties v. Union of India

In the present social scenario, a number of technical devices have been invented for interception of telephonic conversation, which should be considered as serious threats to Privacy and secrecy of telephonic conversation. Interception of telephonic conversation has been a habitual practice in the totalitarian states in the pre-Second World War era, when personal liberty of individual citizens has not received much importance and surveillance devices have got prominent place therein, because of the existence of an environment, where national security of the states has been seriously threatened. But, in the present pattern of welfare states, personal liberty of individual citizens has got the most prominent place in all the civilized democratic countries, which should never be curtailed in unreasonable manner. Freedom of telephonic conversation without any threat of interception has been the personal liberty of the individual citizens in India along with the other countries. As such, protection of Privacy and secrecy of such conversation has become the need of the hour. Under the constitutional set up of India, it could only be curtailed in the public interest or for protection of natural security or on any other

[197] A. R. Desai, Chidananda Reddy and S. Patil, "*Contours of Privacy and Defamation vis-à-vis Free Speech*", Cochin University Law Review, 1996, pp.187-199 at p.199.
[198] *Supra Note 191 at pp.115-116.*

ground mentioned under *Article 19(2) of the Indian Constitution.* Moreover, mobile or satellite communication has become a medium of expression in the present day society and a new media has been created, called the social media, wherein people would like to share and exchange their viewpoints. Exchange of thoughts over the social media, would nothing nut, be a part of Freedom of Speech and Expression guaranteed under *Article 19(1) (a) of the Indian Constitution.* In this sense, the Privacy and secrecy of such freedom or medium of exchange should be protected. Not only the Indian legislature, but also the Indian judiciary has taken initiatives in this respect. Next part of the study will concentrate on this area.

The factum of Telephone Tapping as an invasion of Privacy has been recognised by the Supreme Court of India in the case of ***People's Union for Civil Liberties v. Union of India***,[199] wherein *Section 5(2) of the Indian Telegraph Act, 1885* has been challenged as violating *Article 21 of the Indian Constitution.* In fact, in the instant case, government has tapped certain telephone conversations on the basis of the said impugned section without taking any prior caution and thereby has violated the Right to Privacy of the individual citizens. As such, the constitutional validity of the impugned section has been challenged as violating *Article 21 of the Indian Constitution.* In he said case, the opinion of the court has been delivered by ***Justice Kuldip Singh***, who has held as follows:-

> *"Telephone-Tapping is a serious invasion of an individual's Privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub-rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day".*[200]

The above-stated contention has been the main contention of the judgment, wherein it has been expressly held that, telephone-tapping has been and would always be the serious invasion of the Privacy of individual citizens. It would seriously hurt the Privacy of Communication. But, in the said case, *Justice Kuldip Singh* has gone too far to project so many things about the telephone-tapping as an invasion of Privacy and has also provided extensive guidelines for the prevention of

[199] AIR 1997 SC 568.
[200] www.judis.nic.in/supremecourtof india.pdf, p.1, visited on 4.9.2017.

such violation. In this respect, the relevant portions of the judgment are quoted hereunder:-

> *"We have, therefore, no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy; Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law.'*
>
> *The right to privacy – by itself – has not been identified under the constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern men's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to Privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India, unless it is permitted under the procedure established by law...*[201]
>
> *The Second Press Commission in paras 164, 165 and 166 of its report has commented on the 'tapping of telephones' as under:*
>
> *'Tapping of Telephones*
>
> *164. It is full in some quarters, not without reason, that not infrequently the Press in general and its editorial echelons in particular have to suffer tapping of telephone.*
>
> *165. Tapping of telephones is a serious invasion of privacy, is a variety of technological eavesdropping, conversation on the telephone are often of an intimate and confidential character. The relevant statute, i.e., Indian telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping. Tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy . . .'*[202]
>
> *We, therefore, order and direct as under:*
>
> *1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments...*
>
> *6. The authority which issued the order shall maintain the following records:*
>
> *(a) the intercepted communications,*
>
> *(b) the extent to which the material is disclosed,*
>
> *(c) the number of persons and their identity to whom any of the material is disclosed,*
>
> *(d) the extent to which the material is copied and*
>
> *(e) the number of copies made of any of the material".*[203]

[201] *Id at p.9.*
[202] *Id at p.13.*
[203] *Id at p.16.*

Therefore, the instant case has been a very important decision regarding the prevention of telephone-tapping and the protection of Privacy. No doubt, telephone-tapping has been a serious invasion of Privacy in the era of technological development, which also posed serious threats to Right to Privacy at the verge of invention of new techniques of interpretation of telephonic conversation. At this juncture, it has been a praiseworthy initiative of the Supreme Court of India to declare expressly telephone-tapping as a serious invasion of Right to privacy. In fact, in the instant case, the Supreme Court of India and the Law Commission have expressly recognised Right to Privacy as a fundamental right within the meaning of *Article 21 of the Indian Constitution.* Most important point has been the issuance of extensive guidelines by the Supreme Court of India for permitting telephone-tapping and for determining the procedure for telephone-tapping. In this respect, the Supreme Court of India has clearly played a role of judicial activist.

5.6.3.7. Privacy and Restitution of Conjugal Rights

Privacy and Restitution of Conjugal Rights, in the bare eye, may have no close connection between them, but looking at them from the legal and constitutional perspectives, may bring a different situation. Restitution of Conjugal Rights means the restoring or returning back one's conjugal rights to him or her. In fact, when one spouse leaves the other spouse without reasonable excuse, the decree of restitution of conjugal rights is generally, passed against the person leaving the other spouse. In this sense, it is a just opposite concept of Right to Privacy, because in this situation, the spouse leaving the other spouse has no freedom to live separately from the other spouse without any reasonable cause. As such, in a petition for restitution of conjugal rights, showing of the grounds for reasonable cause or excuse is obvious; otherwise, the decree of restitution of conjugal rights could not be prohibited. This provision is an important part of every matrimonial statute, because marriage is a social institution and the duty of the state is to protect the sanctity of marriage. Restitution of Conjugal Rights, in fact, is the provision for keeping the marriage tie intact and it is a provision, opposite to the provision of divorce. As such, every matrimonial statute in India is having such a provision, e.g. *the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the Divorce Act, 1869*. But, in few cases, the question has arisen that, this provision has been taking away the

freedom of the parties to marriage to live their lives according to their wishes. In this respect, it is taking away the personal liberty of the parties enshrined in *Article 21 of the Indian Constitution*. As such, the constitutional validity of this provision has been challenged before the Supreme Court of India as violating the freedom or Privacy of the parties. The Supreme Court has taken radical view in this respect. Next part of the study will concentrate on this issue.

5.6.3.7.1. T. Sareetha v. T. Venkata Subbaiah : Restitution of Conjugal Rights as violation of Personal Liberty

The question of violation of Right to Privacy of individual citizens by the enforcement of the provision of Restitution of Conjugal Rights has been raised in the case of ***T. Sareetha v. T. Venkata Subbaiah***,[204] wherein the *Andhra Pradesh High Court* has held the *Section 9 of the Hindu Marriage Act, 1955* as ultra vires for violating the *Article 14 and 21 of the Indian Constitution*. In the said case, *T. Sareetha*, a well known film actress of the South Indian cinema, has been married to *Venkata Subbaiah*, at an early age, when she has been in the high school. Soon after their marriage, they have been living separately since long five years. In the meantime, *Sareetha* has been busy with her studies and making the career in the film. After a long period of separation, *Venkata Subbaiah* has filed a petition for restitution of conjugal rights in order to bring *Sareetha* back and to live a family life by way of procreation of children as well as to lead the other necessities of a family life. But, *Sareetha* at that time, has been busy in building her career in the South Indian film and as such, she has challenged the said petition on the ground of violation of her personal liberty. The district court has passed the decree of restitution of conjugal rights against *Sareetha*, but she has challenged the said decree by filing an appeal in the *Andhra Pradesh High Court* on the ground of violation of her Right to Equality, Right to Privacy and Personal Liberty under *Articles 14 and 21 of the Indian Constitution*. The said High Court has upheld the prayer of *Sareetha* and has set aside the decree of the lower court.

In the said case, ***Justice Chaudhury*** has delivered the opinion of the Court, the relevant portion of which is quoted hereunder:-

> *"Applying these definitional aids to our discussion it cannot but be admitted that a decree for restitution of conjugal rights constitutes the*

[204] AIR 1983 AP 356.

> *grossest form of violation of an individual's right to Privacy. Applying Prof. Tribe's definition of right to privacy, it must be said that the decree for restitution of conjugal rights denies the woman her free choice whether when and how her body is to become the vehicle for the procreation of another human being. Applying Parker's definition, it must be said that a decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. Applying the tests of Gaiety and Bostwick, it must be said, that the woman loses her control over her most intimate decisions, clearly, therefore, the right to privacy guaranteed by Art. 21 of our Constitution is frequently violated by a decree of restitution of conjugal rights."*[205]

Therefore, in the said case, ***Justice Chaudhury*** has clearly highlighted the issue of violation of Right to Privacy of a woman on the ground of passing of a decree of restitution of conjugal rights against her, which would also take away the Right to Privacy of her procreation of children and there would be the chances of misuse of her body against her wishes, but at the wishes of the orthodox patriarchal society. The true spirit of the said judgment could be understood from the later part of the judgment, the relevant portion of which is quoted below:-

> *"Examining the validity of S.9 of the Act in the light of the above discussion, it should be held, that a Court decree enforcing restitution of conjugal right constitutes the starkest form of Government invasion of personal identity and individual's zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity. Above all, the decree for restitution of conjugal rights makes the unwilling victim's body a soulless and a joyless vehicle for bringing into existence of another human being. In other words, pregnancy would be foisted on her by the state and against her will. There can therefore be little doubt that such a law violates the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution."*[206]

Therefore, in the instant case, the *Andhra Pradesh High Court* has highlighted the Privacy and freedom of women to take decision regarding their matrimonial life and procreation of children as against the decree and enforcement of restitution of conjugal rights. It has contended that, the said provision would act as a barrier on the self-respect and personal liberty of a woman by using her body as a vehicle for procreation of children against her wishes. On the basis of this

[205] www.indiankanoon.org/doc/1987982.html, visited on 6.9.2017.
[206] *Supra Note 204 at p.370*.

contention, the instant case has struck down *Section 9 of the Hindu Marriage Act, 1955* as unconstitutional for violating the *Articles 14 and 21 of the Indian Constitution*.

5.6.3.7.2. Saroj Rani v. Sudarshan Kumar : Restitution of Conjugal Rights as Protecting Privacy and Sanctity of Marriage

But, at the same time, the *Delhi High Court* has passed an opposite judgment in the case of ***Harvinder Kaur v. Harminder Singh***,[207] wherein the *Section 9 of the Hindu Marriage Act, 1955* has been upheld and the provision of restitution of conjugal rights has been supported for protecting the sanctity of marriage. Therefore, both the cases have created confusion in the then legal scenario. Ultimately, the *Supreme Court of India* has come into the picture and has struck down the decision of the *T. Sareetha v. Venkata Subbaiah* by upholding the decision in the case of ***Saroj Rani v. Sudarshan Kumar***.[208] In the said case, the Supreme Court has established the constitutional validity of *Section 9 of the Hindu Marriage Act, 1955* by stating the essence of restitution of conjugal rights as protecting the Privacy and sanctity of marriage. It has contended that, the main purpose of restitution of conjugal rights, has been to preserve the sanctity of marriage and it would neither mean forcible sexual intercourse nor the forcible procreation of children. As such, establishment of love and affection among the spouses and their children in order to create a family, has been the original intention of restitution of conjugal rights, which could never be negated. In this sense, the basic intention has been the creation of a family, wherein the freedom or Privacy to be maintained in the home, should be based on the mutual understanding of the spouses. As the basis of the provision of restitution of conjugal rights has been a broad social purpose, therefore, it could not be violative of *Articles 14 and 21 of the Indian Constitution*. Hence, the Supreme Court has upheld the said provision and there it has again been proved that, Right to Privacy is a limited right and it could not be stretched too far to negate the broad social objectives or the public interest.

5.6.3.8. Privacy and the HIV/AIDS Infected People : Mr. "X" v. Hospital "Z"

In the present era, AIDS has posed a new problem before the courts regarding conjugal rights, Right to Privacy and Right to Information. The much

[207] AIR 1984 Delhi 66.
[208] AIR 1984 SC 1562.

appreciative step towards the protection of Right to Privacy of HIV infected persons has been the direction of the courts to suppress the identity of the AIDS patients in proceedings before the court, because after disclosure of name, they have to suffer from several embarrassments including bad publicity, social ostracisation or expelling from the community and consequential discriminations in every part of life. As such, the courts in India, have taken a timely decision to keep the names of the HIV/AIDS infected persons secret in the judicial proceedings. The appeal for suppression of identity before court has been made in the case of ***MX of Bombay India Inhabitant v. M/S ZY***.[209] In that case, the Division Bench has passed an order permitting the petitioner to prosecute by suppressing his identity and therefore, to be named as *"Mr. MX"* and has also directed that the respondent corporation to be named as *"ZY."*[210]

There have also been other dimensions of the Right to Privacy of HIV/AIDS infected persons. As for example, whether a husband could claim Privacy from his wife or vice versa, has been a question which has got a special attention in a number of cases. The Supreme Court of India has discussed in different cases, about the Right to Privacy of a prospective spouse suffering from AIDS and has ignored the fact, that the other prospective counterpart should have a right to seek information about the latter's disease, from the hospital where blood reports of the latter have been available.[211] In this respect, the most important case has been the ***Mr. "X" v. Hospital "Z"***[212] case, wherein a person has been found to be HIV positive and the information has been disseminated by the doctor to his prospective wife. The person has filed a suit against the doctor for breach of his Right to Privacy and has also claimed damages thereby. It has been held that, doctor-patient relationship, though basically a commercial relationship, but professionally it has been a matter of confidence and therefore, doctors should be normally and ethically, be bound to maintain confidentiality. In such a situation, public disclosure of even true private facts might amount to an invasion of the Right to Privacy, which might sometimes

[209] AIR 1997 Bom 406.
[210] *Supra Note 174 at pp.537-538.*
[211] *Id at p.538.*
[212] AIR 1999 SC 495.

lead to clash of one person's Right to Privacy with another person's Right to Information.[213]

Therefore, in the above case, Supreme Court of India and other High Courts have played an important role for suppressing the identity of HIV/AIDS infected persons in the judicial proceedings and in case of matrimonial matters. It has also brought about the issue of confidential as well as fiduciary relationship between doctor and patient, regarding non-disclosure of patient's medical information. Though these have raised a controversy between the upholding Right to Privacy against the Right to Information, but for the sake of the protection of Right to Privacy of the HIV/AIDS infected persons, these decisions have created a new dimension in the field of judicial interpretation of Right to Privacy in India.

5.6.3.9. Privacy and Medical Tests : Ms. 'X' v. Mr. 'Z'

Forcible medical tests have been held by the Supreme Court of India and different High Courts as violation of Right to Privacy of the person concerned. In fact, Privacy has been a part of personal liberty under *Article 21 of the Indian Constitution* and in fact, forcible medical test of a person in order to disclose private information regarding his body or health would amount to violation of Right to Privacy of the person concerned. The issue has been raised in various cases and has been decided by the courts accordingly. In this respect, one important case has been ***Ms. 'X' v. Mr. 'Z'***,[214] wherein *Ms. X* has filed a petition for dissolution of marriage on the ground of cruelty and adultery against *Mr. Z* under *Section 10 of the Divorce Act, 1869*. The said petition has been contested on the ground of counter allegations of similar nature. The main question has been whether *Ms. X* could resist the request of *Mr. Z* for directing the Pathology Department of the All India Institute of Medical Sciences, New Delhi to prepare a slide containing blood cells of *Mr. Z* and to order a DNA test with a view to ascertain, if *Mr. Z* would be the father of the foetus. *Ms. X* has claimed that, such an order would violate her constitutional Right to Privacy. Delhi High Court has held, in the instant case that, the Right to Privacy, though a part of a fundamental right forming part of Right to Life and Personal Liberty under *Article 21 of the Indian Constitution*, but it could not be an absolute right. The Right to Privacy might arise from contract or any other specific relationship, like

[213] *Supra Note 174 at p.539.*
[214] AIR 2002 Del 217.

matrimonial relationship, but when the Right to Privacy has become a part of a public document, in that event, a person concerned should not be allowed to insist that, any such test would violate his or her Right to Privacy.[215]

But, in the instant case, *Ms. X* has already given the blood samples in the All India Institute of Medical Sciences and as such, the matter has not been an issue of her Right to Privacy. Her activity would provide the assumption that, she has already consented to DNA test and therefore, now she would not be allowed to deny it on the ground of her violation of Right to Privacy. Once a consent, always a consent and as such, now she would not be allowed to deviate from it. It would seem that, she has already surrendered her Right to Privacy and therefore, she could not be allowed to claim it now. On the basis of such contention, the court has held that, the foetus has no longer been a part of her body and hence, she could not claim her Right to Privacy in that particular instance. It has been a good decision regarding the Privacy and Medical Test, wherein medical test has been allowed on the ground of already surrendered Right to Privacy. But, thereafter a case has also come, where the Supreme Court of India has denied the medical test of persons for the protection of their Right to Privacy. This contention has been held in the case of ***Sharda v. Dharmpal***,[216] wherein the Supreme Court has held that, routine DNA tests should not be conducted on a regular basis of the suspects in order to collect evidence of their crimes, because that would be a serious violation of their Right to Privacy. The court has finally ordered that, such activity could be allowed only when the court has granted such permission to do so on exceptional circumstances. Hence, the Right to Privacy has been upheld over the medical tests.

5.6.3.10. Privacy and Right to Information : Vijay Prakash v. Union of India

In the present social scenario, a conflict has come into being between the Right to Privacy and Right to Information in all the democratic civilized countries and India is not an exception to it. In India, Right to Privacy has been guaranteed as a fundamental right under *Article 21 of the Indian Constitution*, though has not been protected as a statutory right in express manner. On the contrary, Right to Information has been established as an express statutory right in India under the *Right to Information Act, 2005*. Moreover, it is also recognised as a fundamental

[215] *Supra Note 174 at pp.539-540.*
[216] AIR 2003 SC 3450.

right under *Article 19 of the Indian Constitution.* Recognition of both the rights, more or less in the same footing, has created a controversy in India regarding the superseding of one by another. In this respect, a balancing approach should be taken for the proper establishment and protection of both the rights. Indian judiciary has taken active initiatives for creating such balance. Next part of the study will concentrate on this issue of balancing approach taken by the Indian judiciary.

In the case of ***Vijay Prakash v. Union of India***,[217] the *Delhi High Court* has held that, service records and information of the Public Servants would amount to their private and personal information; as such, those informations could not be claimed to disclose for seeking Right to Information. Accordingly, it has been held that, those informations would amount to be the private informations of the Public Servants and disclosure of such informations would amount to serious violation of their Right to Privacy. As such, without stating the gross violation of public interest, such informations could not be disclosed for seeking the Right to Information. In the said case, the petitioner has challenged a decision of the *Central Information Commission (CIC)* under the *Right to Information Act, 2005* which has not allowed a disclosure of the information sought, under *Article 226 of the Indian Constitution.* In the instant case, the petitioner has been a retired Public Servant and his wife has been a Public Servant. When problems have been cropped up between them and they have sought for divorce, the petitioner *Vijay Prakash* has filed an application under the *Right to Information Act, 2005* for seeking information regarding his wife's service records, financial details and investments thereof from the employer of his wife. But, the Public Information Officer concerned has rejected the said application contending that, the information sought for, has been personal information under *Section 8(1) (j) of the Right to Information Act, 2005.* Against that rejection, the petitioner has preferred an appeal to the *Central Information Commissioner,* wherein it has again been rejected and being aggrieved by that rejection, he has filed the instant writ petition before the Delhi High Court. The petitioner has contended in the said writ petition that, those informations have been a part of his public right to information and rejection to provide him such informations

[217] AIR 2010 Delhi 7.

would amount to serious violation of his public interest. He has also contended that, there has been no question of any unwarranted invasion of Right to Privacy.

In the instant case, the opinion of the Court has been delivered by ***Justice Ravindra Bhat***, relevant portion of the said judgment is quoted hereunder:-

> *". . . Thus, if public access to the personal details such as identity particulars of public servants, i.e. details such as their dates of birth, personal identification numbers, or other personal information furnished to public agencies, is requested, the balancing exercise, necessarily dependant and evolving on case by case basis may take into account the following relevant considerations, i.e.*
> *i) whether the information is deemed to comprise the individual's private details, unrelated to his position in the organization, and,*
> *ii) whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;*
> *iii) whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources . . .*
>
> *The nature of restriction on the right to privacy is therefore of a different order; in the case of private individuals, the degree protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. Therefore, if an important value in public disclosure of personal information is demonstrated, in the particular facts of a case, the protection afforded by Section 8(1) (j) may not be available; in such case, the information officer can proceed to the next step of issuing notice to the concerned public official, as a "third party" and consider his views on why there should be no disclosure. The onus of showing that disclosure should be made, is upon the individual asserting it; he cannot merely say that as the information relates to a public official, there is a public interest element ..."*[218]

Therefore, the instant case has been a good example of recognising Right to Privacy over the Right to Information. It has been held therein that, the service records and other informations relating to the service of the Public Servants would amount to their personal information. Those informations could never be claimed as public informations and as such, would not come within the purview of Right to Information. Moreover, the reasons stated in the said case for claiming such information in the public interest, have also been nullified by the learned justice. In this sense, this case has been an exemplary evidence for upholding Right to Privacy over the Right to Information in the case of protection of personal information. This

[218] *Id at pp.13-15.*

provision of protection of personal information has not been a new concept and has already been established as an exception under *Section 8(1) (j) of the Right to Information Act, 2005.* What the *Delhi High Court* has created, has just been clarified it in clear manner. As the Right to Privacy has been a limited right and could be curtailed in the public interest, Right to Information has also been a limited right and could not be sought, when the information would be personal information. In this sense, Right to Information can supersede Right to Privacy in the public interest and Right to Privacy can supersede Right to Information, when the information is personal information. Both the rights are of equal importance and rest in the same footing, because one is a fundamental right under *Article 19 of the Indian Constitution* and the other under *Article 21 of the Indian Constitution.* Hence, the dichotomy between them cannot be easily solved and a balancing approach between them is expected, which should be established for the peaceful co-existence of a democratic society in India.

The fundamental Right to Privacy under the Constitution of India has been established in the strong footing in India with the help of the Indian judiciary. In fact, Right to Privacy has not been declared as a fundamental right in the Indian Constitution. But, the various decisions of the Supreme Court of India and a number of High Courts have established this right as a personal liberty under *Article 21 of the Indian Constitution,* without the protection of which, the guarantee of personal liberty would remain incomplete. In this respect, Indian judiciary has played a great role for protection of Right to Privacy in India in the absence of express statutory protection. Moreover, the Indian judiciary has tried to fix the boundary upto which the protection of Right to Privacy could be claimed and beyond which, stretching of this right would be unreasonable. In the sum-total, the role of Indian judiciary, in this respect, could be called as all pervasive.

5.7. Role of Judiciary in U.S.A., U.K. and India : A Comparative Analysis of the Privacy Protection Initiatives

In fact, there is no direct Constitutional protection of Right to Privacy under the written Constitutions of U.S.A. and India. In the absence of written Constitution, the situation of U.K. is worsening. At this juncture, the Supreme Courts of U.S.A. and India have taken steps for protection of various aspects of Right to Privacy. The

courts have interpreted the Constitutional provisions of Bill of Rights or Fundamental Rights in liberal manner in order to incorporate within it, the protection of Right to Privacy. As such, various existing provisions of the U.S. or Indian Constitution have been expanded to include various dimensions of Right to Privacy within themselves. Another problem in this respect is the absence of adequate Privacy protection legislations in all the three countries. Due to this reason, judicial activism and judicial creativity can be the only recourse for protection of Privacy therein. In this respect also, the Supreme Courts of U.S.A. and India and the Human Rights Court of U.K. have taken active steps. Without the judicial intervention into the matter, the protections of various aspects of Right to Privacy have not been possible in these countries.

Though Indian society is an open society and the need for Privacy has not been realised therein since the very beginning, but it is already seen that, there has been the existence of Right to Privacy since the ancient period. This example produces the evidence of existence of Right to Privacy in Indian society parallely with the western society. In this sense, the jurists who say that, there has been no existence of Right to Privacy in India and it is the product of western culture only, are found to provide wrong interpretation in this respect. Moreover, development of this right with the hands of judiciary has come into being in India much earlier than U.S.A. Though the *Prince Albert v. Strange* case of U.K. has been earlier than the *Nuth Mull v. Zuka-Oollah Beg* case in India, but still it can be said that, judicial development of Right to Privacy has been earlier in India than U.K., because the *Prince Albert v. Strange* case has been based on the law of confidence. In this sense, practically judicial development of Right to Privacy has been started in U.K. by following the U.S. Supreme Court decision after *1890* or after the publication of the *Warren-Brandeis* article therein. As the *Nuth Mull v. Zuka-Oollah Beg* case has come into being prior to that in *1855*, therefore, it is assumed that, judicial development of Right to Privacy has been started in India prior to such development in U.S.A. and U.K.

Moreover, enactment of various legislations in all the three countries has given rise to new controversies relating to the protection of Right to Privacy. Few examples of those legislations are the *Freedom of Information Act, 1966 in U.S.A.,*

Freedom of Information Act, 2000 in U.K. as well as the Information Technology Act, 2000 and the Right to Information Act, 2005 in India. More or less, the purview of all these Acts are similar, because all these legislations provide public right of access to government records. Though the names of some legislations are freedom of information and some are right to information, but the practical functions of all these legislations are more or less, same. These laws have been enacted to provide the Right to Know to the general public regarding the governmental activities. As such, these laws provide the Freedom of Information or the Right to Information to the general public about the governmental secrets in order to maintain transparency and public accountability of the government. But, enactment of these laws has given rise to certain controversies relating to the protection of Right to Privacy, because governmental records contain personal information of the individual citizens also. As such, disclosure of those informations to the other members of general public brings the question of violation of Privacy of personal informations of the said individuals. In this sense, new controversy has been raised regarding the superiority of both the Right to Privacy and the Right to Information against one another. Hence, the enactments of new laws are giving birth to new controversies to everyday, which can only be solved by the judicial interpretation and not otherwise.

More specifically, the Comparative Analysis of Judicial Activism of Right to Privacy in U.S.A., U.K. and India can be presented in the following manner:-

(i) In comparison to U.S.A., Right to Privacy has not been much developed in U.K., because there has been the attitude of governmental control of private lives and reluctance to adopt new things found since the olden days. On the contrary, India has followed the path of U.S.A.

(ii) U.S.A. has been freed from British Colonialism long ago and since then; it has tried to develop its own legal system based on new liberal thinking. But, U.K. has remained conservative since long time. India has been freed from British Colonialism later on and therefore, its legal system is still based on the English Legal System, inspite of following the path of U.S.A.

(iii) The judges of the U.S. Supreme Court have been much more modern and liberal to accept new legal principles or to give new shape to age-old Common Law principles by way of judicial interpretation, whereas, U.K. Courts have always

shown their orthodox attitude. In this respect, Supreme Court of India has followed the path of U.S. Supreme Court.

(iv) U.S. judiciary has upheld the civil or individual liberty above all, which has established the protection of Right to Privacy therein in the strong footing. But, U.K. judiciary has always shown the state control over the individual or civil liberties, which has been the main reason for underdevelopment of Right to Privacy therein. Indian Judiciary, on the contrary, has followed the U.S. judicial precedents in order to establish Right to Privacy in full-proof manner.

(v) Presence of a strong written Constitution and Bill of Rights has helped the growth of Right to Privacy in U.S.A., whereas, in the absence of both these elements, this right has not flourished in U.K. Again, presence of written Constitution and Fundamental Rights has led to the growth of Right to Privacy in India.

(vi) The relationship between Privacy and law of confidence has been first established in *Prince Albert v. Strange, 1849* case in U.K., on which the foundation of elaborate edifice of the law of Privacy in U.S.A. has been based. But, in India, the first case on Right to Privacy has been the *Nuth Mull v. Zuka-Oollah Beg, 1855* case.

(vii) The decision of *Prince Albert v. Strange, 1849* case in U.K. has encouraged the U.S. lawyers *Warren-Brandeis* to write their article on Right to Privacy. But, the Indian judiciary has its own precedent of the *Nuth Mull v. Zuka-Oollah Beg, 1855* case.

(viii) In this sense, the English law has been enriched in the roots, but has not been developed accordingly like the American law to suit the needs of the changing social scenario. Similarly, Indian law has been enriched in the ancient period, but has been deteriorated in the modern period.

(ix) U.S. judiciary has tried to provide concrete protection of Right to Privacy under various amendments of the U.S. Constitution. But, the U.K. judiciary has always tried to negate Right to Privacy by providing remedy on the ground of breach of confidence in Privacy violation cases. However, Indian judiciary has followed the path of U.S. judiciary in order to provide constitutional protection of Right to Privacy.

(x) U.K. is lagging far behind U.S.A. regarding the case by case development of Right to Privacy, because what U.S.A. has done in the *20th Century*, U.K. is doing in the *21st Century*. India has also started such initiative in the *20th Century*, but is still lagging far behind U.S.A., because of its lack of awareness and social scenario regarding Privacy protection laws.

(xi) The whole development process of Privacy protection has been made under the auspices of judiciary in India and no such Privacy Act has been enacted herein like U.S.A. U.K. is lacking both the legislative and judicial protection of Right to Privacy.

(xii) The existence of *Nuth Mull v. Zuka-Oollah Beg, 1855* case has not only shown presence of Right to Privacy in India earlier than U.S.A., but also the following of English principle of violation of ancient light. This principle has also been followed in U.S.A. later on.

(xiii) Search and seizure has been an important issue regarding the violation of Right to Privacy under the U.S. Constitution, which has been developed since the *Boyd v. United States, 1886* case. Indian judiciary has tried to establish Right to Privacy in the same line as has been reflected in the *M.P.Sharma v. Satish Chandra, 1954* case. U.K. judiciary has followed a different path.

(xiv) U.K. judiciary has provided remedy for violation of Privacy on the ground of trespass, even in the recent period, in the case of *Kaye v. Robertson, 1991*. On the contrary, both U.S.A. and India have concentrated on the constitutional development of Right to Privacy.

(xv) Even after the passing of the *Human Rights Act, 1998*, U.K. judiciary has shown its reluctance to consider Right to Privacy as a human right. *Douglas v. Hello!, 2001* is the reflection of such contention. In the meantime, U.S. and Indian judiciary have developed a general Constitutional Right to Privacy in the cases of *Griswold v. Connecticut, 1965 and Kharak Singh v. State of U.P., 1963* respectively.

(xvi) Both U.S. and Indian judiciary have recognised Right to Privacy as a Fundamental Right, but U.K. has never recognised it; rather it has recognised Right to respect for Private Life.

The comparative analysis of judicial activism of Right to Privacy in U.S.A., U.K. and India is not limited to the aforesaid discussion. It produces ample evidence

to show that, Indian judge-made law of Privacy has been enriched with the U.K. precedents in the pre-independence era and U.S. precedents in the post-independence era. It has become a boon for the Indian law to be developed in the light of both the precedents. Inspite of that, it is very unfortunate to note that, Indian law of Privacy has not been adequately developed till today. Moreover, enactment of Information Technology Law and inadequacy of Press Laws have created many serious problems in the countries of U.S.A., U.K. and India, which can only be solved by the judicial interpretation or judicial creativity. In this sense, active judicial intervention for protection of Right to Privacy in all the three countries is the need of the hour.

5.8. Sum-Up

The role of judiciary enhancing Right to Privacy in U.S.A., U.K. and India has shown that, U.S.A. is the first and foremost country, which has recognised Right to Privacy in most scientific manner with the help of U.S. Judiciary. It is the most advanced country in the world with respect to the judicial development and protection of Right to Privacy. In comparison to U.S.A., U.K. is lagging far behind in the field of Privacy protection, because it has recognised it only under the law of confidence and not otherwise. However, as regards judicial protection of Right to Privacy, U.K. is totally based on the case by case development of this right. But, it has not recognised it as a fundamental right, because it has no written constitution or a Bill of Rights unlike U.S.A. From this perspective, India is the follower of U.S.A. and has developed Right to Privacy as a fundamental right by recognising it as a part of personal liberty within the meaning of *Article 21 of the Indian Constitution* with the help of Indian judiciary. India has started its initiative long after U.S.A. and in this respect; India is lagging far behind U.S.A. But, activeness is far better than inactiveness and as such, the initiative taken by India for protection of Right to Privacy by way of judicial development is praiseworthy.

This has been the whole outcome of *Chapter-V,* which can be briefly summed-up in the following manner:-

(1) Positive aspect of Privacy is always used for the benefit of the mankind and as such, it is related to the use of seclusion or solitude for some creativity beneficial for the mankind.

(2) Negative aspect of Privacy is always used for the destruction of the mankind and therefore, it is related to the use of seclusion or solitude for some creativity devastating for the mankind.

(3) Privacy may be used for both good and evil purposes.

(4) Whether a particular society would use Privacy for good purpose or evil purpose that depends upon the tastes and habits of the people living therein as well as the nature and circumstances of each case.

(5) Jurists have supported the enjoyment of positive aspects of Privacy, beneficial for the mankind as a whole and have rejected the negative aspects of Privacy destructive to the mankind in general.

(6) On the basis of this bottomline of the Privacy Principle, the judiciary in U.S.A., U.K. and India, has pronounced judgments for protection of Right to Privacy, which has been the main focus of *Chapter-V***.**

(7) The role of judiciary in a democratic society is to bring social change with the help of judicial creativity and law reform.

(8) Judicial activism and judicial creativity have been the main recourse for protection of Right to Privacy in U.S.A., U.K. and India.

(9) In this respect, the Supreme Courts of U.S.A. and India as well as the Human Rights Courts of U.K. have taken active steps.

(10) Without the judicial intervention into the matter, the protections of various aspects of Right to Privacy have not been possible in these countries.

(11) Since the publication of the *Warren-Brandeis* article in U.S.A., the U.S. Supreme Court has taken active steps for protection of Right to Privacy therein.

(12) Since the decision of the *Prince Albert v. Strange* case in U.K., everybody has felt the necessity of Privacy protection therein and U.K. judiciary has started to take initiatives in this respect.

(13) The Indian judiciary has taken active steps for protection of Right to Privacy both in the pre-independence and post-independence era.

(14) In the pre-independence era, *Nuth Mull v. Zuka-Oollah Beg* case is noteworthy, which has established the Customary Right to Privacy in India.

(15) In the post-independence era, *Kharak Singh v. State of U.P.* case is noteworthy, because it has established the Constitutional Right to Privacy in India and has granted it the status of fundamental right.

(16) Regarding the judicial recognition of Right to Privacy, U.S.A. is the forerunner, which has started its initiative since the *Boyd v. United States* case in *1886.*

(17) But, Right to Privacy has come out as a comprehensive right in U.S.A. in the *Griswold v. Connecticut* case in *1965.*

(18) Judicial development of Right to Privacy in U.S.A. has touched various components of Privacy, like *Fourth Amendment prohibition against unlawful searches and seizures, use of contraceptives, Right to Abortion, First Amendment protection of Freedom of Speech and Press, Marriage, Procreation, Children and Family Relationship, Information Technology, Homosexual relationship etc.*

(19) Judicial development of Right to Privacy in U.K., though has been started since *1849* from the *Prince Albert v. Strange* case, but has actually been flourished after the establishment of the *European Court of Human Rights* and the enactment of the *Human Rights Act, 1998.*

(20) The U.K. Courts have touched various components of Privacy, like *Breach of Confidence, Trespass, Human Rights, CCTV Footage, Freedom of Expression and Information Technology.*

(21) Apart from *Prince Albert v. Strange, Kaye v. Robertson, 1991* is an important English case, which has established Right to Privacy in U.K. as against trespass.

(22) In India, though the Customary Right to Privacy has been established by the *Nuth Mull v. Zuka-Oollah Beg* case in *1855,* but it has been rested in the strong footing in the case of *Gokal Prasad v. Radho in 1888.*

(23) A number of cases have also been decided on the issue of Privacy and the Purdah System in India, among which *Nihal Chand v. Bhagwan Dei, 1935* is noteworthy.

(24) In the post-independence era, Fundamental Right to Privacy has been established as a personal liberty with the help of cases like *Kharak Singh v. State of U.P. in 1963, Govind v. State of M.P. in 1975, State of Maharashtra v. Madhukar Narayan Mardikar in 1991, R. Rajagopal v. State of Tamil Nadu in 1995, People's Union for Civil Liberties v. Union of India in 1997* and so on.

(25) The Indian judiciary has also touched various components of Privacy for its judicial development, like *Search and Seizure, Police Surveillance, Dignity of Women, Natural Modesty of Women, Defamation and Freedom of Expression, Telephone-Tapping, Restitution of Conjugal Rights, HIV/AIDS Infected People, Medical Tests and Right to Information.*

(26) The comparative analysis of judicial activism of U.S.A., U.K. and India has projected the idea that, Indian judiciary has been enriched with both the U.S. and U.K. judicial precedents regarding the protection of Right to Privacy, still India is lagging far behind the other two countries on the issue.

Last but not the least, Indian judiciary has followed the path of U.S. judiciary for development of Right to Privacy in India, but has started such development long after the U.S. developmental process. In this sense, Indian judicial development of Right to Privacy is still in the process of development and has a long way to go. After conducting a comprehensive study of judicial enhancement of Right to Privacy in U.S.A., U.K. and India, it can be said that, the process is not a static; rather a dynamic process in all the countries and as such, there is always a scope for future betterment in all the three countries regarding the judicial protection of Right to Privacy.