

**RIGHT TO PRIVACY AND ITS CURRENT
TRENDS : A COMPARATIVE STUDY UNDER
THE LEGAL SYSTEMS OF U.S.A.,
U.K. AND INDIA**

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DECLARATION

I declare that the thesis entitled "RIGHT TO PRIVACY AND ITS CURRENT TRENDS : A COMPARATIVE STUDY UNDER THE LEGAL SYSTEMS OF U.S.A., U.K. AND INDIA" has been prepared by me under the guidance of Dr. Rathin Bandyopadhyay, Professor of Department of Law, University of North Bengal. No part of this thesis has formed the basis for the award of any degree or fellowship previously.

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CERTIFICATE

I certify that Ms. Sangeeta Chatterjee has prepared the thesis entitled "RIGHT TO PRIVACY AND ITS CURRENT TRENDS: A COMPARATIVE STUDY UNDER THE LEGAL SYSTEMS OF U.S.A., U.K. AND INDIA", for the award of PhD degree of the University of North Bengal, under my guidance. She has fulfilled all the requirements under the UGC Regulations on Minimum Standards and Procedure for the award Ph.D. Degree, Regulations 2009. Now her Ph.D. thesis is ready for submission. It is an original piece of work and it has not been submitted anywhere for the award of any degree. It may hence be submitted for evaluation before the examiners for the award of the degree of Doctor of Philosophy (Law) of the University of North Bengal. She has carried out the work at the Department of Law, University of North Bengal.

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ABSTRACT

The idea of Privacy, which was originated in the animal society, has been adopted in the primitive human society, where the traces of it were first found. According to different Anthropological studies, the idea of Privacy varied in respect of different primitive societies. With the evolution of primitive society to ancient society and then gradually to modern society, the idea of Privacy has been developed to get its present shape. The root of Privacy and its protection is embedded in the history of human civilization, which is characterized specially by transformation of primitive society into modern society. The social transformation has increased both the physical and psychological opportunities for Privacy and also proved to be fruitful for conversion of these opportunities into choices of values in the context of socio-political reality. Social transformation is the responsible factor for changing nature of Privacy as well as the changing character of Privacy violations from primitive societies to modern societies.

Privacy was never an alien in India; rather it was embedded in the deep rooted custom of the rich cultural heritage of India. The development of Right to Privacy in U.S.A. in the modern period has been based on the Warren-Brandeis article and the search and seizure cases under Fourth Amendment of the U.S. Constitution, the final result of which is the Privacy Act, 1974. U.K. had no law of Privacy; instead there was the law of breach of confidence. With the help of various legal developments, the Younger Committee Report was submitted in 1972, the final outcome of which is the Data Protection Act, 1998. Though India is lagging far behind U.K. and U.S.A. for protection of Privacy in the modern period, but it is also enriched with various legislative and judicial developments, which ultimately has given rise to the Right to Privacy Bill, 2011, now known as Privacy Bill, 2014.

Right to Privacy is an important right under the Right to Life and Personal Liberty as also an integral part of Human Rights Law which is a matter of concern for everybody in the contemporary social scenario. Privacy does not only mean leading an isolated life, but specifically it denotes freedom from unauthorized and unwarranted interference into one's private life.

According to the Nordic Conference of Jurists on the Right to Respect for Privacy, 1967, violation of individual Right to Privacy means, the interference with one's private, family and home life, physical or mental integrity or moral or intellectual freedom, the attacks on honour or reputation, being placed in a false light, the disclosure of irrelevant, embarrassing facts relating to private life, the use of name, identity or likeness, the interference with correspondence, the spying, prying, watching and besetting, misuse of communication, written or oral and the disclosure of information given or received by one in circumstances of professional confidence.

Therefore, the violation of the Right to Privacy includes violation of basic human rights of family, marriages, child-bearing, motherhood, education, information, reputation, personal liberty and many more, all of which are in the

urgent need of protection in the contemporary social scenario. To make it more elaborate, it can be said that, the specific instances of violation of Right to Privacy are unauthorized and unreasonable telephone-tapping, e-mail scanning, narcotic analysis, polygraph test and brain mapping, sting operation, biometric enabled national ID Cards, the role of media in violating the Right to Privacy of public personalities by taking their photographs without permission and unauthorized interference into their private life, growing number of the heinous crime of female foeticide as the violation of Right to Privacy of a woman, making of counter-terrorism laws without concerning about the violation of Right to Privacy of the citizens of a country. All of these rights are included in the basic human rights of individuals and as such the violation of Right to Privacy amounts to violation of basic human rights of individuals.

The problem area in this field or sphere of study is that the Right to Privacy has not been adequately dealt with by the legislatures of different countries. The present legislations that deal with the protection of the Right to Privacy do not in fact secure this right to the greatest extent. Since protection of the Human Right to Privacy is an issue that attracts global norms transcending national boundary, therefore, the present study has taken into account the development of the law relating to the Right to Privacy in the international and national field as well as the part played by the judiciary, as far as the protection and enhancement of these rights are concerned.

The objective of the present study is to understand and summarize the various emerging dimensions of Right to Privacy and also to address the socio economic challenges confronting the protection of Right to Privacy in U.S.A., U.K. and India. In a nutshell, the objectives of the study are to trace the historical background of the Right to Privacy, to make a comparative study and to examine the various aspects of Right to Privacy in U.S.A., U.K. and India, to examine the International, Regional and National Laws on Right to Privacy throughout the world, to review the role of the Judiciary in U.S.A., U.K. and India on the protection of Privacy rights, to evaluate the Outstanding Facets, Dimensions and Current Trends of Right to Privacy and to remove the conflict between Right to Information and Privacy. The study also aims at providing certain remedial measures and suggestions to prevent the violation of Right to Privacy.

The purpose of this study is also to review the existing laws relating to Privacy, to make the general people aware of their Privacy rights, to evaluate the concept of Privacy in Cyberspace and to find out the need for creating a separate fundamental Right to Privacy after Article 21 of the Indian Constitution and to analyze the merits and demerits of the Right to Privacy Bill 2011, now known as the Privacy Bill, 2014.

PREFACE

The idea of Privacy centres around the concept of ‘private space,’ therefore, the amount of private space which everyone should enjoy freely and the time limit of outside interference over it, will be the scope, ambit and extent of Privacy. On the contrary, significance of Privacy means, the importance of Privacy in a civilized society. Privacy also has various effects. The effects of Privacy means, prevention of unwanted publicity and interference into human life to protect human dignity by recognition and enforcement of Right to Privacy in a complex social structure. Over and above, Privacy has to perform different functions in a civilized society. According to Prof. Alan F. Westin, the Functions of Individual Privacy are Personal Autonomy, Emotional Release, Self Evaluation and Limited and Protected Communication. The functions of Privacy play an important role to protect personal autonomy by preventing unlimited and unprotected communication of information, which ultimately protect the right to live with human dignity in a modern democratic society.

In the international human rights law, ‘Privacy’ is clearly and unambiguously established as one of the basic human rights in 1948 with the proclamation of the Universal Declaration of Human Rights. The importance of Privacy as a human right and its need for legal protection has been given in the various other international instruments, like the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. In the regional level, there are also various human rights Conventions, which deal with the protection of Right to Privacy. Important conventions among them are the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the American Convention on Human Rights, 1969, the African Charter on Human Rights and People’s Rights, 1981 and the Asia-Pacific Privacy Charter, 2003.

A Comparative Analysis of the Privacy protection laws of U.S.A., U.K. and India projects the idea that, though India has started protecting Right to Privacy prior to U.S.A. and U.K., but in the present social scenario, it is lagging far behind the other two countries, inspite of having strong Customary Laws of Privacy since the ancient period. 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.

Legislations and judicial decisions on outstanding facets have created many new debates on Right to Privacy in the contemporary social scenario. Such debates have occurred in the areas of Freedom of Information, Right to Information and Right to Privacy, Privacy and Biometric Enabled National ID Cards, Privacy versus Sting Operation, Privacy versus Narco-Analysis, Polygraph Test and Brain-Mapping as well as the Privacy versus LGBT Rights. Right to Privacy is not an absolute right

and limitations can be imposed on it on the grounds of Public Interest, Public Figure, Public Record, Public Disclosure, Consent, Privilege, Newsworthiness, Freedom of Information or Right to Information and Administration of Criminal Justice. Limitations on Right to Privacy can also be imposed on the grounds specified under Article 19(2) of the Indian Constitution.

Privacy is not a well-defined right in U.S.A., U.K. and India. Therefore, at first it should be properly introduced as a well-defined right in the three countries removing all the vagueness, because without defining a right in concrete sense, its protection cannot be possible in full-fledged manner. Express Constitutional protection of Right to Privacy is unavailable in U.S.A., U.K. and India, which is an impediment for its enforcement. Therefore, both U.S.A. and India should incorporate Right to Privacy as a Fundamental Right under their Constitutions. Time has come for U.K. to think seriously for adopting a written constitution, without which no human rights including Right to Privacy can be protected and guaranteed. Constitutional protection of Right to Privacy is not enough, statutory protection of it is also required. As such, a full-proof statute on Right to Privacy should be enacted. In this respect, the long standing Privacy Bill, 2014 should be passed into an Act, otherwise strong punishment cannot be provided in the cases of Privacy violation.

Now I would like to take the opportunity to express my gratitude towards everyone for carrying out this extensive research work. With a deep sense of reverence and respect firstly, I would like to thank almighty God for his blessings to help me complete the Thesis.

At the very outset I would like to thank Dr. Rathin Bandopadhyay, Professor, Department of Law and Head, Department of Management, University of North Bengal, my Supervisor for this work, without whose constant zeal and enthusiasm this work would ever be complete. It was more than a pleasure to work under the able supervisions of a multi faceted personality like him. In fact words fall short to express my gratitude towards him; all that can be said is, he was the perfect guide every scholar would yearn for.

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Dated:

Sangeeta Chatterjee

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TABLE OF ABBREVIATIONS

ACHR	:	American Convention on Human Rights
ACHR	:	Arab Charter on Human Rights
ACHRPR	:	African Charter on Human Rights and People's Rights
AHRC	:	Asian Human Rights Charter
AHRD	:	ASEAN Human Rights Declaration
A.I.R.	:	All India Reporter
A.P.	:	Andhra Pradesh
APEC	:	Asia-Pacific Economic Co-operation
APPC	:	Asia-Pacific Privacy Charter
ASEAN	:	Association of South East Asian Nations
All E.R.	:	All England Reports
All.	:	Allahabad
BBC	:	British Broadcasting Corporation
BD	:	Bangkok Declaration
Bom.	:	Bombay
CAN-SPAM	:	Controlling the Assault of Non-Solicited Pornography and Marketing Act
CCTV	:	Closed-Circuit Television
CDHRI	:	Cairo Declaration on Human Rights in Islam
CECPIAPPD	:	Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
CEDAW	:	Convention on the Elimination of All Forms of Discrimination against Women
CEP	:	Controller, Editorial Policy
C.L.R.	:	Calcutta Law Reports
COPPA	:	Children's Online Privacy Protection Act
CPIO	:	Central Public Information Officer
CRC	:	Convention on the Rights of the Child
C.U.L.R.	:	Cochin University Law Review
Cal.	:	Calcutta
Ch.	:	Chancery
Ch.D.	:	Chancery Division
Col. L.R.	:	Columbia Law Review
Cornell L.R.	:	Cornell Law Review
Cr.P.C.	:	Code of Criminal Procedure
DPSP	:	Directive Principles of State Policy
Del.	:	Delhi
Del. L.R.	:	Delhi Law Review
ECHRFF	:	European Convention on Human Rights and Fundamental Freedoms
ECPA	:	Electronic Communications Privacy Act
ECtHR	:	European Court of Human Rights

EEC	:	European Economic Community
EU	:	European Union
ed.	:	Editor
Edn.	:	Edition
et. al.	:	and others
FD	:	Fundamental Duties
FERPA	:	Family Education Rights and Privacy Act
FR	:	Fundamental Rights
FTC	:	Federal Trade Commission
GLBA	:	Gramm-Leach-Bliley Act
Govt.	:	Government
Guj	:	Gujrat
H.C.R.	:	High Court Reports
HIPAA	:	Health Insurance Portability and Accountability Act
H.L.	:	House of Lords
Harv. L.R.	:	Harvard Law Review
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
ICJ	:	International Commission of Jurists
I.L.R.	:	Indian Law Reports
I.P.C.	:	Indian Penal Code
IT	:	Information Technology
Ibid.	:	Ibidem (in the same place)
Id.	:	Idem (the same)
J.I.L.I.	:	Journal of Indian Law Institute
J.K.	:	Jammu and Kashmir
Jour.	:	Journal
K.B.	:	King's Bench
Ker.	:	Kerala
LGBT	:	Lesbian, Gay, Bisexual and Transgender
M.P.	:	Madhya Pradesh
Mad.	:	Madras
Mass	:	Massachusetts
NCCL	:	National Council for Civil Liberties
NCIPA	:	Neighbourhood Children's Internet Protection Act
NCJRRP	:	Nordic Conference of Jurists on the Right to Respect for Privacy
NCT	:	National Capital Territory
N.O.C.	:	Notes of Cases
Ny. Univ. L.R.	:	New York University Law Review
OECD	:	Organization for Economic Co-operation and Development
OGGPPTFPD	:	OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data
Op. cit.	:	Opera citato (Already cited)
PII	:	Personally Identifiable Information
PIO	:	Public Information Officer

Pat.	:	Patna
Pub. Law	:	Public Law
Punj.	:	Punjab
Q.B.	:	Queen's Bench
RIP	:	Regulation of Investigatory Powers Act
RTI	:	Right to Information
Raj.	:	Rajasthan
SAARC	:	South Asian Association for Regional Cooperation
S.C.	:	Supreme Court
S.C.C.	:	Supreme Court Cases
S.C.J.	:	Supreme Court Journal
S.C.R.	:	Supreme Court Reports
SPIO	:	State Public Information Officer
Supl.	:	Supplementary
Supra	:	Above
UDHR	:	Universal Declaration of Human Rights
UIDAI	:	Unique Identification Authority of India
UIDHR	:	Universal Islamic Declaration of Human Rights
U.K.	:	United Kingdom
UNESCO	:	United Nations Educational, Scientific and Cultural Organization
UNGRCPDF	:	United Nations Guidelines for the Regulation of Computerized Personal Data Files
U.S.	:	United States
U.S.A.	:	United States of America
USA PATRIOT	:	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
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INTRODUCTION

“Our interest in privacy ... is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are subject of others’ attention ... They are related to the functions privacy has in our lives: the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society ... ”¹

The term ‘Privacy’ is derived from the Latin word ‘privatus’ which means separated from the rest. Though it is a variable concept and varies with cultural or social context, but actually it means, the right to be left alone. The need for Privacy is to create a balance between individual and social interests, which is equally applicable to past, present and future society. In this sense, the necessity of Privacy was found in the dawn of human civilization. The idea of Privacy is as old as Biblical periods. Also the growth and expansion of Privacy varied according to the variation in different stages of human civilization. Hence, the description of origin and history of Right to Privacy should proceed from the ancient period to the modern period. In fact, the idea of Privacy was originated in the animal society and gradually it has been incorporated into the human society.

The idea of Privacy, which was originated in the animal society, has been adopted in the primitive human society, where the traces of it were first found. According to different Anthropological studies, the idea of Privacy varied in respect of different primitive societies. With the evolution of primitive society to ancient society and then gradually to modern society, the idea of Privacy has been developed to get its present shape. The root of Privacy and its protection is embedded in the history of human civilization, which is characterized specially by transformation of primitive society into modern society. The social transformation has increased both the physical and psychological opportunities for Privacy and also proved to be fruitful for conversion of these opportunities into choices of values in the context of socio-political reality. Social transformation is the responsible factor for changing nature of Privacy as well as the changing character of Privacy violations from primitive societies to modern societies.

¹ Ruth Gavison, “*Privacy and the Limits of Law*”, Yale Law Journal, Vol. 89, 1980, p.421.

The comparison of 'Privacy' between primitive and modern societies, establishes that, whatever may be the nature of society, primitive or modern, the need for Privacy or seclusion would always be there, for fulfilment of physical and psychological desires of man. The history of Privacy in the Western society starts from the evolution of Western political and social institutions since the time of Greek and Roman civilizations. The history of Privacy in modern democratic society is characterized by its political system, which plays the fundamental role for shaping its balance of Privacy. The comparative analysis of Privacy in different Western societies and cultures show that, Privacy is not a static, rather a dynamic concept. For creating an ideal modern society having the Right to Privacy, there should be a balance between the basic postulates of Individual Privacy, called Solitude, Intimacy, Anonymity and Reserve.

The origin of Privacy in ancient India was culminated into the term 'Avarana', in the idea of Meditation in Vedas and Upanishads and embedded in the idea of 'Dharma'. The history of Privacy in India was divided into the Hindu and Muslim periods, both of which were enriched with the rules and regulations of Privacy. Privacy was never an alien in India; rather it was embedded in the deep rooted custom of the rich cultural heritage of India. The development of Right to Privacy in U.S.A. in the modern period has been based on the Warren-Brandeis article and the search and seizure cases under Fourth Amendment of the U.S. Constitution, the final result of which is the Privacy Act, 1974. U.K. had no law of Privacy; instead there was the law of breach of confidence. With the help of various legal developments, the Younger Committee Report was submitted in 1972, the final outcome of which is the Data Protection Act, 1998. Though India is lagging far behind U.K. and U.S.A. for protection of Privacy in the modern period, but it is also enriched with various legislative and judicial developments, which ultimately has given rise to the Right to Privacy Bill, 2011, now known as Privacy Bill, 2014.

Right to Privacy is an important right under the Right to Life and Personal Liberty as also an integral part of Human Rights Law which is a matter of concern for everybody in the contemporary social scenario. Privacy does not only mean leading an isolated life, but specifically it denotes freedom from unauthorized and unwarranted interference into one's private life.

Currently violation of Right to Privacy is an important issue in the modern democratic societies, because technological advancements in the communication and

information systems are creating serious threats to the individual Right to Privacy by making it practically impossible. A major factor of the Privacy problem is the absence of legislation and organizational rules ensuring Privacy, confidentiality and due process to the subjects of computerized information. Data banks have been established at all levels of government, business and the military services without any real knowledge or concern for their potential impact over individual rights. This is the situation all over the world.

The need of the hour calls for an extensive work on existing legislations protecting the Right to Privacy in different legal systems confronting challenges in making new laws covering every aspect of Right to Privacy. Hence this comparative study of U.S.A., U.K. and India is taken up.

Privacy in general terms means, the right to be let alone. This expression was used by *Justice Cooley* in 1888 which was followed by *Louis Brandeis and Samuel Warren* in 1890 in the *Harvard Law Review*, in their article, “*The Right to Privacy*”. According to them, the object of Privacy is to protect ‘*inviolable personality*’. Professor *A. F. Westin*, in his landmark book, “*Privacy and Freedom*”, 1970, defines *Privacy as the desire of individuals for solitude, intimacy, anonymity and reserve*. According to him, *Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent, information about them is communicated to others*.

According to the *Nordic Conference of Jurists on the Right to Respect for Privacy, 1967*, violation of individual Right to Privacy means, the interference with one’s private, family and home life, physical or mental integrity or moral or intellectual freedom, the attacks on honour or reputation, being placed in a false light, the disclosure of irrelevant, embarrassing facts relating to private life, the use of name, identity or likeness, the interference with correspondence, the spying, prying, watching and besetting, misuse of communication, written or oral and the disclosure of information given or received by one in circumstances of professional confidence.

Thus, the violation of the Right to Privacy includes violation of basic human rights of family, marriages, child-bearing, motherhood, education, information, reputation, personal liberty and many more, all of which are in the urgent need of protection in the contemporary social scenario. To make it more elaborate, it can be said that, the specific instances of violation of Right to Privacy are unauthorized and

unreasonable telephone-tapping, e-mail scanning, narcotic analysis, polygraph test and brain mapping, sting operation, biometric enabled national ID Cards, checking and abolishing the 'veil' system of Muslim women in various countries, the role of media in violating the Right to Privacy of public personalities by taking their photographs without permission and unauthorized interference into their private life, growing number of the heinous crime of female foeticide as the violation of Right to Privacy of a woman, making of counter-terrorism laws without concerning about the violation of Right to Privacy of the citizens of a country. All of these rights are included in the basic human rights of individuals and as such the violation of Right to Privacy amounts to violation of basic human rights of individuals.

The problem area in this field or sphere of study is that the Right to Privacy has not been adequately dealt with by the legislatures of different countries. The present legislations that deal with the protection of the Right to Privacy do not in fact secure this right to the greatest extent. Since protection of the Human Right to Privacy is an issue that attracts global norms transcending national boundary, therefore, the present study will take into account the development of the law relating to the Right to Privacy in the international and national field as well as the part played by the judiciary, as far as the protection and enhancement of these rights are concerned.

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

In the international human rights law, 'Privacy' is clearly and unambiguously established as one of the basic human rights in 1948 with the proclamation of the *Universal Declaration of Human Rights*. Article 12 of this Declaration lays down that, *no one shall be subjected to arbitrary interference with his Privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks*. The importance of Privacy as a human right and its need for legal protection has been given in the various other international documents. Such as, *Article 17 of the International Covenant on Civil and Political Rights, 1966*,

which says that, *no one shall be subjected to arbitrary or unlawful interference with his Privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.* Another one is *Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966.* It says that, *the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of development of children. Marriage must be entered into with the free consent of the intending spouses.*

In the regional level there are also various human rights conventions. *Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950* provides that, *everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.*

In 1965, the *Organization for American States proclaimed the American Declaration of the Rights and Duties of Man*, which called for the protection of numerous human rights including Privacy. The Inter-American Court of Human Rights has also begun to address Privacy issues in its cases. *Article 11 of the American Convention of Human Rights, 1969* sets out the Right to Privacy in terms similar to the Universal Declaration. This Article says that, *everyone has the right to have his honour respected and his dignity recognised. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.*

The *African Charter on Human Rights and Peoples' Rights, 1981* deals with various human rights, but unfortunately there is no direct provision relating to the Right to Privacy. The only relevant provision is *Article 4*, which states that, *human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.* As such there are not much developments of Right to Privacy. But, the *African Charter on*

the Rights and Welfare of the Child, 1999 speaks about the Right to Privacy. Article 10 of the Charter says that, *children should have a Right to Privacy*.

Here the Asian Charter is also required to be mentioned. In mid-2003 the *Asia-Pacific Privacy Charter Initiative* was launched under the auspices of the Asia-Pacific Privacy Charter Council (APPCC), a *regional expert group that seeks to develop independent standards for Privacy protection in the region, in order to influence the enactment of Privacy laws in the region in accordance with those standards, and the adoption of regional Privacy agreements in accordance with those standards*. Thus, it is found that, all the continents are concerned about the Right to Privacy and they are taking attempts to make Privacy laws in the regional level.

Following the directives, as laid down in the aforementioned Conventions, most of the economically advanced nations of the western and the eastern world have framed laws concerning the protection, recognition and enhancement of the Right to Privacy. The present study aims to highlight the position of Right to Privacy in the various parts of the world with special reference to the situation in U.S.A., U.K. and India along with their comparative study.

The first expression of the Right to Privacy under the *U.S. Constitution* was made by *Louis Brandeis and Samuel Warren* in 1890 in their famous *article in the Harvard Law Review* as stated above. The U.S. Constitution never used the word, "Privacy" directly, but has clearly given several important protections in the *Bill of Rights*. Since 1965, the *U.S. Supreme Court* started recognizing the right of personal Privacy or certain other areas of Privacy under the *U.S. Constitution*, in the *First Amendment, Fourth and Fifth Amendments, in Penumbra of the Bill of Rights, in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment*.

According to those provisions, the Right of Privacy is not absolute. The government intrusion into the private property is allowed in cases of search and seizure, if reasonable. Therefore, Right to Privacy is available only against government action, and that too for search and seizure cases. No such protection against violation of Privacy by individual action is found.

The *Privacy Act of 1974* was also made by the U.S. Government. Since the passing of that Act, the U.S. Government has started protecting *specific Privacy concerns, like, financial Privacy, health care Privacy, credit report Privacy,*

children's Privacy, consumer Privacy etc. This Act provides for the maintenance of personal records by the government agencies and it prevents the unauthorized release or disclosure of those personal records. Therefore, this Act deals only with Data Privacy and regarding Individual Privacy, no such developments have been made. Besides, advancements of technology, computers and internet have created many new dimensions of Right to Privacy including Workplace Privacy which require new legislations. There is also the *Children's Online Privacy Protection Act, 2000* dealing with the Right to Privacy of children in U.S.A.

The law relating to the Right to Privacy in U.S.A. has been developed through various cases, important among them are *Grosjean v. American Press Co., (1935) 297 U.S. 233*, *Beard v. City of Alexandria, (1951) 341 U.S. 622*, *Griswold v. Connecticut, 381 U.S. 479 (1965)*, *Rowana v. Post Office Department, (1970) 397 U.S. 728* and *Cox Broadcasting Corporation v. Mortin Cohn, (1975) 420 U.S. 469*.

United Kingdom also started to protect the Right of Privacy since 1972. In that year the *Younger Committee Report on Privacy* was published in U.K. Then the *Final Report of the Royal Commission on the Press* was made in 1977. Both of these are two important documents on Right to Privacy in U.K.

But before all these, there was only *Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* as stated above. *Article 10 of the Human Rights Act, 1998* also protects the 'right to respect for private and family life'. This article guarantees the right to freedom of expression of the citizens without any public interference. Therefore, this article only protects certain aspects of Right to Privacy and not all. Thus, in U.K. these two Articles have not given total protection to the Privacy right.

After the making of these legal provisions, the U.K. Parliament has enacted the *Data Protection Act* defining the legal basis for information handling of their people in 1998 which is a recent piece of legislation dealing with the law relating to Right to Privacy. This Act gives protection to the Privacy of data and personal information, but not the Individual Privacy. Protection of data of the citizens does not mean protecting every aspect of Right to Privacy. Hence, Individual Privacy is totally unprotected. Apart from that, no separate legislation covering all aspects of Right to Privacy is enacted till now. Thus, a new law is required which should cover the whole area exhaustively.

The law governing the Right to Privacy in U.K. has also been developed through various cases, important among them are, *Prince Albert v. Strange*, (1848) 2 *De G & Sm* 652, *Sheen v. Daily Telegraph*, (1961) unreported, *Re 'X' (a minor)*, (1975) *All.E.R.* 697, *Bernstein v. Skyviews*, (1977) 2 *All.E.R.* 902 (QBD), *Douglas v. Hello!*, (2001) 2 *All.E.R.* 289 at 316 and *Peck v. U.K.*, ECtHR 28/01/2003, no. 44647/98.

In India we find the origin of Privacy in the *ancient Hindu Jurisprudence*, like the description of the houses in the *Grihya-Sutras*, *Kautilya's Arthashastra* and the *epics of the Ramayana and the Mahabharata*. In the *medieval period*, Privacy was found in the habit of observing 'purdah' among the Muslim women to prevent public exposure of their faces. Then with the enactment of the Indian Constitution it took a new shape, though the *Indian Constitution* has never guaranteed the Right to Privacy as a fundamental right. To some extent under *Articles 19 and 21*, Privacy rights can be claimed by individuals but the Supreme Court has not recognized the Privacy right.

Then the era of developing the concept of Privacy by the Indian judiciary has begun. Some important judgments on this point are *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295, *Govind v. State of M.P.*, AIR 1975 SC 1378, *State of Maharashtra v. Madhukar Narayan Gardikar*, AIR 1991 SC 207 and *Vishaka v. State of Rajasthan*, AIR 1997 SC 3014.

With the help of the above cases, the concept of Right to Privacy has been gradually developed in India, for which Indian Judiciary has played a significant role. However, in the Indian scenario, even after Kharak Singh's case and in spite of the other cases, no total protection has been given to the Right of Privacy till now. Although it is guaranteed as a part of Article 21, but not absolute under the Indian Constitution and can be enforced only against state action, but not against individual's action. As the question of Privacy is gaining much importance day by day in various new fields, proper legislation and enforcement machineries are necessary for such areas.

In India, no express legislative enactments governing the Right to Privacy are found, but some statutory provisions are worth mentioning in this respect, like *Section 22 of the Hindu Marriage Act, 1955*, *Section 33 of the Special Marriage Act, 1954*, *Section 53 of the Divorce Act, 1869*, *Section 18 of the Indian Easements Act, 1882*, *Section 509 of the Indian Penal Code, 1860*, *Sections 28, 29, 47, 48, 49*,

164(3) and 165 of the Code of Criminal Procedure, 1973, Section 13 of the Press Council Act, 1978, Sections 5(2) and 69(1) of the Indian Telegraph Act, 1885, the Family Courts Act, 1984, the Indian Post Office Act, 1898, the Indian Evidence Act, 1872, the Medical Termination of Pregnancy Act, 1971, the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, the Information Technology Act, 2000 and the Right to Information Act, 2005.

The *Right to Privacy Bill 2011*, now known as the *Privacy Bill, 2014* has been drafted where we find the statutory definition of Right to Privacy and the protection of the various aspects of the Right to Privacy. But this Bill mostly seeks to cover the Privacy laws relating to data protection in India. Thus, inspite of this Bill, there remains the necessity of passing legislations for the protection of Individual Privacy, which is absolutely important. Also we are craving for the creation of a new fundamental right, called the Right to Privacy, which should be a separate fundamental right after Article 21 of the Indian Constitution.

After the discussion of the existing laws relating to Right to Privacy all over the world, we need a comparative study of all these legal provisions. To compare the law relating to Privacy in U.S.A., U.K. and India, we are taking some specific aspects of Right to Privacy for our discussion, like, Individual Privacy, Privacy of Family, Marriage, Child, Motherhood, Information, Reputation and Personal Liberty. All of these aspects are not equally protected in these three countries.

Though the *Universal Declaration of Human Rights, 1948* and the *International Covenant on Civil and Political Rights, 1966* specifically speak for the Individual Privacy, Privacy of family, home, marriage and correspondence, no express legislation is found in either U.S.A. or U.K. or in India covering all these rights. Few areas have been covered in each of these rights in all the three countries. It is important to note that, *in camera proceedings* in divorce cases are found in some matrimonial statutes in India, such as *Section 22 of the Hindu Marriage Act, 1955, Section 33 of the Special Marriage Act, 1954 and Section 53 of the Divorce Act, 1869.*

In U.S.A., there is one statute, called the *Children's Online Privacy Protection Act, 2000* protecting the Privacy of the child. But, in U.K. or in India, there are no express provisions covering the Right to Privacy of a child in totality, but a number of legislations are found providing partial protection in this respect.

In all the three countries of U.S.A., U.K. and India, only some rights of women for abortion, prevention of unjustified abortion and prohibition of female foeticide have been dealt with in some statutes, like the *Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994* in India. But, the law governing the independent decision of a woman regarding her motherhood is found nowhere.

The aspect of Data or Information Privacy is dealt with adequately by the *Privacy Act, 1974* in U.S.A. and the *Data Protection Act, 1998* in U.K. In India, there is also the *Information Technology Act, 2000* and the *Right to Information Act, 2005*. But, a separate law covering the data protection is needed in India.

Privacy of Reputation is found in law of Torts in all the three countries, which is unwritten law. Also some express provisions of Criminal Law deal with this, like *Section 509 of the Indian Penal Code, 1860*. But, no separate legislation is there in any of the countries.

Right to Privacy is a part and parcel of right to Life and Personal Liberty. As such this right is guaranteed under the various Constitutional provisions of U.S.A., U.K. and India, like *First, Fourth, Fifth and Ninth Amendments of the U.S. Constitution and Articles 19 and 21 of the Indian Constitution*. There are various cases, by the judgments of which this right has been enriched and developed. But, a separate law covering the Right to Privacy guaranteeing the personal liberty is absent everywhere.

Apart from the specific aspects of Right to Privacy mentioned above, there are also various other facets of the Right to Privacy which are required to be adequately protected by express legislations in these three countries. The intention of this study is to highlight those aspects also and to suggest appropriate legislations covering all aspects of Right to Privacy.

After comparing the legal provisions in U.S.A., U.K. and India, it is found that the Constitutional and other legal provisions in U.S.A. and U.K. are much developed than in India. Though in India, the concept of Right to Privacy is found from the ancient period, but there are no such developments in the modern times. As stated above, this right is neither expressly guaranteed in the Indian Constitution nor in any other Indian Statute. Above all, a large section of the Indian masses are not even fully aware of their Right to Privacy. As such, the said right is not being exercised in totality. Here lies the need of a proper research work in this field.

The aforesaid discussion signifies that, the Human Right to Privacy has not been adequately and satisfactorily redressed by the legislature. Further, along with absence of proper law, there are weak implementation and failure of existing protective machineries. The problem is, therefore, of grave concern and is to be investigated from various angles including legal, sociological, psychological and judicial point of view to find out whether the concept of Right to Privacy in the context of protection of human rights has been adequately dealt with by the present laws, whether there is defect in the law/laws and whether new law is required to cope with the changing facets of the concept of Right to Privacy in the changing social order. A humble attempt would be made to bring out an appropriate suggestion. The present study is intended to contribute in this area.

The objective of the present study is to understand and summarize the various emerging dimensions of Right to Privacy and also to address the socio economic challenges confronting the protection of Right to Privacy in U.S.A., U.K. and India. In a nutshell, the objectives of the study are :-

- ★ To trace the historical background of the Right to Privacy.
- ★ To make a comparative study and to examine the various aspects of Right to Privacy in U.S.A., U.K. and India.
- ★ To examine the International, Regional and National Laws on Right to Privacy throughout the world.
- ★ To review the role of the Judiciary in U.S.A., U.K. and India on the protection of Privacy rights.
- ★ To evaluate the Outstanding Facets, Dimensions and Current Trends of Right to Privacy and to remove the conflict between Right to Information and Privacy.
- ★ The study also aims at providing certain remedial measures and suggestions to prevent the violation of Right to Privacy.

In the contemporary social scenario, where human rights of each and every individual is of utmost concern all over the world, the existing legislative policies of different legal systems prevailing in U.S.A., U.K. and India for securing and protecting the Right to Privacy of individual human beings, are insufficient and inadequate to confront the present threats, and there is an urgent need to modify or amend the existing laws or to frame a new legislation for specific purpose of

securing Right to Privacy of all individuals within the national territory of the subject nations.

In spite of the various national and international instruments, the Right to Privacy is not absolutely protected till now. There are various problems associated with this right, which are required to be solved.

Thus, the present study involves the following basic questions :-

- a) What does it mean by violation of Right to Privacy and what are its current trends?
- b) Are the existing laws on the Right to Privacy in U.S.A., U.K. and India sufficient? If not, what is to be done in this regard?
- c) What are the merits and demerits of the Right to Privacy Bill, 2011, now known as Privacy Bill, 2014 of India?
- d) How far the existing implementing machineries have been successful in redressing the violation of Right to Privacy in U.S.A., U.K. and India?
- e) What is the role of the Executive organs and the Judiciary in securing the individual Right to Privacy in U.S.A., U.K. and India?
- f) How can the law relating to the Right to Privacy be made more effective?
- g) What remedy to be provided to the victims of violation of Right to Privacy?
- h) Whether telephone-tapping, e-mail scanning and other security measures in the national interest amount to the violation of Right to Privacy?
- i) Whether narcotic analysis, polygraph test and brain mapping of the criminals amount to violation of their Right to Privacy?
- j) Whether checking and abolishing the 'veil' system of Muslim women in various countries amount to violation of their Right to Privacy or not?
- k) What is the role of media in violating the Right to Privacy of public personalities and how to prevent those violations?
- l) Whether the question of morality and immorality is associated with the violation of Right to Privacy or not?
- m) Whether female foeticide amounts to violation of Right to Privacy of a woman or not?
- n) Whether counter-terrorism laws amount to violation of Right to Privacy?

These are some relevant questions associated with this study. There are so many other questions of similar type and the purpose of this study is to find out the

answers of the questions. An attempt has been made in the present research work to find out the appropriate solution of the aforesaid problems.

Since the concept of human rights is a growing concept, it is changing day by day. As such, the concept of Right to Privacy is also increasing everyday. Though the instances of Right to Privacy have been found from the ancient period, but there are not many developments found in the said field till now. Thus, the significance of the study is to find out the necessity of making comprehensive legislations for protecting the Right to Privacy in the international and national field.

The purpose of this study is also to review the existing laws relating to Privacy, to make the general people aware of their Privacy rights, to address the socio economic challenges confronting the protection of Right to Privacy, to evaluate the concept of Privacy in Cyberspace and to remove the conflict between Right to Information and Privacy, to find out the need for creating a separate fundamental Right to Privacy after Article 21 of the Indian Constitution and to analyze the merits and demerits of the Right to Privacy Bill 2011, now known as the Privacy Bill, 2014. Finally, the aim of this research work is to provide certain remedial measures and suggestions to prevent the violation of Right to Privacy.

The Methodology of this research is mainly Doctrinal. It is doctrinal, because the research involves the study of the Constitutional and various Statutory provisions of U.S.A., U.K. and India dealing with the laws relating to the Right to Privacy.

The sources of Data have been both from Primary and Secondary Sources. As the Primary Sources, various Acts, Statutes, Codes, Rules, Regulations, Ordinances, International, National and Regional Instruments, like Conventions, Declarations, Protocols, Treaties and Judgments of various cases and also different Reports have been studied. As the Secondary Sources, different Books, Articles, Journals, Periodicals, Dailies, Websites, Conference Proceedings, Published and Unpublished thesis and Dissertations have been relied upon and consulted.

This research involves the developing and testing of various theories and hypothesis. Therefore, it is a fundamental or theoretical research. The present study has examined thoroughly the efficacy of the existing laws on Right to Privacy and has analyzed these in details. Thus, it has been called a Descriptive and Analytical Research.

This work is a comparative study of the laws concerning the Right to Privacy in U.S.A., U.K. and India. Therefore, the existing legislative provisions along with the comparative analysis have been given in the study whenever and wherever required.

As the study has been doctrinal, any tools or techniques of empirical study have not been used in this research.

In the present research, the collection of data has been made through the thorough study of various documentary materials as stated above. Also the published Statistics have been collected from various Government Departments and Internet. The scope of the use of the tools and techniques of empirical research, like Interview, Observation and Case Study is much less in this study.

The data collected through doctrinal study has been scrutinized and edited in order to reduce sampling error. After editing, the entire material has been analyzed and interpreted in the proper manner to find out the actual result. Finally, the Research Report has been prepared accordingly.

There has been a significant work in the past few years at the international and regional level as also in the countries of U.S.A., U.K. and India, through which initiatives have been taken at different fronts to solve the issues relating to the protection of right to privacy. These include various International Instruments, like Conventions, Declarations, Protocols, Treaties, Regional Conventions and Charters, country-wise Statutes, Acts, Codes and Cases including Reports and Conference Proceedings. In this part, the Researcher has consulted and reviewed those existing or previous literatures which are in the forms of Books, Articles and Cases.

BOOK REVIEW

(i) The Handbook of Human Rights Law : An Accessible Approach to the Issues and Principles, by Michael Arnheim, Kogan Page Ltd., London, U.K. and Sterling, U.S.A., 2004, available at the British Council Library, Kolkata, is a book dealing with the intersection of law and human resources in the context of U.K. and European Legislation. It provides that, the Human Rights Act, 1998 has incorporated into U.K. Law, rights and freedoms guaranteed by the European Convention on Human Rights. This work contains an elaborate discussion on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and Article 10 of the Human Rights Act, 1998. Both of these Articles are dealing with the law relating to right to privacy in U.K. this book has

got an exclusive coverage of interesting high profile English cases on right to privacy and the status and approach of the Human Rights Court in Strasbourg, U.K. on the privacy rights aspects.

(ii) Right to Privacy in India, by Prof. G. Mishra, Preeti Publications, Delhi, 1st Edition, 1994, available at the Indian Law Institute Library, New Delhi, is a book which throws light on the recognition of right to privacy in the legal and moral norms of ancient Indian society and traces the recognition of this right in the customary and statutory law of British and contemporary India. It is the only work in India making the thorough study of the right to privacy.

(iii) Privacy Law : A Comparative Study, by S. K. Sharma, Atlantic Publishers and Distributors, New Delhi, 1994, available at the Indian Law Institute Library, New Delhi, is a book which deals with the comparative analysis of the privacy law prevailing all over the world. The leading decisions of various courts, the Freedom of Information Act of U.S.A., the Younger Committee Report of U.K. and the Constitutional position of privacy in U.S.A., U.K., India as also in other countries have been critically analyzed and emphasized in this work.

(iv) Constitutional Law of India, by Dr. J. N. Pandey, Central Law Agency Publications, 40th Edition, 2003, is a book which incorporates all recent constitutional developments and judicial activism in India. It contains a brief, but lucid exposition of the main characteristics of the Indian Constitution. There are also important authoritative pronouncements of the Supreme Court at appropriate places. It is a very useful book for all the legal professionals.

(v) Human Rights, by U. Chandra, Allahabad Law Agency Publications, 5th Edition, 2004, is a book which deals with the nature, concept, origin and development of human rights, international, national and regional human rights instruments as also the enforcement machineries. At a glance, this book is a total coverage of the law relating to the human rights which is no doubt helpful for the students, researchers and legal professionals.

(vi) Privacy and Freedom, by Alan F. Westin, Atheneum Publication, New York, 1970, available at the Indian Law Institute Library, New Delhi, is a book containing the functions of privacy and surveillance in society, new tools for invading privacy and the American society's struggle for controls to achieve the right to privacy. In fact, it is a book which shows the situation and policy choices for the right to

privacy in 1970. It helps us to know the historical background of the modern privacy law.

(vii) *Privacy and Human Rights* (ed.), by A. H. Robertson, Manchester University Press, Manchester, 1972, is an edited book available at the Indian Law Institute Library, New Delhi. This book contains the Reports and Communications presented at the Third International Conference about the European Convention on Human Rights, organized by the Belgian Universities and the Council of Europe, with the support of the Belgian Government, held at Brussels, 30th September-3rd October, 1970. That conference was mainly based on the discussion on protection of right to privacy.

ARTICLE REVIEW

(i) *Right to Privacy – An Analysis of Developmental Process in India, America and Europe*, by Shrinivas Gupta & Dr. Preeti Misra, Vol. 18, 2005, CILQ, pp.524-552, is an article based on the definition and concept of right to privacy and it analyzes, the growth, development and recognition of the right to privacy by the Judiciary and Legislature in India vis-à-vis their European and American counterparts.

(ii) *Constitutional Control of Right to Pivacy*, by M. L. Upadhyay and Prashant Jayaswal, Vol. 2, 1989, CILQ, pp.39-58, is an article which highlights the origin, development and dimensions of the right to privacy as a human right and measures its depth and potentiality in the wider national interest. This work also analyzes the right to privacy in India as a peculiar blend of Constitutional, Customary and Common Law Right scattered over various legal fields.

(iii) *Right to Privacy Versus Freedom of Press : A Comparative Conspectus of Legal Position in U.S.A., U.K. and India*, by Dr. M. K. Bhandari, Vol. XI, 1991, IJLS, pp.178-191, is an article which provides a comparative analysis of the law relating to the freedom of press vis-à-vis the law of the right to privacy along with the important cases on these aspects in U.S.A., U.K. and India.

(iv) *Electronic Surveillance – A Tool for Invasion of Privacy*, by G. R. Lekshmi, Vol. 32:1&2, 2008, *The Academy Law Review*, pp.223-256, is an article which specifically emphasizes on the tools and techniques used for Electronic Surveillance in the national interest. This study suggests that, indiscriminate use of the technology in the domestic level becomes an attack on the right to personal privacy of the general public.

(v) Right to Privacy is an Aspect of Human Dignity, by Shrinivas Gupta, Vol. 17, 1985, Lawyer, pp.67-73, is an article which deals with the concept, origin and development of right to privacy with special reference to right to privacy in India. It specifically highlights the right to privacy as an aspect of the right to live with human dignity.

(vi) Right to Privacy of Parties in Matrimonial Disputes – An Analysis, by Dr. S. Srinivas Reddy, Vol. 1, 2009, ALT, pp.7-9, is an article which provides that, publication or telecast of any information relating to marital relationships of parties to the litigation in the matrimonial proceedings which are conducted in-camera, would be an invasion of the right to privacy of the litigating parties.

(vii) Privacy and Defamation : SC Defines Parameters, by Soli J. Sorabjee, Vol. 16, 1995, PCIR, pp.17-19, is an article which incorporates the views taken by the Indian Supreme Court on the right to privacy. It provides that, injury to a person's reputation is also the violation of his or her right to privacy, apart from constituting the tort of defamation.

CASE REVIEW

(i) Griswold v. Connecticut, 381 U.S. 479 (1965), is an important American case on the right to privacy. In this case, a general Constitutional right to privacy was articulated for the first time in U.S.A. Here, the Connecticut Law making the birth control measures a criminal offence was held unconstitutional as violative of the marital right to privacy of husband and wife.

(ii) Prince Albert v. Strange, (1848) 2 De G & Sm 652, is an important old English case, which is the foundation stone of the elaborate edifice of the law relating to the right to privacy. In this case, the unauthorized exhibition of the family portraits of Prince Albert and Queen Victoria without their permission was held to be the violation of their right to privacy. This decision left the field open for further development, which occurred with the publication of the seminal article, "The Right to Privacy", by Samuel Warren and Louis Brandeis, in 1890, in the Harvard Law Review.

(iii) People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568, is an important Indian case on the right to privacy. In this case, Section 5(2) of the Indian Telegraph Act, 1885, which empowers the State to intercept telephonic conversation held in private on specific grounds of national interest, was challenged. The Hon'ble Supreme Court held that, telephone tapping is a serious invasion of the individual

right to privacy guaranteed under Articles 19 and 21 of the Constitution and it can be permitted only in the gravest of grave circumstances in the public emergency.

(iv) *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295, is also an important Indian case on the right to privacy. The concept of right to privacy for the first time emerged under the Indian Constitution in 1963 from this case. In that case, a question was raised whether the right to privacy could be implied from the existing fundamental rights, like Articles 19(1)(c), 19(1)(d) and 21 or not. In this case, the sole question for determination by the court was whether ‘surveillance’ under the U. P. Police Regulations constituted an infringement of the citizens’ fundamental rights guaranteed by Part III of the Constitution. The court held that, since regulation 236(6), which authorized domiciliary visits, was violative of Article 21 as there was no law on which the same could be justified, it was unconstitutional.

(v) *Govind v. State of M.P.*, AIR 1975 SC 1378, is another significant case on the right to privacy in India. It continued in the same line with the *Kharak Singh*’s case. In this case, the right to privacy was regarded as a fundamental right, emanating from the rights to personal liberty, freedom of speech and freedom of movement.

(vi) *State of Maharashtra v. Madhukar Narayan Mardikar*, AIR 1991 SC 207, is the next important case on the right to privacy in India. Here, it was held that, even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person, if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.

(vii) *Vishaka v. State of Rajasthan*, AIR 1997 SC 3014, is the next important case on the right to privacy in India which provides a landmark judgment. In this case, the Supreme Court has laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until a legislation is enacted for this purpose. The petition was filed by a social worker by way of Public Interest Litigation for the enforcement of rights of working women under Articles 14, 19 and 21 of the Constitution and in finding suitable methods for realization of the true concept of ‘gender equality’. Gender equality includes protection from sexual harassment and right to work with dignity, which is universally recognized human right. This judgment has opened a new door for the concept of right to privacy, which is the ‘right to privacy in work place’.

The significant works on the Right to Privacy have been honoured under the heads 'Bibliography' and 'Literature Review'. Finally, the Researcher has found that, the law relating to the Right to Privacy is at the developing stage in the countries of U.S.A., U.K. and India. No comprehensive legislation covering every aspect of Right to Privacy is found in any of the countries. This research work has tried to provide some suggestions in this respect.

There has been a humble attempt on the part of the Researcher to examine various dimensions of Right to Privacy and also to make a thorough study of different international and national laws on Right to Privacy of the countries like U.S.A., U.K. and India. Apart from Introduction, the present study has been comprised of Seven Chapters and has been categorized and divided into the following Chapters :-

Introduction – It introduces the area, nature and character of the research work as well as objectives of the study, hypothesis, research questions, significance of the study, research methodology and chapterisation.

Chapter 1 : Right to Privacy : Conceptual Perspectives – This Chapter deals with the meaning, concept, definition, nature, scope, purpose and functions of Right to Privacy. As the idea of Privacy centres around the concept of 'private space,' therefore, the amount of private space which everyone should enjoy freely and the time limit of outside interference over it, will be the scope, ambit and extent of Privacy. On the contrary, significance of Privacy means, the importance of Privacy in a civilized society. Privacy also has various effects. The effects of Privacy means, prevention of unwanted publicity and interference into human life to protect human dignity by recognition and enforcement of Right to Privacy in a complex social structure.

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

Chapter 2 : Right to Privacy : Origin and Historical Development in U.S.A., U.K. and India – This Chapter deals with the origin, history and

development of Right to Privacy in U.S.A., U.K. and India. The origin of Right to Privacy can be traced back in U.K. to the famous English Case of *Prince Albert vs. Strange, 1848*, where privacy of royal couple Queen Victoria and Prince Albert, was violated by a photographer Strange in their private premises. In U.S.A., *Boyd vs. United States, 1886*, is an important case on Right to Privacy. In this case, it was held that, the purpose of prohibition against unlawful searches and seizures under Fourth Amendment of the U.S. Constitution were to protect security and privacy of persons, houses, papers and effects.

India also had a great historical background and a well-advanced law of privacy since the ancient period. In India, the origin of Privacy was found in the ancient Hindu Jurisprudence, in the description of houses in Grihya-Sutras, Kautilya's Arthashastra and the epics of Ramayana and Mahabharata. In the medieval period, Privacy was found in the habit of observing 'purdah' among the Muslim women to prevent public exposure of their faces.

The development of Right to Privacy in India in the modern period has been marked by a very old case, *Nuth Mull vs. Zuka-Oollah Beg and Kureem Oollah Beg, 1855*. It has been the first Indian case decided by the Sadar Diwani Adalat of the North-Western Provinces, in 1855, where the question of Right to Privacy has arisen. This case shows the evidence that, the Right to Privacy has been broadly recognized in India at least half a century before the U.S.A., where the idea has come in 1890 by the publication of the Warren-Brandeis article. It has been held by the Court in this case that, construction of a house should not be made in such a way, so that, the others premises may be looked into from the roof of the new house and thereby their Right to Privacy is violated. Hence, Customary Right to Privacy has been protected in India since the very old period.

Chapter 3 : Position of Right to Privacy in International Legal Arena –

This Chapter deals with the position of various components of Right to Privacy in the international, regional and municipal legal arena. Right to Privacy is not a narrower local or regional human right, rather its scope and extent have been broadened so much that, it covers a wide range of globally accepted human rights within its periphery. In fact, Right to Privacy is considered as a global phenomenon in the modern age. It has international recognition and is effective in all parts of the world. International recognition of Right to Privacy has been started just after the end of Second World War and the establishment of United Nations in the year 1945.

It has got a remarkable development under the auspices of the United Nations. Presently, it is an internationally acclaimed human right. As such, it is incorporated as an important human right in numerous International Instruments. In this respect, it has a great international legal perspective.

In the international human rights law, 'Privacy' is clearly and unambiguously established as one of the basic human rights in 1948 with the proclamation of the Universal Declaration of Human Rights. The importance of Privacy as a human right and its need for legal protection has been given in the various other international instruments, like the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. In the regional level, there are also various human rights Conventions, which deal with the protection of Right to Privacy. Important conventions among them are the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the American Convention on Human Rights, 1969, the African Charter on Human Rights and People's Rights, 1981 and the Asia-Pacific Privacy Charter, 2003.

Apart from the International and Regional legal instruments, Municipal Laws of various Countries are well-advanced on Right to Privacy. The Municipal Laws of different Countries can be divided into the Privacy Laws of Common Law Countries, Civil Law Countries and the Nordic Law Countries. A few other countries are also remaining, the Privacy Laws of which are important in this respect. Moreover, Privacy Laws are found all over the world in an all-round manner. In the modern period, the significance of Right to Privacy has been understood by all legal systems in the world and as such, the laws of Privacy enacted by them have become fruitful to portray the International Legal Arena of Right to Privacy.

Chapter 4 : Right to Privacy : National Legal Framework of U.S.A., U.K. and India – This Chapter deals with the existing national legal framework of U.S.A., U.K. and India as well as a comparative analysis of the said laws. Right to Privacy, although had never been guaranteed in the United States as a Constitutional Right, but had been judicially examined therein. With the progress and development of the new American nation, called U.S.A., the growth of Privacy protection laws have been occurred concurrently. There have been six phasic or periodic developments of Right to Privacy in U.S.A. The present Privacy laws in U.S.A. can

be categorized as the *U.S. Constitution, 1787, the Federal Privacy Laws and the State Privacy Laws*. The U.S. Federal and State Legislatures have enacted various legislations covering various aspects of Right to Privacy, so that, each and every component of this right would be protected.

At the very beginning, English laws were very slow and unwilling to develop Laws of Privacy. Gradually with the passage of time, recognition of this right came into being with the hands of the judiciary. In comparison to U.S.A., Privacy laws are not much enriched in U.K. In fact, there has been no existence of Privacy Laws in U.K. before the passing of the *Human Rights Act, 1998 and Data Protection Act, 1998*. Apart from the Common Law protection of Privacy in U.K., there are various statutory provisions enacted in the present era, few portions of which are directly applicable for the protection of Right to Privacy.

Right to Privacy in India is not of recent origin; it is an age-old concept and can be traced back from ancient Indian society. In fact, there are several customary rules prevailing in India which protect Privacy interest of an individual. Apart from that, constitutional provisions have provided protective umbrella to this right in indirect manner. Besides customary rules and constitutional provisions, several other statutes recognise Right to Privacy directly or indirectly in India. Privacy as a Customary Easement right was recognized in India since the very beginning in the *Indian Easements Act, 1882*. The main articles relating to protection of Privacy under the Indian Constitution are *Articles 19 and 21*.

A Comparative Analysis of the Privacy protection laws of U.S.A., U.K. and India projects the idea that, though India has started protecting Right to Privacy prior to U.S.A. and U.K., but in the present social scenario, it is lagging far behind the other two countries, inspite of having strong Customary Laws of Privacy since the ancient period.

Chapter 5 : Role of Judiciary Enhancing Right to Privacy in U.S.A., U.K. and India – This Chapter deals with the role of judiciary in U.S.A., U.K. and India regarding the protection of various components of Right to Privacy as well as provides a comparative analysis of the same. 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. 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.

Chapter 6 : Outstanding Facets, Dimensions and Current Trends of Right to Privacy in U.S.A., U.K. and India : A Comparative Analysis – This Chapter deals with the legislative and judicial initiatives of U.S.A., U.K. and India regarding the protection of outstanding facets, dimensions and currents trends of Right to Privacy. It also provides the limitations of Right to Privacy and makes a comparative analysis of those elements along with the contemporary debates on Right to Privacy.

In the contemporary social scenario, a number of problems have been cropped up relating to various aspects of Right to Privacy which are closely associated with modern social life. In the present day society, human beings are subjected to various new habits and tastes owing to social change, which have created either threats on Right to Privacy or on human life and dignity. Such problems have also given birth to many new dimensions of Right to Privacy, which are non-existent in the previous century. Those are generally called the outstanding facets of Right to Privacy, because without addressing to those threats and challenges, any discussion on Right to Privacy would remain incomplete. More specifically, these areas are *Privacy vs. Private Life, Privacy of Women, Privacy of Children, Privacy vs. Scientific and Technological Developments* as well as *Data and Information Privacy*.

Legislations and judicial decisions on outstanding facets have created *many* new debates on Right to Privacy in the contemporary social scenario. Such debates have occurred in the areas of *Freedom of Information, Right to Information and Right to Privacy, Privacy and Biometric Enabled National ID Cards, Privacy versus Sting Operation, Privacy versus Narco-Analysis, Polygraph Test and Brain-Mapping* as well as the *Privacy versus LGBT Rights*.

Right to Privacy is not an absolute right and limitations can be imposed on it on the grounds of *Public Interest, Public Figure, Public Record, Public Disclosure, Consent, Privilege, Newsworthiness, Freedom of Information or Right to Information* and *Administration of Criminal Justice*. Limitations on Right to Privacy can also be imposed on the grounds specified under *Article 19(2) of the Indian Constitution*.

The comparative analysis of outstanding facets, dimensions and current trends of Right to Privacy as well as the contemporary debates on Right to Privacy provide the idea that, U.S.A. is the strongest country regarding Privacy protection, U.K. is at the middle level and India is a novice country with respect to the measurement of such protection.

Chapter 7 : Conclusion and Suggestions – This Chapter makes the conclusion of the whole study and provides a few suggestions for protection of Right to Privacy in U.S.A., U.K. and India. Finally, in this Chapter, the researcher has been dedicated to conclusion and suggestions, which are rounded-off with a note of overall re-evaluation of the present scenario of Right to Privacy in the aforesaid three countries. Accordingly, few humble suggestions have been provided for reformation of existing laws and effective implementation of the same regarding the protection of Right to Privacy therein.

CHAPTER 1

RIGHT TO PRIVACY: CONCEPTUAL PERSPECTIVES

1.1. Prologue

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

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

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

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

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

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

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

1.2. Privacy : The Meaning and Concept

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

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

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

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

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

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

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

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

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

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

⁵ *Id* at p.17.

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

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

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

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

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

⁶ *Ibid.*

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

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

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

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

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

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

“A foreigner visiting an Indian village for the first time will have a feeling that there is absolutely no privacy in India, because Indian village life is always alive with people all the time and in all the places. Everyone is related to every other person as uncle and aunt and anybody will enter anybody’s house at any time. Guest unannounced will invade houses. To him it may be invasion of his privacy. But to the villagers it is their culture to see their guests are taken care of even when not requested.

An Indian visiting for the first time a western country would shocked by their culture and freedom in all matters.

Definition of Privacy varies according to context and environment. It is different in different cultures, also differs from place to place. Privacy protection is frequently seen, as a way of drawing the line at how far society can intrude into a person’s affairs.

There is respect for privacy in all cultures as how the people living there expect it. For Europeans, their correspondence and their papers may be more sacred and secret than their own families. An English man may allow one or two women to share his compartment but not his confidential papers. But in Indian marriage, family and home are more sacred than individual rights. It is not the individual Privacy that is protected. Inviolability of home is acknowledged even to the extent of denying rights to some of the members of the family. Many of the fundamental rights such as right to equality and certain other freedoms are denied to women because family and marriage are more sacred than individual rights and freedoms.”¹³

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

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

¹¹ 4 Harvard Law Review 193 (1890).

¹² *Supra* Note 8 at p.4.

¹³ Dr.Vany Adithan, “*Right to Privacy under Art.21-B,*” Madras Law Journal, Vol.II(2003), pp.28-32 at p.29.

under what circumstances and to what extent he may allow other to have access to those information. Until then he may maintain secrecy, anonymity and solitude.”¹⁴

According to Oxford Dictionary of Law (Indian Edition), ‘Privacy’ means the right to be left alone. It is the right to a private life as set out in Article 8 of the European Convention on Human Rights, 1950, which is now part of U.K.Law as a consequence of the Human Rights Act, 1998. The right includes privacy of communications (telephone calls, correspondence) etc.; privacy of the home and office; environmental protection (including freedom from excessive noise: *Hatton, V. U.K.* [2003] 37 EHRR 611); the protection of physical integrity and protection from unjustified prosecution and conviction of those engaged in consensual non-violent sexual activities. This right is a qualified right; as such, the public interest can be used to justify an interference with it providing that this is prescribed by law, designed for a legitimate purpose and proportionate. Public authorities have a limited but positive duty to protect privacy from interference by third parties.¹⁵

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

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

¹⁴ *Id* at pp.29-30.

¹⁵ Elizabeth A. Martin & Jonathan Law (ed.), Oxford Dictionary of Law (Indian Edition), Oxford University Press Publications, New York, U.S.A., 1st. Indian Edition ,2008, p.410.

¹⁶ Tapas Gan Chowdhury, Mitra’s Legal & Commercial Dictionary, Eastern Law House Pvt.Ltd. Publication, Kolkata, 6th Edn.,2006, p.686.

¹⁷ *Ibid.*

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

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

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

1.3. Privacy : The Definition

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

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

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

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

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

1.3.1. Privacy : The Earlier Definitions by Western Scholars

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

In this sense, Clinton Rossiter has observed that :-

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

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

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

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

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

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

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

²⁰ G. Mishra, *Right to Privacy in India*, Preeti Publications, New Delhi, 1st. Edn., 1994, p.20.

²¹ Richard B. Parker, "A Definition of Privacy", *Rutgers Law Review*, Vol.27, 1974, p.275.

²² Michael A. Weinstein, "The Uses of Privacy in the Good Life," *Privacy Nomos XIII*, 1971, p.94.

²³ Charles Fried, *An Autonomy of values*, 1970, p.140.

²⁴ Hyman Gross, *Privacy and Autonomy*, *Privacy Nomos XIII*, 1971, p.169.

²⁵ Arthur R. Miller, *The Assault on Privacy*, 1972, p.40.

²⁶ Alan F. Westin, *Privacy and Freedom*, 1970, p.7.

²⁷ Earnest Van Den Haag, *On Privacy*, *Privacy Nomos XIII*, 1971, p.160.

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

1.3.1.1. Definition of Thomas M. Cooley

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

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

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

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

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

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

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

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

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

1.3.1.2.1. Warren and Brandeis Concept of Privacy

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

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

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

³⁰ *Id* at p.205.

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

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

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

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

- i) The right to privacy does not prohibit any publication of matter which is of public or general interest.³¹
- ii) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.³²
- iii) The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.³³
- iv) The right to privacy ceases upon the publication of the facts by the individual, or with his consent.³⁴
- v) The truth of the matter published does not afford a defence.³⁵

³¹ *Id at p.214,*

³² *Id at p.216.*

³³ *Id at p.217.*

³⁴ *Id at p.218.*

³⁵ *Ibid.*

vi) The absence of “malice” in the publisher does not afford a defence.³⁶

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

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

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

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

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

1.3.2. Privacy : The Later Definitions by Western Scholars

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

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

³⁶ *Ibid.*

³⁷ *Id at p.219.*

³⁸ *Ibid.*

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

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

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

- i) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs.
- ii) Public disclosure of embarrassing private facts about the plaintiff.
- iii) Publicity which places the plaintiff in a false light in the public eye.
- iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁴⁰

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

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

³⁹ William L. Prosser, "Privacy", California Law Review, Vol.48, 1960, p.389.

⁴⁰ *Ibid.*

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

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

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

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

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

- 1) If privacy is to be respected for its intrinsic value rather than its instrumental value, then it would be irrelevant to consider the actual value of public disclosure of personal information.
- 2) If the social interest of privacy is to be considered for its intrinsic value, then it would be necessary to give greater representation of the right in policy formulation.
- 3) It is necessary to reconcile the Constitutional law of privacy, like contraception and abortion with privacy of association, possession of pornography, unreasonable intrusion upon and disclosure of privacy engagements.⁴³

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

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

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

⁴³ *Supra* Note 41 at pp.8-9.

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

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

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

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

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

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

⁴⁴ Ruth E. Gavison, *Privacy and Its Legal Protection* (Unpublished thesis submitted to the University of Oxford for Ph.D. in 1975), p.150.

⁴⁵ *Supra* Note 41 at p.5.

⁴⁶ Harry Kalven, J.R., "Privacy in Tort Law – were Warren and Brandeis Wrong ?," *Law and Contemporary Problems*, Vol.31, 1966, p.251.

⁴⁷ Clark C. Havinghurst, *Law and Contemporary Problems*, Vol.31, 1966, p.251.

⁴⁸ *Supra* Note 39 at p.383.

⁴⁹ *Supra* Note 20 at p.24.

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

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

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

David M. O'Brien has clearly stated as follows:-

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

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

⁵⁰ *Supra* Note 41 at p.8.

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

“A woman’s legal right to bear children without unwanted on-lookers does not turn on the desire to protect her emotional equanimity, but rather on a desire to enhance her individuality and human dignity.”⁵¹

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

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

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

⁵¹ *Supra Note 42 at p.973.*

⁵² *Id at p.974.*

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

Dworkin said as follows :-

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

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

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

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

1.3.2.4. Definition of Charles Fried : Privacy as Control

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

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

⁵³ Gerald Dworkin, "The Common Law Protection of Privacy," University of Tasmania Review, Vol.2, 1967, pp.418, 433.

⁵⁴ Hyman Gross, "The Concept of Privacy", New York University Law Review, Vol. 42, 1967, p.46.

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

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

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

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

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

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

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

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

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

⁵⁵ Charles Fried, "Privacy", Yale Law Journal, Vol. 77, 1965, pp.482-483.

⁵⁶ Edward Shils, "Privacy : Its Constitution and Vicissitudes," Law and Contemporary Problems, Vol. 31, 1966, p.282.

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

- (i) Privacy is a relative concept and it must be counted against other person or persons only.
- (ii) In case of breach of boundary, decisive element is the voluntary consent.
- (iii) If the latter person discloses information voluntarily, then it should be counted as sharing of privacy and not breach of privacy.⁵⁷

1.3.2.6. Definition of Hyman Gross : Privacy and Control

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

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

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

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

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

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

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

⁵⁷ *Id at pp.281-282.*

⁵⁸ *Supra Note 54 at p.38.*

⁵⁹ *Id at pp.35-36.*

⁶⁰ *Supra Note 24 at p.169.*

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

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

- (a) the control an individual has over the flow of information about himself and
- (b) the control over the communication of information about oneself by others.”⁶²

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

- (i) Gross has given two definitions of Privacy in two places, instead of one, without referring to each other.
- (ii) Each definition is conflicting with the other and contrary in meaning to one another, because one is defined as ‘condition of life’ and the other is defined as ‘form of control’.
- (iii) Though Gross has talked about control over information, but actually control of information is practically impossible.
- (iv) Gross’s concept of control by an individual over the flow of information from one person to another is again practically impossible, because the receiver of information may deny the control.
- (v) Control over communication of information by others, is also practically impossible, because they may communicate the information beyond the knowledge of the person giving information.
- (vi) As a whole, Gross’s concept of privacy suffers from duality of senses.

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

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

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

His definition runs as follows:-

⁶¹ *Supra Note 20 at p.34.*

⁶² *Ibid.*

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

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

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

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

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

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

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

⁶³ *Supra* Note 22 at p.88.

⁶⁴ *Id* at p.104.

⁶⁵ *Supra* Note 21 at pp.278-279.

⁶⁶ *Supra* Note 44 at p.33.

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

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

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

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

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

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

⁶⁷ *Supra Note 26 at p.7.*

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

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

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

Prof. Lusky's observation runs as follows:-

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

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

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

⁶⁸ Louis Lusky, "Invasion of Privacy : A Clarification of Concepts", *Columbia Law Review*, Vol. 72, 1972, pp.693-695.

⁶⁹ *Id* at pp.693, 695-697.

⁷⁰ *Id* at p.693.

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

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

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

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

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

His definition runs as follows:

*“Privacy is the individual’s ability to control the circulation of information relating to him – a power that often is essential to maintaining social relationship and personal freedom.”*⁷²

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

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

⁷¹ Adam Carlyle Breckenridge, *The Right to Privacy*, 1971, p.1.

⁷² *Supra* Note 25 at p.40.

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

*“Privacy is control over when and by whom the various parts of us can be sensed by others.”*⁷³

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

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

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

⁷³ *Supra Note 21 at p.281.*

⁷⁴ *Id at p.277.*

⁷⁵ *Ibid.*

⁷⁶ *Id at p.285.*

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

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

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

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

“Privacy is a situation (or a condition) of an individual vis-a-vis others, which is related to the extent to which one is known to others, is physically accessible to others, and is the subject of others ‘interest’ and attention.”⁷⁷

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

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

⁷⁷ *Supra* Note 44 at p.24.

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

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

1.3.2.13. Definitions of Justice Report and Younger Committee Report

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

According to Justice Report, Privacy means :-

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

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

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

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

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

⁷⁸ Justice Report (*Privacy and the Law*), 1970, p.5.

⁷⁹ The Younger Committee Report (*Report of the Committee on Privacy*), 1972, p.10.

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

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

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

1.3.3. Privacy : The Definitions by Indian Scholars

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

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

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

1.3.3.1. Privacy : The Definition by Shrinivas Gupta

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

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

*defined nor any judicial pronouncement has so far come to make the position clear.”*⁸⁰

1.3.3.2. Privacy : The Definition of Pannalal Dhar

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

1.3.3.3. Privacy : The Definition of Govind Mishra

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

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

1.3.3.4. Privacy : The Definition of Upendra Baxi

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

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

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

⁸⁰ Shrinivas Gupta, *“Right to Privacy : A Kind of Personal Autonomy”*, Lex Et Juris, 1988, p.39.

⁸¹ Pannalal Dhar, *Right to Privacy*, AIR Journal Section (Raj.), 1987, p.145.

⁸² Govind Mishra, *Privacy : A fundamental Right under the Indian Constitution*, 8 & 9, Delhi Law Review, p.139.

⁸³ *Id* at p.138.

⁸⁴ K. K. Mathew on *Democracy, Equality and Freedom*, Introduction, lxxiv, note 262.

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

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

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

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

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

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

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

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

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

⁸⁶ *Supra* Note 20 at pp.44-45.

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

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

1.4. Privacy : The Classification

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

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

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

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

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

1.4.1. Intimate Privacy

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

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

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

1.4.2. Family Privacy

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

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

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

⁸⁷ *Supra* Note 4 at p.36.

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

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

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

1.4.3. Social Privacy

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

- (a) **Political or Legal Privacy;**
- (b) **Professional Privacy;**
- (c) **Community Privacy.**

1.4.3.a. Political or Legal Privacy

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

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

1.4.3.b. Professional Privacy

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

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

1.4.3.c. Community Privacy

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

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

1.4.4. Individual Privacy

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

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

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

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

1.5. Privacy : The Nature and Basis

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

⁸⁸ *Supra* Note 2 at pp.11-12.

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

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

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

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

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

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

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

1.5.1. The Nature of Privacy

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

- (i) Privacy as the Legal Claims.
- (ii) Privacy as the need to reveal and the need to withhold.
- (iii) Privacy as the balance between Individual and Social Rights.

1.5.1.1. Privacy as the Legal Claims

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

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

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

- (a) To obtain or make use of one's ideas, writings, means, likeness or other indications of identity.
- (b) To obtain or reveal information about one or those for whom one is personally responsible.
- (c) To intrude physically or in more subtle ways into one's life, space and one's chosen activities.⁹⁰

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

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

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

⁸⁹ *Supra Note 1 at p.71.*

⁹⁰ *Ibid.*

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

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

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

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

1.5.1.3. Privacy as the Balance between Individual and Social Rights

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

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

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

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

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

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

1.5.2. The Basis of Privacy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.6. Privacy : The Scope, Extent and Significance

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

1.6.1. The Scope and Extent of Privacy

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

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

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

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

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

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

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

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

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

- (a) Marriage – as decided in the case of *Loving vs. Virginia*, 388 U.S. 1, 12 (1967).
- (b) Procreation – as decided in *Skinner vs. Oklahoma*, 316 U.S. 535, 541-542 (1942).
- (c) Contraception – as decided in *Eisenstadt vs. Baird*, 405 U.S. 438, 453-454 (1972).
- (d) Family Relationship – as decided in *Prince vs. Massachusetts*, 321 U.S. 158, 166 (1944).

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

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

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

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

(i) The Privacy Act, 1974

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

⁹³ *Supra* Note 1 at p.338.

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

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

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

(iii) The Fair Credit Reporting Act, 1970

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

(iv) Crime Control Act, 1973

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

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

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

dissemination of criminal records and a Bill to prohibit military surveillance of civilian activities.'⁹⁴

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

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

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

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

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

⁹⁴ *Id* at p.341.

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

In the absence of a general right to privacy in U.K., the action for breach of confidence was the only remedy, which provided protection against the gratuitous publication of personal information, as was found in the case of *Prince Albert vs. Strange*, 1848. But, it was an equitable remedy. Hence, no direct statutory remedy was available for cases of invasion of privacy. At this juncture, the Younger Committee had published its Report on Privacy in 1972, where several specific recommendations were made by proposing a general Right to Privacy for U.K. Later on, some of those recommendations became law. But, the practical situation was that, unlike U.S.A., neither the British Parliament nor the British Courts had taken active steps for making a comprehensive law on Privacy. The Younger Committee had also accepted this truth of absence of express legislations on Privacy and the presence of the equitable remedy for breach of contract as the only effective remedy in U.K. This situation took a long time to change. Only in 1984, with the passing of Data Protection Act, one positive development was made on the issue of Privacy. But, the Act dealt with data privacy and not the individual privacy. However, the Act was concerned with personal information automatically processed, with no distinction between the public and private sectors, but no information about legal persons, such as companies, nor information in manual files were found. National security was in category of exemption. Due to the various lacuna in the Data Protection Act, 1984, a new Data Protection Act was passed in 1998 and the old Act was replaced by the new one. The new Act had tried to improve the situation by covering a larger area.

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

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

1.6.1.3. The Scope and Extent of Privacy in India

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

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

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

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

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

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

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

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

⁹⁵ *Id* at p.342.

- (a) Mohd. Hussain Saheb vs. Chartered Bank, AIR 1964 (1) Mad. 1012 for discussion of secrecy in Bankings.
- (b) Sections 24, 25, 26, 29 of the Indian Evidence Act, 1872 on Confessions.
- (c) Sections 121-129, 132 of the Indian Evidence Act, 1872 on Privileged Communications.
- (d) In camera proceedings under Section 33 of the Special Marriage Act, 1954 and Section 53 of the Divorce Act, 1869.
- (e) Secrecy of Ballot under Sections 16, 95, 127-A, 128 of the Representation of Peoples Act.⁹⁶

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

1.6.2. The Significance of Privacy

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

⁹⁶ *Id* at p.343.

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

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

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

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

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

⁹⁷ *Id* at p.345.

⁹⁸ A. R. Desai, Chidananda Reddy and S. Patil, “*Contours of Privacy and Defamation vis-a-vis free speech,*” *Cochin University Law Review*, 1996, pp.187-199 at pp.188-189.

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

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

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

- 1) Difference between Privacy and Right to Privacy.
- 2) Whether Privacy is a Public Right or Private Right.

1.6.2.1. Difference between Privacy and Right to Privacy

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

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

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

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

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

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

“Shortcomings of the prevailing theoretical approach to privacy prompted an alternative analysis of privacy as an existential condition of limited access to an individual's experiences and engagements. That analysis established that privacy differs in significant ways from the right of privacy. Individuals may have a large degree of privacy without having chosen it, and, even when individuals voluntarily undertake to secure the privacy of their engagements, their expectations of privacy need not be legally enforceable. The right of privacy does not necessarily include the right to choose where, when and how one will have privacy.

*Since privacy is an existential condition of individual's engagements, the right of privacy may encompass a broad range of privacy interests. The right of privacy is an abstract, not an absolute, right extending to a variety of privacy interests. Yet, not every assertion of a privacy interest need be legally recognised. Some privacy interests are adequately protected by non-legal safeguards, while others are guaranteed through their association with more traditional legal categories. Some privacy claims are not of sufficient importance in particular contexts of litigation to justify legal recognition”.*¹⁰²

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

⁹⁹ *Supra* Note 41 at p.16.

¹⁰⁰ H. J. McCloskey, “*The Political Ideal of Privacy*”, *Philosophical Quarterly*, Vol. 21, 1971, pp.303, 305-308.

¹⁰¹ *Supra* Note 41 at p.17.

¹⁰² *Id* at pp.20-21.

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

1.6.2.2. Whether Privacy is a Public Right or Private Right

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

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

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

- (i) Intimate Privacy;

- (ii) Family Privacy;
- (iii) Social Privacy;
- (iv) Individual Privacy.

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

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

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

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

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

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

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

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

1.7. Privacy : The Effects and Functions

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

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

1.7.1. The Effects of Privacy

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

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

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

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

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

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

1.7.2. The Functions of Privacy

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

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

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

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

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

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

The “Functions of Individual Privacy” are discussed hereunder.

1.7.2.1. Function 1 : Personal Autonomy

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

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

¹⁰⁴ A. Towe, “*Growing Awareness of Privacy in America*,” Mont. Law Review, Vol. 39, Winter 1976, p.37.

¹⁰⁵ Edward Shils, “*Social Inquiry and the Autonomy of the Individual*,” in Daniel Lerner (ed.), *The Human Meaning of the Social Sciences*, New York, 1959, pp.114-157, quoted by Alan F. Westin, *Supra* Note 26 at p.33.

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

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

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

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

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

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

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

1.7.2.2. Function 2 : Emotional Release

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

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

- (i) Emotional Release from the pressure of playing social roles.
- (ii) Emotional Release from strict compliance to social norms.
- (iii) Emotional Release from daily abrasions in life.
- (iv) Emotional Release in the management of bodily and sexual functions.

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

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

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

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

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

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

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

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

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

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

1.7.2.3. Function 3 : Self Evaluation

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

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

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

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

“institutionalized system in all societies”.¹¹¹ Hence, the process of Self Evaluation is possible in the environment of acute Privacy.

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

1.7.2.4. Function 4 : Limited and Protected Communication

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

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

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

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

¹¹¹ Alfred R. Lindesmith and Anselm L. Stranss, *Social Psychology* (rev. ed.), New York, 1956, p.435; Editorial “*Technology and Contemplation*,” 100 *America* 100 (1958).

¹¹² Georg Simmel, *The Sociology of Georg Simmel*, (tr. and ed.) Kurt Wolff, New York, 1950, pp.409-416.

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

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

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

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

¹¹³ Erving Goffman, *The Presentation of Self in Everyday Life*, New York, 1959, pp.160-161.

¹¹⁴ Simmel, *op. cit.*, pp.326-329.

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

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

1.8. Sum-Up

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

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

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

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

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

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

- 1) Privacy has both material and philosophical aspects. Hence, the term ‘Privacy’ has been derived from the term ‘Private Space.’ Every individual, be he of past, present or future society, always acts in search of his own ‘Private Space,’ where the one can enjoy freedom from outside interference and can act according to one’s wishes.
- 2) The oldest and traditional definition of Right to Privacy was propounded by Thomas M. Cooley as well as by Warren and Brandeis. Though various Indian and Western Scholars have tried to define Privacy in their own terms, but the

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

- 3) Various authors have expressed that, it is impossible to define 'Privacy' universally due to its variable nature based on the social and cultural context. Hence, the Western and Indian Scholars have possessed differences in their opinions while defining Privacy. According to Western Jurists, Privacy is not a single right, rather it is a bundle of rights and as such, the concept of Privacy defined in the Nordic Conference of Jurists, 1967, is appropriate. On the contrary, Indian Jurists have opined that, Privacy is a single concept and whatever may be the nature of the right, actually Privacy lies in the idea of exclusion of all others from the purview of the activities of an individual.
- 4) Depending upon the nature and circumstances of each case, Privacy can be classified as Intimate Privacy, Family Privacy, Social Privacy and Individual Privacy. Social Privacy can again be classified into Political or Legal Privacy, Professional Privacy and Community Privacy. But, the classification of Privacy is not an exhaustive one, it may change according to changing time, place and society. Also, the classification is not based on water-tight compartments and is overlapping with each other.
- 5) The idea of Privacy is embedded in its nature and basis. The nature of Privacy is characterized by freedom of individual human beings from any outside interference. Accordingly, Privacy is nothing but the exclusion of all others from various aspects of the life of an individual human being. Hence, the nature of Privacy is embedded in the ideas of freedom and exclusion.
- 6) Though there may be various kinds of Privacy Torts, but in all cases, only one right is violated, i.e. right to live with human dignity. Another name for that right is 'inviolable personality.' Hence, it can be said that, whatever may be the nature of privacy violation, ultimately the 'inviolable human personality' is violated. In this sense, to protect right to privacy means, to protect inviolable personality of individual human beings, without the protection of which the Right to Privacy can never be protected. Hence, the basis of Privacy is nothing but the 'inviolable personality' of human beings.
- 7) As the idea of Privacy centres around the concept of 'private space,' therefore, the amount of private space which everyone should enjoy freely and the time limit of outside interference over it, will be the scope, ambit and extent of

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

- 8) The significance of Privacy can again be sub-divided into two parts – Difference between Privacy and Right to Privacy and Whether Privacy is a Public Right or Private Right. In this sense, Privacy is a condition and hence, it may be foregone, forfeited or invaded. A Right to Privacy includes the notions of control and voluntariness in denoting individual's claims of entitlement to the recognition of their interests in Privacy.
- 9) Privacy also has various effects. The effects of Privacy means, prevention of unwanted publicity and interference into human life to protect human dignity by recognition and enforcement of Right to Privacy in a complex social structure.
- 10) Over and above, Privacy has to perform different functions in a civilized society. According to Prof. Alan F. Westin, the Functions of Individual Privacy are Personal Autonomy, Emotional Release, Self Evaluation and Limited and Protected Communication. The functions of privacy play an important role to protect personal autonomy by preventing unlimited and unprotected communication of information, which ultimately protect the right to live with human dignity in a modern democratic society.
- 11) The functions of Privacy propounded by Prof. Alan F. Westin can be criticized on the point that, these functions should equally be played during social transformation from primitive to modern or civilized society also. Otherwise, the utilization of those functions would be incomplete.
- 12) Last but not the least, the functional justification of Privacy as a basic human right is derived from the purpose it serves while protecting individuals from various emotional disturbances, like anxiety, humiliation, embarrassment, disgrace, inconvenience, annoyance, shame and indignities.

CHAPTER 2

RIGHT TO PRIVACY : ORIGIN AND HISTORICAL DEVELOPMENT IN U.S.A., U.K. AND INDIA

2.1. Prologue

Idea of Privacy encompasses a very broad ambit as its nature, basis and significance. Generally, nature of Privacy lies in the exclusion of all others from the periphery of a particular individual, whereas, the basis of Privacy rests upon the protection of ‘inviolable personality’ of human beings. The significance of Privacy means the importance of Privacy in a civilized society. Apart from the broad and general ambit, Privacy also covers various specific areas, like Intimate Privacy, Family Privacy, Individual Privacy, Community Privacy, Professional Privacy, Workplace Privacy, Privacy in Cyberspace and so on. But, the most important point is that, whatever may be the nature or type of Privacy, violation of Privacy always causes the infringement of one basic human right and that is the infringement of Right to live with Human Dignity. Hence, Privacy and Human Dignity are directly proportional to each other, thereby violation of one causes the violation of other.

Privacy is a state of affairs subjected to solitude, intimacy, anonymity and reserve, which includes the conditions necessary to preserve the human dignity in any social order. Such state of affairs is obvious for the development of physical as well as emotional and intellectual quality of human beings in a civilized society. Privacy is also playing various functions in a civilized society, like Personal Autonomy, Emotional Release, Self Evaluation and Limited and Protected Communication. The sum total of all these functions provides the idea that, protection of Personal Autonomy is must for the protection of Right to Privacy in a civilized society and for this purpose; unlimited and unprotected communication of information should be prohibited.

Functions of Privacy are much more relevant in a complex social order, in a modern civilized society. But, that does not mean that, Privacy had no functions to play in the old, primitive, ancient societies or during the age of social

transformation. There was the existence of Privacy in the old and ancient societies and as such, the relevance of functions of Privacy was also recognized. The only difference was that, functions were simple in the old simple societies, whereas, those have become critical in the modern complex societies. Hence, Privacy is a universally acclaimed concept and equally applicable for past, present and future society. Though it may vary with the variation of time, place and society, but nobody can deny the existence of Privacy in each and every society, be it primitive, ancient or modern, be it civilized or uncivilized. Accordingly, any study of Privacy would remain incomplete without the discussion of origin, history and development of Privacy in different social systems.

The term 'Privacy' is derived from Latin word 'privatus' which means separated from the rest. Privacy implies an inclination to be left alone. The term 'Privacy' has various implications in different contexts. It differs as per cultures of the people.¹ Its meaning has varied with the times, the historical context, the state of culture and the prevailing judicial philosophy.² It has many variables relating to culture, personal notions, time in history and geographical area.³

Right to Privacy is an absolute and intimate right to an individual, which is a matter of grave concern for social scenario. But, very few persons have the knowledge that, it is not a right of recent origin, rather it has a great historical background and can be traced back since the very old past. Right to Privacy, at the very outset may mean, the leading of an isolated life, but specifically it denotes the freedom from unauthorized and unwanted interference into one's private life.⁴

The value of Right to Privacy as an inherent human right was realized since time immemorial, rather since the times of ancient human civilizations. This right acts as a catalyst in promoting and developing personality, integrity, dignity, reserveness, intimacy, anonymity, solitude and freedom of individual persons. It is recognized as a valuable human right due to its working towards the furtherance of

¹ Sunita Khariwal, "Parameters of Right to Privacy", Indian Socio-Legal Journal, Vol.XXXIX (1&2), 20'13, pp.129-134 at p.129.

² Hyman Gross, *Privacy-Its Legal Protection* (Introduction to the 2nd.edn.), Oceana Publications Inc., New York, 1976, p.ix.

³ *Supra* Note 1 at p.129.

⁴ Sangeeta Chatterjee & Dr. Rathin Bandyopadhyay, "Confidentiality of Information as Right to Privacy : A Comparative Analysis of Indian, U.S. and British Laws", India International Journal of Judicial Sciences, Vol.1(1), March 2012, pp.1-16 at p.3.

basic human relationships of love, friendship, respect, parentage, son ship, conjugal relationship etc. Privacy is not only a good technique for furthering the fundamental human relations, but also without privacy, these are simply unthinkable. In fact, all these fundamental human relations require a context or the possibility of privacy for their existence. Therefore, privacy is considered as a factor forming the basis of our personal and social relationships and every individual enjoys this right as a part of his or her personal liberty.⁵

The need for 'Privacy' in a 'free society' is clearly explained by Prof. Hyman Gross. According to him, the fundamental consideration in a free society lies in the balancing of individual and social claims. This ultimate tendency of balancing between individual and social rights gives rise to a dynamic tension between individual and state, because individuals try to achieve their Right to Privacy and state tries to protect the interests of society at large.⁶

Hence, the need of Privacy can be well-understood from the words of Prof. Hyman Gross, where the balancing of the individual and social interests, is the prime concern of the Right to Privacy. The 'Functions of Individual Privacy' as propounded by Prof. Alan F. Westin, have also enlightened us on the same issue. Accordingly, the functions of individual privacy are to uphold personal autonomy by limited and protected communication, but every individual should maintain a balance between secrecy and disclosure in the public interest. This need of Privacy in a free society is equally applicable in past, present and future society. Therefore, the scope and ambit of Privacy existing in the present day society, was existed in the past society also. In this sense, it is clearly evident that, the necessity of Privacy was found since the very old period, i.e. since the dawn of human civilization.

According to Smt. Kiran Deshta, the idea of Privacy is as old as Biblical periods.⁷ The studies of animal behavior and social organization suggests that man's need for privacy may well be rooted in the animal origins, and that men and animals share several basic mechanisms for claiming privacy among their own fellows.⁸ The traces of Right to Privacy are found in Bible, where the 'feeling of shame' was

⁵ E. J. Jathin, "*Human Genome Project : Emerging Challenges of Right to Privacy vis-à-vis Insurer's Right to Know*", Cochin University Law Review, Vol.XXXI (2007), pp.1-28 at p.3.

⁶ *Supra* Note 2 at p.ix.

⁷ Kiran Deshta, *Right to Privacy under Indian Law*, Deep and Deep Publications Pvt. Ltd., New Delhi, 2011, p.81.

⁸ Alan F. Westin, *Privacy and Freedom*, Atheneum Publication, New York, 1970, p.8.

recognized for the first time in consequent to violation of privacy. The first case of privacy violation was considered to be the case of Adam and Eve in the Bible. Accordingly, it is stated in the Bible that, after Adam and Eve had eaten the fruit of the tree of knowledge, “the eyes of both were opened, and they knew that they were naked, and they sewed fig leaves together and made themselves aprons.”⁹

The growth and expansion of Privacy has varied according to variation in different stages of human civilization. Starting from the Biblical period to the modern day society, the concept of ‘Privacy’ has been expanded enormously and today it has become a part and parcel of everyday life. The idea of privacy also varies from society to society and culture to culture, but without privacy any society or any individual is simply unthinkable. As the Right to Privacy is part and parcel of Right to live with Human Dignity, violation of Right to Privacy causes violation of Human Dignity. Hence, guarantee of this right was necessitated in every society in their own interest. This necessity for protection of Right to Privacy has gradually given birth to the statutory recognition of Right to Privacy and different Privacy legislations, which ultimately resulted into the present legal framework of Right to Privacy all over the world.

As regards origin, history and development of Right to Privacy, it is pertinent to mention that, this right was originated in the animal world and then it gradually moved towards the primitive human civilizations and then gradually passed from the primitive society to the modern day society of human beings. Hence, the description of origin, history and development of Right to Privacy will also proceed in the same direction.

2.2. Privacy : The Origin

Man thinks that, the Right to Privacy is a special characteristic of human beings and the desire for privacy is a human function for the unique ethical, intellectual and artistic needs. But, the social scientists engaged in animal studies have disproved this typical human thinking. Accordingly, it is written by Prof. Alan F. Westin in his book that, “studies of animal behavior and social organization suggest that man’s need for Privacy may well be rooted in his animal origins, and that men and animal share several basic mechanisms for claiming privacy among

⁹ Charles Fried, “*Privacy*”, Yale Law Journal, Vol.77 (475), 1968, p.478.

their own followers.”¹⁰ The Origin of Human Right to Privacy lies in the origin of man, i.e. in the animal world. Hence, discussion of man’s patterns of privacy should be started chronologically from the man’s evolutionary heritage.

2.2.1. Privacy in the Animal Society

The social scientists engaged in animal studies have reached at a basic finding that, virtually all animals seek periods of individual seclusion or small-group intimacy. This basic tendency of animal beings is called ‘tendency towards territoriality’. Owing to this tendency, an organism tries to impose private claim on an area of land, water or air including the defense against intrusion by members of its own species.¹¹ Studies have found that, due to the tendency of territoriality, the animals generally act absolutely for the “animal joy of life.” More specifically, it is the craving of privacy by the animals within their borders or private territories to prevent the intruders entering into their territories.¹²

The social scientists have again propounded that; the territorial patterns of animal beings are used by them to serve various important purposes, like -

- (i) habitation of the species in different territories depending upon the availability of natural resources;
- (ii) selection of “worthy males” for providing animal breeding and to fulfill the requirement of male assistance to raise the young ones;
- (iii) providing physical frames for different group activities , e.g. learning, playing, hiding etc.;
- (iv) informing the group members in advance against the entry of intruders.

In fact, the territory rules in animal life and the law of trespass in human society are synonymous with each other. Both of them are having same value in each society. In each case, the organism craves for ‘private space’ to promote individual and small group intimacy. Hence, it is proved that, the need for ‘private space’ does not only exist in the human society, but animal society also.

¹⁰ *Supra* Note 8 at p.8.

¹¹ H. E. Howard, *Territory in Bird Life*, London, 1920; W. C. Allee, *The Social Life of Animals*, Boston, 1958; C. R. Carpenter, “*Territory : A Review of concepts and Problems*,” in A. Roe and G. G. Simpson (eds.), *Behaviour and Evolution* , New Haven, Conn., 1958; H. Hediger, “*The Evolution of Territorial Behaviour*,” in S. L. Washburn (ed.), *Social Life of Early Man*, New York, 1961; V. C. Wynne – Edwards, *Animal Dispersion in Relation to Social Behaviour*, New York, 1962.

¹² Robert Ardrey, *The Territorial Imperative*, New York, 1966, p.95.

In this sense, the necessity of Privacy among animals and human beings can be compared to each other. Studies have found that, both animals and human beings usually maintain distance or territorial spacing with the other. There are various rules of distance among animals, e.g. personal distance, intimate distance, social distance and flight distance. ‘Personal distance’ is subjected to the space between two non-contact animals, e.g. Spacing of birds on a telephone wire.¹³ ‘Intimate Distance’ is the distance regulating space between mates or parents and their offspring.¹⁴ This rule is followed mostly among birds and apes. ‘Social Distance’ is the distance between different animal groups.¹⁵ ‘Flight Distance’ is the point of approach at which an animal will flee from an intruder of another species.¹⁶ The same rules of distance are followed by human beings also and for that reason, we find different types of Privacy in the human world, like Personal Privacy, Intimate Privacy, Social Privacy and Community or Group Privacy. The classification of Privacy is based on the rules of distance-setting mechanism. Man has only eliminated ‘Flight Distance’ due to the incapacity to fly, but usually maintains the personal, intimate and social distance in the interpersonal relationships like mammals in the animal world.¹⁷

Apart from the maintaining of different kinds of distance man uses various “*animal*” or physical senses, like touch, taste, smell, sight and hearing for the purpose of defining the boundaries of privacy. The sensory mechanisms of odor, noise, visual intrusion or touch are the common deciding factors for invasion of privacy for human beings in their everyday life. When someone comes “*too close*” to one by means of any of these factors, then it amounts to violation of Privacy. In this respect also, human beings are equated with animal beings, because the use sensory organs in the human society is having its origin in the animal society.

Therefore, it is proved that, animals need privacy for various purposes. They usually maintain distance or territorial space from one another for various individual and intimate activities. As stated above, the social scientists have categorized the distance setting mechanisms under several heads and hence, there are different types

¹³ Edward T. Hall, *The Hidden Dimension*, New York, 1966, pp.15, 16-37.

¹⁴ *Id* at p.20.

¹⁵ *Id* at pp.13-14.

¹⁶ *Id* at pp.10-14.

¹⁷ *Id* at pp.39-70.

of 'distance' among animals. Furthermore, ecological studies have clearly specified that, animals are also having the minimum needs for 'private space' like human beings, without which their survival would be seriously jeopardized.

Finally, the animal studies have also found that, there is another similarity between animal beings and human beings. Both of them are under the need for social stimulation alongside the need for privacy. Hence, the animals go for seclusion or privacy to perform certain activities and when those activities are completed, they again come and join the groups. Thus, it is proved that, privacy and social stimulation both are two important parts of animal lives.

Hence, it can be summed-up by saying that, there should be a balance between privacy and participation in the animal world; otherwise their struggle for existence would be seriously jeopardized. This theory of balancing the privacy and participation is equally applicable to human beings as well as to animal beings. This contention further proves that, need for privacy is not restricted to human beings, but it is the need of every form of life.

2.2.2. Privacy : The Existence in Primitive Human Society

Though the origin of privacy is found in the animal society, but it gradually has been adopted by human society. Primitive human society is the first one, where the traces of 'Privacy' have been found. In this respect, it is pertinent to mention that, dominant anthropological studies on privacy have shown that, our contemporary norms of privacy are the creation of modern society and those advanced values of privacy are absent in the primitive human societies of past and present times. It is evident that, privacy is more or less the creation of civilization and the uncivilized societies are not subjected to the Right of Privacy, even in the present times. There is nothing private and everything is public in the everyday activities of life in various primitive and tribal societies found today also.

This point can be explained with the example of *Dorothy Lee*, whose work as a cultural anthropologist centers around the relation between freedom and culture in various societies. She has created a contradistinction between privacy in American society and inter-personal life among the Tikopia of Polynesia.¹⁸ According to *Mrs. Lee*, in child rearing, Americans concentrate on teaching the child to be "himself"

¹⁸ Dorothy Lee, *Freedom and Culture*, Englewood Cliffs, N.J., 1959, pp.31-32.

and “*self-dependent*”, preparing for his individual struggle in life and also giving the mother important privacy during child rearing.¹⁹ Hence, it is found that, the need for privacy is imperative in the American Society.

More fully, the views of *Mrs. Lee* provide the idea that, life among the Tikopia was special due to its special characteristics, which were exclusive to the primitive societies, but unacceptable in the modern societies. One of such important characteristics was that, they imposed greater emphasis on social values rather than individual values. Therefore, social rights were upheld therein over the individual rights. They supported the notion of joint family system, instead of the nuclear family. As for example, they used to sleep together in a crowded place along with their children, parents, brothers and sisters, by mixing sexes and generations. The custom of adoption of a child or a brother was also recognized to get rid of the loneliness of a single widow. Hence, Family Privacy was recognized in the Tikopian society. In case of work life, the concepts of private office or lonely workplace were not found as opposed to the modern work culture. The habit of at least taking a child alongside was practiced in case of a lonely workplace. Hence, Workplace Privacy was also not recognized in the Tikopian society.

Studies on life among the Tikopia conducted by *Mrs. Lee* clearly show the absence of Privacy in the primitive societies. In support of this view, again, another study conducted by *Margaret Mead* on another primitive society, called ‘Samoa’, can be referred.

Margaret Mead has conducted a famous study on the society of ‘Samoa’, where the basic American concept of Right to Privacy was absent. More or less, Samoans were equated with the Tikopians on the point of privacy in their lives. Idea of privacy was found in the construction of houses at Samoa. There were no walls in the Samoan house and only mosquito net performs the function of wall between the sleeping married couples, children and old people. In this respect, they were also sleeping together like the Tikopians. They had also supported the notion of joint family system, instead of the nuclear family system. Some of the basic features of the Samoan society are as under:-

¹⁹ *Id at pp.74-75.*

- (i) Samoan adults used to wear little clothes, but children remained without clothing.
- (ii) Bathing in the sea was performed without clothes.
- (iii) The beaches were used as open latrines.
- (iv) No privacy was observed during the processes of birth and death.
- (v) Children were permitted to observe the moments of intimacy.²⁰

If all the characteristic features of the Samoan society are coupled together, then only one idea would flow from it and that is, there was no sense of shame as well as no recognition of Right to Privacy in the Samoan society. There was no concept of Personal Privacy, Family Privacy, Social Privacy or Group Privacy. Most important point was that, there was not only the absence of Privacy, but there was absence of shame, which is the basis criterion of civilization. Hence, they were called the primitive uncivilized society.

Third example of absence of Privacy in primitive societies can be given from the writings of *Livingston Jones*, on another area of the world, the Tlingit Indians of North America. There was no question of Intimate or Family Privacy in the society of Tlingits. In this sense, they were equated with Tikopians and Samoans. The only difference was that, there was the presence of shame to a limited extent among the Tlingits, as they used to wear clothes. They were also the supporters of joint family system and they used to live together in a bunch. The concept of Privacy of Information was not recognized among them. Accordingly, they were very much curious about one another and every activity of birth, death or even a quarrel was considered as an attention drawing event and also followed by a crowd. They were not habituated of knocking at the door before entering one another's house. More shocking was that, a woman used to change her clothes in front of a stranger came to visit her husband, without any embarrassment. It was the acute example of absence of shame, though with a limited extent.²¹

Therefore, all the studies conducted on primitive societies can be summarized by one common finding of all of them. These studies have found that, there are no fixed principles of Privacy which are universally applicable to each and every society. But, it does not totally disapprove the inference of existence of

²⁰ Margaret Mead, *Coming of Age in Samoa*, Mentor ed., New York, 1949, pp.82-85.

²¹ Livingston F. Jones, *A Study of the Tlingits of Alaska*, New York, 1914, p.58.

universal norms, values and needs of Privacy. Rather, it prescribes that, the norms and values of Privacy varies from time to time, society to society and culture to culture. In this sense, Privacy may be present in every society in one form or the other, but it may not be visualized by the persons belonging to different society supporting different norms of Privacy. Hence, the studies prove that, Privacy is a variable concept since its inception.

Apart from that, various studies of Anthropology, Sociology and different survey reports of major ethnographic studies, and also the Human Relations Area Files at Yale University suggest four general aspects of Privacy, which are virtually present in every society. The general aspects of Privacy Common to every society are discussed below:-

(i) Anthropological studies have found that, every individual is subjected to privacy and disclosure or companionship at different parts of the life. This rule is virtually applicable to every society, which is formally clothed with the terms 'social distance' and 'avoidance rules' by the social scientists.²²

(ii) *Robert F. Murphy* of Columbia University has conducted a study on this distance-setting process. According to him, '*reserve and restraint*' are two elements of individual privacy which are '*common*' factors in '*all social relationships*'. *Murphy* has called it the main '*dialectical process of social life*'.²³

(iii) Every individual has to play different roles with different persons at different social situations and for this purpose, one has to present one as a different '*self*' at different times.²⁴

(iv) Restriction of information and emotions of oneself is necessary for protection of the individual from stresses and strains of the social interaction and for this, privacy as well as social distance is required not only within the casual relations, but also within the intimate relations

The study of *Robert F. Murphy* on Privacy is the most important study in this respect. *Murphy* has conducted his study on the Tuareg tribes of North Africa. The Tuareg men were habituated with shielding their eyes and mouth with a veil to

²² *The Sociology of Georg Simmel*, in Kurt Wolff (tr. and ed.), New York, 1950.

²³ Robert F. Murphy, "*Social Distance and the Veil*," *American Anthropologist*, Vol.66, 1964, pp.1257-74.

²⁴ Gardner Murphy, "*Social Motivation*", in Gardner Lindzey (ed.), *Handbook of Social Psychology*, Cambridge, Mass., Vol.1, 1954, pp.601-31.

protect their privacy at the time of making interpersonal relations with others. As the eyes and mouth are the instruments of 'exposure', therefore, Tuareg people were covering their faces with veil, which would protect their physical as well as psychological privacy. *Murphy* has observed that, the 'Tuareg veil' was the visual example of distance-setting process among human beings. He has also concluded that, 'Tuareg veil' was the symbolic realization of the need for privacy in every society. Such examples are also found now-a-days, like covering of faces of the women with a fan at the time of making relations with men, use of dark glasses by the people of high society in Middle East, Latin America and Hollywood etc.²⁵

Basically, the studies of *Dorothy Lee* and *Margaret Mead* have shown the absence and non-recognition of 'Privacy' in the primitive societies. More or less, those studies have proven that, there were no needs of 'Privacy' in different primitive societies and everything remained public. In this respect, those studies have highlighted a contradistinction between primitive societies and modern societies on the issue of Privacy. But, gradually various other studies have been found, which expressed a different contention. One example of such study is the Anthropological study of *Robert F. Murphy*. *Murphy's* study has shown the existence of 'Privacy' in some primitive societies. Hence, that study gives us the idea of social transformation due to which the primitive societies gradually started to recognize 'Privacy'. The doctrines of 'Social distance' and 'Avoidance rules' propounded by various social scientists as well as found in the studies of *Murphy*, are the burning examples of that social transformation, which has proven the existence of 'Privacy' in the primitive societies. There are also other studies in support of the existence of 'Privacy' in the primitive societies, which are discussed hereunder.

2.2.2.1. Norms of Privacy in Interpersonal Relations

The primitive human societies are subjected to Privacy in matters of different interpersonal relations. When individual Privacy is claimed on the one side,

²⁵ Robert F. Murphy, *op. cit.*

interpersonal disclosure becomes limited on the other side. Various instances of individual Privacy are found in different primitive societies, which are as follows:-

- (i) More or less, all societies had rules for concealment of female genitals and restrictions on its exposure.²⁶
- (ii) Hence, complete nudity practiced by few societies was just an exception to this general rules.²⁷
- (iii) According to *George P. Mardock*, “*modesty about natural functions*” was the basic characteristic of all primitive societies.²⁸
- (iv) But, the practical situation was somewhat different. Practically, openness was found regarding evacuation in the most non-literate societies and it was made a “*public affairs*”. Hence, the situation was contrary to the modern norms of Privacy in the societies, like United States.
- (v) The moments of individual Privacy, like birth, illness and death were considered as taboo in many societies and thereby kept secluded from general view.²⁹
- (vi) Again, in some cases, few societies considered these affairs as public matters, which were just exceptions and not the norms of Universal Privacy.
- (vii) Need for Privacy in the intimacy of sexual relations was recognized in all the societies.
- (viii) But, there were few exceptions to this general rule that, men and women would seek seclusion at the time of performing sexual act.
- (ix) The survey conducted by *Ford and Beach* on sexual patterns in 190 societies had proved the situation. According to them, “*human beings in general prefer to copulate under conditions of Privacy.*”³⁰
- (x) The survey highlighted a few societies as exceptions, like the Formosan and Yap natives of the Pacific, who used to perform sexual acts openly in public.

²⁶ Clellan S. Ford and Frank A. Beach, *Patterns of Sexual Behaviour*, paperback edn., New York, 1951, pp.102-104.

²⁷ *Ibid.*

²⁸ George P. Mardock, “*The Universals of Culture*,” in E. A. Hoebel, J. D. Jennings and E. R. Smith (eds.), *Readings in Anthropology*, New York, 1955, P.5; J. W. M. Whiting and I. L. Child, *Child Training and Personality*, New Haven, Conn., 1953, pp.84-86, 116.

²⁹ Sigmund Freud, *Totem and Taboo*, New York, 1950, pp.27-29,33.

³⁰ Ford and Beach, *op.cit.*, pp.77-79, 81-83, 92, 196.

(xi) But, there were certain differences between these two societies. Formosans usually did not have intercourse in the presence of children.³¹

(xii) Yapese couples usually secluded at the time of intercourse, but they did not mind in the presence of any other person in the scene.³²

The above-mentioned instances are the examples of existence of Privacy in different primitive societies in matters of interpersonal relations. The views also provide a clear idea on existence of 'Privacy' in respect of performance of various essential functions of human life in the primitive societies. This contention can be further illustrated with the views of *Prof. A. R. Holmberg*, who wrote an essay about the situation of Privacy among the Siriono Indians of eastern Bolivia. According to him, Siriono Indians were habituated with performing sexual intercourse in the bush rather than in the house. The main reason behind it was that, Privacy was almost impossible within the hut, because they used to reside in small huts and more or less fifty hammocks usually hung in the confined space of five hundred square feet, within their huts.³³ Hence, staying in those huts was itself a hardship, thereby the question of Privacy was almost unthinkable.

2.2.2.2. Norms of Privacy in the Family Household

Again, norms of Privacy are also found in the family-household settings of primitive life. Whether the primitive household was nuclear or extended, most societies had rules limiting free entry into the house by non-residents, as well as rules governing the outsider's conduct after entry.³⁴ Apart from that, less privacy was found for the individual or pair in an extended household rather than in a nuclear family. This contention was based on the criterion that, more people used to see and exercise influence over each other's behavior in the extended household.

The most important norm of Privacy is the norm relating to 'avoidance rules'. Actually, the idea of Privacy is embedded in the concept of 'avoidance rules',

³¹ *Id at p.77.*

³² *Ibid.*

³³ A. R. Holmberg, *The Siriono* (unpublished Ph.D dissertation), Yale, 1946, p.183, quoted in Ford and Beach, *op.cit.*, p.78.

³⁴ Qukan, in M1, J.25, 3033, *Human Relations Area Files*, Yale University; W. E. Freeman, "The Family Systems of the Iban of Borneo," in Jack Goody (ed.), *Cambridge Papers in Social Anthropology*, No.1, 1552, London, 1958, p.52; Aurel Krause, *The Tlingit Indians*, New York, 1956, p.112.

because one needs to avoid others in respect of private matters to achieve Privacy. This principle was followed in the primitive societies, which was formally known as 'avoidance rules' and owing to these rules, the entry of outsiders were restricted or limited in the primitive households. There were various practices in the primitive societies, which had proven the existence of avoidance rules. These rules were followed to ensure psychological Privacy of individuals among the crowding.³⁵ It was the foremost effect of these rules. Another example of observance of these rules was the restriction in the flow of information in an extended household by covering the face, averting the eyes, going to one's mat or facing the wall. This system of withholding information for claiming Privacy was followed, more or less, in all the societies. Basically, this system was embedded in the social structure of primitive societies.³⁶ In this context, *R. M. Underhill* conducted a study on the Papago Indians. The study found that, the households of Papago Indians usually contained ten or more people living and sleeping in a one-room house, but surprisingly their 'avoidance rules' were so strong that, they skillfully managed their movements in that small place without touching one another. This situation of Privacy was contrary to the Europeans, who had more Privacy, but they never maintained such avoidance rules of not touching one another.³⁷

Another study is found on the maintenance of norms of Privacy in the household, conducted by *Clifford Geertz*, by comparing household-privacy in two Indonesian societies, Bali and Java. The study found that in Java, people usually lived in small houses made of bamboo and their family structure was mostly nuclear family including mother, father and unmarried children. Sometimes it might include an aged grandparent, but none else. Generally, the Javanese houses contained a street facing cleared front yard, loosely and thinly woven house walls and the houses were, excluding the walls or fences around the house and the houses were without doors. In fact, absence of Privacy was not only found in the construction of Java houses, but within the houses also. People moved freely from one place to another within the house. Even outsiders were allowed freely in the house during day time

³⁵ William J. Goode, *The Family*, Englewood Cliffs, N. J., 1964, pp.53-54; Beatrice Blackwood, *Both Sides of the Buka Passage*, Oxford, 1935, pp.22-23.

³⁶ Murphy, *op.cit.*, p.1274.

³⁷ R. M. Underhill, "Social Organization of the Papago Indians," Columbia University Contributions of Anthropology, Vol.30, p.119.

and early evening. Privacy was almost 'non-existent' there, because anybody could enter into the bedroom of sleeping inmates. Every place was almost open for everyone and prior intimation of presence of an outsider was not required. Privacy, to some extent, was found only in the bathing enclosure, where people were usually changing their clothes and outsiders were restricted only in that place. Clothing was practiced among them, but the clothes were too short and usually covered only from shoulders to knees of a man or woman. Hence, Javanese literally had almost no physical shield against the outside world.³⁸

Though there was the absence of Physical Privacy in the Java families, but they were subjected to Psychological Privacy. In fact, their openness towards outsiders and absence of physical or social barriers against the outside world had made them prone to psychological barriers of Privacy. The study found that, Java people were very restrained in their relationships within their household and outside; they were soft spoken, usually hiding their feelings from everyone and always behaved with appropriate decorum. They maintained good amount of etiquette and developed very high patterns of politeness, which were added with emotional restraint and they usually showed that attitude in both speech and behavior, while dealing with the outsiders. Most significantly, the attitude and behavior of Java people were same in private and public sphere. Hence, they maintained no difference in private and public life. In this sense, their attitude was quite 'stuffy' in the modern sense of the term. The final outcome of the study on Java people proved the existence of Privacy in the Java society, but only of psychological nature. In the absence of Physical or Social Privacy, Java people usually maintained the Privacy of their personal lives in the same manner both in private life as well as in public life. They created no difference between public and private in comparison to modern society.³⁹

Next comes the living style of people in Bali. In Bali, the house yards of the people were usually surrounded by high stonewalls coupled with a narrow, half blocked-off doorway. The family structure in Bali was also different from Java. In the Bali house yards, usually lived a patrilineal extended family consisting of a

³⁸ Dr. Geertz's paper was delivered informally at a seminar on privacy conducted by members of the Center for Advanced Study in the Behavioral Sciences, Stanford, Calif., in 1959. Quoted with permission of Dr. Geertz by Alan F. Westin, *op.cit.*, pp.16-17.

³⁹ *Ibid.*

number of Javanese type of nuclear families. The number of nuclear families in a Bali house was ranging from one to a dozen or more. Generally the heads of those nuclear families were related patrilineally and the members of those families were father, his two married sons, his two married brothers, his father and the unmarried children of all of them. In some cases, those members might include a set of cousins with their families who were sons of two brothers and likewise. As regards the entry of outsiders within the house, Bali house was again different from Java house. Non-kinsmen were not allowed within the house, except with invitation on ceremonial occasions. If the other people wanted to see a number of Bali family, they needed to bring that person outside the house by sending a child. Other patrilineal relatives and friends of the family used to visit the family members in the early evening for gossiping. Except these people, nobody could enter into the house and family members were free from public life within their family for leading their private life peacefully. They were surrounded by their immediate family members only within the house. Hence, in Bali household, privacy was maintained as a matter of right and there were differences between public and private life in the Bali society.⁴⁰

If a comparison is made between the life in Java society and the life in Bali society, then the following points may be emerged:-

- (i) The constructional structures of Java and Bali houses were different from each other. Openness was the feature of Java house, whereas, closeness was found in Bali house.
- (ii) Java house were small, made of bamboo, loosely woven, excluding the fences and doors. Whereas, Bali house yards were big, surrounded by high stone walls and coupled with a narrow, half blocked-off doorway.
- (iii) Family structure in Java was nuclear, whereas, family structure in Bali was patrilineal.
- (iv) In a Java house, usually a single nuclear family resided. On the contrary, in a Bali house, a patrilineal extended family resided containing a number of nuclear families of Javanese type.
- (v) Outsiders were allowed in the Java house without any restriction. But, except patrilineal relatives, no outsiders were allowed in the Bali house.

⁴⁰ *Ibid.*

(vi) Javanese people had no physical or social privacy, they only had psychological privacy. Whereas, in Bali, people had both physical as well as psychological privacy.

(vii) Java people had no private life and their psychological privacy was same for the family members and outsiders. On the other hand, Bali people had their private life and they usually had different behaviors for family members and outsiders.

(viii) Java people created no difference between private and public life. Whereas, Bali people created the difference between public and private life.

The above-stated comparison between Java and Bali society, clearly shows the difference regarding the idea of Privacy in these two societies. In fact, Java society was more open towards everyone and thereby there was absence of physical privacy in the individual life, they were only subjected to psychological privacy. On the contrary Bali society was more close or interwoven among themselves, which prevented the entry of outsiders in that society. Hence, they enjoyed much more privacy in the individual life than the Java people. They were subjected to both physical and psychological privacy. In this sense, it can be said that, though both the societies were primitive, but Bali society was quite modern than the Java society in respect of Right to Privacy.

2.2.2.3. Norms of Privacy in different Ceremonies of Human Life

Apart from the interpersonal relations and settings of family household, existence of norms of Privacy are also found in various other activities of human life in the primitive societies. Those areas need specific elaboration.

One special kind of human activity in the primitive society was the 'rites of passage', where boys and girls were kept secluded after attaining a certain age. In those cases, Privacy was required for certain group ceremonies of the boys and girls. Usually, in such cases, those boys and girls were withdrawn from the whole group for participation in special ceremonies in secluded places. Generally, they re-entered the main group after attaining adulthood. Girls and boys were sent in separate places for observation of separate ceremonies. Girls were kept in the all-female society from several days to several months, where they received sexual instructions and marriage information from other women. On the contrary, boys were sent to the all-men society for the same period, where they faced various ordeals designed to test

their manhood, after the passing of which they received sexual instructions. The age of seclusion for boys and girls, was generally the age of puberty. This seclusion of the youths was an acute example of Privacy for observance of special ceremonies in the primitive societies.⁴¹

Hence, studies have found that, there was another aspect of Privacy, called '*Ceremonial Privacy*', existed in the primitive societies. In this respect, *Margaret Mead* again suggests that, "*the enforcement of privacy for the ceremonies of various sub-groups in the community rests on the feeling that the presence of 'spectators' would affect the psychological feeling of unity and belonging of the participants.*"⁴² The theory behind the '*Ceremonial Privacy*' lies in the feeling of insecurity and lack of confidence based on the loss of group-unity in the primitive societies.

In this respect, *Margaret Mead* has thrown light on the issue by giving the example of the night dances among the Samoans, which usually ended in openly promiscuous relations. As a matter of general rule, only men and women of full age did participate in those dances. Children and old people could not participate therein, not even they were allowed as spectators, which were considered indecent. Same attitude was followed in cases of all emotionally charged events, like a woman's weaving bee, a house-building or a candle nut burning, which were all events of formal ceremonial nature. All these were the examples of cases of '*Ceremonial Privacy*', which had been given great importance in the primitive human societies.⁴³

Last but not the least, the importance of '*Ceremonial Privacy*' in the primitive societies, lies in the fact that, more or less it was present in every society and there were various ceremonies common to every society, which could not be performed without Privacy. In those ceremonies various parts of the whole group or community had been excluded. A few examples of such ceremonies were the ceremonies for warrior males, cult members, women etc. In case of violation of Privacy in these ceremonies, strict punishments were prescribed. Apart from that, taboos were found prohibiting ordinary people, except priests from entering into the sacred places of the society.⁴⁴

⁴¹ Arnold van Gennep, *The Rites of Passage*, Chicago, 1960, pp.180-185.

⁴² Mead, *op.cit.*, p.85.

⁴³ *Ibid.*

⁴⁴ Georg Simmel, "*The Sociology of Secrecy and Secret Societies*," *American Journal of Sociology*, Vol.11, 1906,p.441; Hutton Webster, *Primitive Secret Societies*, New York, 1908; Camilla H.

Finally, it can be summed-up by drawing an inference from the various Anthropological studies and studies of various other Social Sciences on 'Privacy' that, at the dawn of human civilization, there was no concept of 'Privacy' in the primitive human societies. But, with the occurrence of social transformation, when the primitive societies developed gradually, alongside the concept of 'Privacy' came into being. Thus, the origin of Privacy was found in the animal society, which gradually incorporated into the human world, by way of non-existence of Right to Privacy to the existence of Right to Privacy in the primitive human societies.

2.3. Privacy : The History

The Origin of Right to Privacy is found in the animal society, which gives the idea of existence of Privacy not only in the human life, but also in all forms of lives on the earth. The idea of Privacy originated in the animal society has been incorporated into the human society, at the first instance, in the primitive human society. Gradually, the primitive societies have been transformed into modern societies and hence, the concept of Privacy is advanced with the passage of time. While, the primitive societies are subjected to no Privacy or little Privacy, the modern societies are subjected to great amount of Privacy, which has become the part of modern human lives subsequently. With the advancement of modern technologies, surveillance in human society has become an essential aspect of human life, consequent to which the cases of privacy violations have been increased. This situation has given rise to the social concerns for protection of Privacy all over the world.

In the modern technologically advanced society, when the violations of Privacy are a contemporary social issue, no one can outweigh the importance of Privacy in every human society. To deal with the present day problems of violation of Privacy, every individual should know the root cause of those problems. In this context, it is pertinent to mention that, the root of Privacy and its protection is embedded in the history of human civilization, which is characterized specially by transformation of primitive society into modern society. Therefore, the study of

Wedgewood, "The Nature and Functions of Secret Societies," *Oceania*, Vol.1, 1930, p.129; George Schwab, *The Tribes of the Liberian Hinterland*, Cambridge, Mass., 1947; George Harley, *Notes on the Poro in Liberia*, Cambridge, Mass., 1941.

history of Privacy should be started from the era of transformation of Primitive societies to Modern societies.

2.3.1. Privacy in the Context of Transformation of Primitive to Modern Societies

The Anthropological studies conducted by various Social Scientists have suggested that, the social transformation from primitive to modern societies is a very important criterion for historical development of Right to Privacy. The transformation has increased both the physical and psychological opportunities for Privacy. Hence, the needs for Privacy have become possible for individuals and family units to a greater extent. It is also proved to be fruitful for conversion of these opportunities into choices of values in the context of socio-political reality. Some of the Anthropologists, like John Honigmann, have explained this situation as an 'increase in the scale of life'.

Honigmann's study has defined the 'increase in scale of life'. According to him, increase in scale of life is equated with freedom. It is also directly related to freedom, as it increases, freedom also increases. Though this increase brings forth centralization tendencies, but the most important impact of it, is the freedom in personal relations. Freedom is necessary for everyone, be it a primitive man or a modern civilized man. To understand the idea of increase in scale of life, a comparison is required between a primitive man and a civilized modern man. The primitive man was pressurized by the neighbors and Kinsmen, from whom he could never escape. His position in the society was influenced by sex, age and blood. Therefore, the freedom of a primitive man was limited. On the contrary, a civilized modern man is free from the influences of neighbors, Kinsmen and others. His house is like his castle and thereby he can live aloof in his house. Moreover, he has the freedom of movement to escape from any pressurization. As regards the Right of Privacy, modern man has more Privacy than the primitive man. Due to the inside and outside pressure, a primitive man was not free to live a life according to his wishes and thereby had less Privacy. But, a modern man is free from such pressures and influences, thereby in a position to enjoy greater amount of Privacy. Moreover, in a number of primitive societies, enjoyment of private life was not recognized and everything was public, which was another reason of lack of Privacy therein,

whereas, in every modern society, citizens are having both private and public life. Therefore, a modern man can easily enjoy the Privacy in his private life. Hence, the increase in scale of life from primitive to modern society has been subjected to the increase of freedom in various areas of human life including the increase of Right to Privacy.⁴⁵

This position can again be illustrated with the help of social developments due to industrialization. It has given rise to modern industrial societies, which are subjected to the nuclear family system, urbanization, anonymity of city life, mobility in work and residence as well as the decrease in superstitions and control of individual life by the religious authorities. All these factors are responsible for the growth of physical and psychological privacy in the modern industrial society, which were absent in the primitive society. In spite of these merits of modern society in support of Privacy, there are also various demerits which actually decrease Privacy in the modern society. Those factors are density and crowding of populations, bureaucratic organizational life and insecurity leading towards the desire of creating new relations. Moreover, the invention of new physical, psychological and data surveillance instruments has posed threats of constant surveillance on modern human life, which is another cause of loss of Privacy in the modern life. Above all, the modern state always wants to control the human lives with its military, technological and propaganda capacities. All these factors will go against the enjoyment of citizen's individual Right to Privacy in a modern state. Therefore, every individual tries to acquire Privacy from constant state surveillance in a modern society, which is also necessary for their existence as human beings. Though the achievement of Individual, Family or Group Privacy in a modern state is necessary for the present social structure, but acquisition of Privacy is also obvious for getting freedom from the constant technological surveillance. Hence, Privacy is equated with Freedom in the modern industrialized society.

The study of social transformation reveals that, Right to Privacy is a product of society and hence, it changes with the social change. For this reason, various changes have been found in respect of Privacy in the primitive society and Privacy in the modern society. In the primitive societies, there were more openness among

⁴⁵ John J. Honigmann, *The World of Man*, New York, 1959, p.154.

the group members of different social groups; consequently they used to share information among each other. Man is curious by nature and due to this natural tendency of curiosity; man usually invades privacy of others. Such invasion of privacy is possible to a greater extent in an open society, where everything remains public. Primitive societies were basically open societies and hence, less Privacy was found therein. Maintenance of secrecy was found in primitive societies only in cases of religious fear (Commission of sin) or fear of natural forces; otherwise existence of Privacy was limited or almost impossible.

In the modern societies, this situation has changed gradually. Modern societies are more close and complex in nature and hence, invasion of Privacy, in every case, is not an easy task. In a close society, intimacy among human beings and sharing of information with each other is not a common feature. Due to the complex social structure men are busy with their daily activities and there is no scope for curiosity towards others, in a modern society. Hence, cases of invasion of Privacy are less on this ground. But, the advancement of modern technology has imposed surveillance on human beings, resulting into violation of individual Privacy. This is a typical characteristic of modern society and primitive societies are not subjected to these types of privacy violations.

Accordingly, it can be said that, social transformation is the responsible factor for changing nature of Privacy as well as the changing character of privacy violations from primitive societies to modern societies.

2.3.2. The Comparison of Privacy between Primitive and Modern Societies

History of Privacy is characterized by the change in the concept of Privacy from primitive to modern societies. For better understanding of this process as also to understand the nature of change, it is obvious to bring out the comparison between Privacy in the primitive society and Privacy in the modern society.

In this respect, the following discussion may enlighten everyone on this issue by bringing forth the points of difference between Privacy in the Primitive Society and the Modern Society. After comparison, following points may be found:-

- (i) Perceiving the situation a state of Privacy is different in primitive and modern societies.

- (ii) Isolation was not expected and welcomed in primitive society, whereas, it is necessary for spiritual, mental and intellectual development in modern society.
- (iii) Even in physical solitude, people in primitive society did not believe that they were wholly alone. Whereas, in modern society, people needs physical solitude and they believe in its existence.
- (iv) In pre-literate societies, people believed in the presence of various supernatural forces and thought that, they were always under their observation. But, in the modern societies, acceptance of presence and observation of supernatural forces has become lesser.
- (v) In primitive societies, supernatural forces were classified as follows:-
 - (a) Protecting the individual;
 - (b) Threatening or tempting the individual;
 - (c) Watching the individual to judge one's fate for a future purpose, might be after death.⁴⁶

On the contrary, such classification and believing in supernatural forces in that manner, have become absurd in the modern society.

- (vi) In most primitive societies, the need for protection, the identity crisis and spiritual longings were the common factors behind the overdependence on supernatural forces. Whereas, in the modern societies people have become independent and broad minded, thereby their dependency on supernatural forces has been minimized.

The above stated discussion shows the evidences of fear of seclusion and overdependence on supernatural forces for protection in the primitive society, but absence of those situations in the modern society. It proves the absence of Privacy in the primitive society, but the presence of it in the modern society.

Hence, the comparison of 'Privacy' between primitive and modern societies, establishes that, whatever may be the nature of society, primitive or modern, the need for privacy or seclusion would always be there, for fulfillment of physical and psychological desires of man. The difference between the two societies is that, in the primitive societies, there were fears of supernatural forces and religious sanctions,

⁴⁶ William W. Howels, *The Heathens: Primitive Man, and His Religions*, New York, 1948, Ch.10; Robert H. Lowie, *Primitive Religion*, New York, 1924; E. Vogt and W. Lessa (eds.), *Reader in Comparative Religion*, New York, 1965.

whereas, in the modern societies, those fears have been abolished. Again, in the primitive societies, the need for Privacy was mainly physical, but in the modern societies, psychological Privacy is also needed with the physical Privacy, for the development of intellectual quality of human beings. The evidences milked the communication with the spirits or gods in the primitive societies in the state of solitude, shows the necessity of physical privacy therein. Actually, the primitive people always tried to communicate with their guardian spirits to prevent the evil forces from causing any harm to them. Therefore, the traces of physical privacy were found in the primitive societies in somewhat limited manner. For this reason, it is generally thought that, there was absence of Privacy in the primitive society.

On the contrary, in the modern society, both physical and psychological Privacy are very much present. Though the fear of supernatural forces or evil spirits has been abolished in the contemporary society, but the practice of religious communication is still present herein. For this purpose, meditation is required either in the physical solitude of forest, beach or church, or in the psychological isolation of self-induced processes in the physical presence of others.⁴⁷

Apart from the differences between the two societies, various similarities have also been found among them regarding the need for Privacy. One such similarity is that, man always needs seclusion for religious communication or to communicate with God, and this need for Privacy is universal, it is equally applicable to primitive and modern, both societies. Also, solitude, seclusion or Privacy is needed for concentration or meditation in each and every society, whether primitive or modern. In this respect, it is also pertinent to mention that, the idea of being watched by the supernatural forces and the need to communicate with the guardian spirits for protection is not absolutely abolished from the modern society. These practices are very much present now-a-days among the Judeo-Christian, Muslim, Hindu and Buddhist religions. Simultaneously, the beliefs of primitive people on ancestors, spirits, witches and gods are still existing to-day. Hence, the similarities between the two societies are not single, but many.

Thus the study finds that, Privacy is an important characteristic of each and every society, be it primitive or modern. Privacy is needed by man in every society

⁴⁷ F. E. Williams, *Orokaiva Magic*, London, 1928 , pp.81-82.

to attain physical and psychological freedom only difference is that, in the primitive societies, choice of such freedom was not with the individuals, whereas, in the modern societies, individuals are having the freedom to choose their Right to Privacy as and when needed.

2.3.3. History of Privacy in the Ancient Western Society

The history of Privacy is not only characterized by Privacy in the era of transformation from primitive to modern society, but it includes the beginning and development of Privacy in the modern society also. Rather, without the discussion of historical development of Right to Privacy in the modern society, any study of Privacy would be incomplete. The history of Privacy in the modern society is divided into Privacy in the a western society and Privacy in a Modern Democratic Society.

The history of Privacy in the Western society starts from the evolution of Western political and social institutions since the time of Greek and Roman civilizations. Therefore, the history of Privacy can be traced back since the beginning of Greek and Roman civilizations. Gradually, the history moves towards the starting of American civilization. The study centers round the idea of Privacy conceived by the ancient Greek and Roman civilizations, on the one side and the modern American civilization, on the other side. No prominence was given on Right to Privacy in the ancient civilizations and individuals are not free to act according to their wishes. There were Church and State control found in every sphere of human life. In contrast, modern American society was much more liberal on the issue of Privacy and considered Privacy as an essential aspect of Human Dignity.

In this respect, it is pertinent to mention that, the ancient societies were stricter on the issue of Privacy and they kept human beings under strict surveillance. Hence, surveillance gained prominence over Privacy. But, the modern American society started to give importance on Right to Privacy since its inception by keeping check on surveillance mechanism. As the Americans considered Privacy as an essential attribute of human dignity, they believed that, without guarantee of Privacy, guarantee of human dignity would be incomplete. For that reason, they gave importance to Privacy.

The problem of the modern American society was the advancement of modern science and technology, with the help of which, every sphere of human lives could be kept under surveillance. But, the Americans believed in free society and free life. Hence, they started keeping check on surveillance mechanisms and recognized Privacy as a basic Human Right. Such concern for Privacy in the American society gradually gave birth to a well-advanced law of Privacy therein. On the contrary, different ancient Western societies had not gone so far on the issue of Privacy due to their practice of strict surveillance on human lives.

Thus, the history of Right to Privacy in Western Societies is marked by the development of Right to Privacy in positive direction, in the American society, in comparison to ancient Western Societies. Only exception is that, there were no proper mechanisms for prevention of invasion of Right to Privacy of the celebrities from investigative journalism, which has come later on.

2.3.4. History of Privacy in the Modern Democratic Society

History of Privacy in modern democratic society is characterized by its political system. Political system in each society may differ from the other and along with it, the idea of Privacy varies from society to society. This is so because, political system in every society plays the fundamental role for shaping its balance of privacy and different patterns of privacy disclosure and surveillance are functional necessities of different kinds of political regimes. In this sense, modern democratic society can be classified under two heads:-

- (i) Modern Society in Totalitarian State; and
- (ii) Modern Society in Democratic State.

The discussion and contrast of Privacy in these two societies would give a clear idea of Privacy in the political systems of modern democratic societies.

2.3.4.1. Modern Society in Totalitarian State

The modern totalitarian state relies on secrecy for the regime, but high surveillance and disclosure for all other groups.⁴⁸ Hence, in the modern totalitarian states, especially in the Socialist countries of Soviet Russia and China, Right to Privacy of individual citizens, has been totally discarded. The traditional concept of

⁴⁸ Margaret Mead and Elena Calas, “*Child-training Ideas in a post-revolutionary context: Soviet Russia*”, in Margaret Mead and Martha Wolfenstein (eds.), *Childhood in contemporary Cultures*, Chicago, 1955, pp.179, 190-191; Henry V. Dicks, “*Observations on Contemporary Russian Behavior*” *Human Relations*, Vol.5, 1952, pp.111, 140, 159, 163-164.

privacy prevalent in the ancient societies has been considered as immoral and antisocial, because these totalitarian states are based on the theory of totalitarianism, which is opposed to the theory of individualism. As the idea of Privacy flows from the individualistic theory, these states have rejected Right to Privacy absolutely. These states believe that, State and Government should always supersede the individual citizens and therefore, individual interests should be suspended in the interests of the State. For this reason, they have considered state interest above all and have imposed strict surveillance on every aspect of the lives of individual citizens. They have kept information regarding every part of their citizens' lives to protect the national security. Hence, the idea of Privacy has lost its significance absolutely in the regime of totalitarian states.

But, with the passage of time and with the emergence of new generations, the totalitarian states have shifted gradually to democratic systems and hence, the strict rules of surveillance are relaxed to some extent, to give the individual citizens, some amount of Privacy in their personal matters. In fact, a degree of Privacy has been provided to families, church, science and arts. At the same time, police terror has been reduced in the totalitarian states. But, the people were already habituated with the old methods; thereby they have continued to follow those systems. Privacy has been a newly emerged right in these states and as such use of Privacy has not always been in the same manner by the people. Moreover, over aggressive use and abuse of Privacy has been made punishable in those states to restore the control over the citizens in the hand of the regime. This situation proves that, though Right to Privacy has been provided to the citizens in some personal matters, but it has always been limited. Not only that, individual interests in these states can never override the state interests and always state interests have been uphold over the individual interests. In this sense, Individual Privacy has been superseded by the Social Privacy and the State has always enjoyed the Right to Privacy and Secrecy in matters of maintenance of Government records as well as secret data. Above all, the most important fact is that, though Right to Privacy of individual citizens' has been recognized in personal matters, like spying, eavesdropping and watching devices including secrecy of Government records are retained and continued by the State.

This old system has been continued for the protection of the regime against oppression and tyranny by the people with the use of absolute Privacy rights.

Thus, the totalitarian states generally give impetus on State interests and due to this, Right to Privacy are more or less neglected in these states.

2.3.4.2. Modern Society in Democratic State

The modern democratic states are based on individualistic theory as opposed to the situation in totalitarian states. In these states, individual citizens gain prominence over the States. State and Government are subjected to criticism by the general public, always, in these states. Hence, Right to individual Privacy is recognized in these states. Democracy is government of the people, for the people and by the people. Therefore, people and people's right are supreme in democracy. In this sense, democratic states are just opposite to totalitarian states. For this reason, Right to Privacy is considered as an important human right in these states.

2.3.4.3. Comparison between Totalitarian State and Modern Democratic State

The situation of Privacy in modern democratic states can be well-understood by a comparison between totalitarian states and modern democratic states. Following points may be emerged from the comparison:-

- (a) The social balance of disclosure and surveillance over Privacy is absolutely necessary in the totalitarian states. Whereas, balancing of individual and group Privacy is the essential element of democratic states.
- (b) Existence of both disclosure and surveillance is prerequisite in totalitarian states. Whereas, imposing limitations on both disclosure and surveillance is prerequisite in liberal democratic states.
- (c) Totalitarian states rely on the secrecy for maintenance of governmental functions. But, the liberal democratic states rely on publicity as a control over government and for smooth running of the governmental functions.
- (d) In totalitarian states, Privacy is provided for personal matters only. On the contrary, in liberal democratic states, Privacy acts as a shield for individual and group lives.

Therefore, the comparison between totalitarian states and modern democratic states shows the strict attitude of totalitarian states towards Privacy on the other side. The reasons for protecting Privacy in the liberal democracies are not always clearly

expressed by the political thinkers, but the reasons are familiar to the citizens of liberal democracies.⁴⁹

2.3.4.4. The Need for Privacy in Modern Democratic State

The liberal democratic states are generally based on the ideology of providing good life towards the citizens. For this purpose, active participation in political life is not enough, participation in sports, arts, literature and other non-political activities are essential. Therefore, educational and intellectual developments of individuals are necessary for having a good life, which is understood by the liberal democracies. Family is acquiring an important role in these countries and the citizens are always having commitments towards the family. Family is considered as a basic autonomous unit dealing with educational, religious and moral aspects of its members. As the family controls the lives of individuals in the society, thereby it is in a position to assert the claims of physical and legal Privacy against the society as well as the state. Hence, family Privacy and Individual Privacy are gaining prominence in these countries over the Social Privacy. Choice of religion is considered as a 'private' matter in these states, on which state control can never be imposed. It gives rise to another type of Privacy, called Religious Privacy. Therefore, it can be said that, liberal democratic states are not imposing control on the life of the citizens; instead these states provide a good amount of freedom towards them. Moreover, liberal democracies strive towards providing physical, psychological, intellectual, moral and religious Privacy to its citizens. If freedom or Privacy is provided in these areas of individual life, then only success and happiness can be possible in the life of the individual citizens.

Apart from that, liberal democracies provide Privacy of membership, intra-group Privacy and Privacy of Associations. Individual Privacy and Organizational Privacy, both are given impetus therein. Intellectual Privacy is having a special status in these countries, consequent to which scholars and scientists usually enjoy freedom from constant government surveillance. Right to vote is recognized therein by the use of secret ballot. In contrast with totalitarian states, liberal democracies

⁴⁹ Hannah Arendt, *The Human Condition*, Anchor (ed.), New York, 1959, pp.23-69; H. M. Roelofs, *The Tension of Citizenship: Private Man and Public Duty*, New York, 1957; H. D. Lasswell, "The Threat to Privacy" in R. M. McIver (ed.), *Conflict of Loyalties*, New York, 1952, pp.121-140; Clinton Rossiter, "The Pattern of Liberty", in M. R. Konvity and Clinton Rossi8ter (eds.), *Aspects of Liberty*, Ithaca, New York, 1958, pp.15-32; Morroe Berger et al., *Freedom and Control in Modern Society*, New York, 1964, p.190.

enjoy protection against improper police conduct, like physical brutality, self-incrimination as well as unreasonable searches and seizures by establishing a proper constitutional, legal and political set up. Another most important right recognized in these states, is the Right to Freedom of Opinion and Expression, which includes Freedom of Media also. The liberal democracies usually need to create a balance between Right to Privacy and Freedom of Expression, in order to run a perfect governmental machinery. Therefore, these states always try to create a balance between the governmental organizational and institutional Privacy on the one side and the Freedom of Media, interest groups and other governmental agencies on the other side, to make the government responsible for its conduct towards the general public. Hence, the Right to Privacy and Freedom of Media for maintaining the public accountability of the government is the basic structure of the liberal democracies.

Therefore, the necessity of Privacy in individual life is well-understood by the modern democratic societies and are given protection to this right over and above the state control, surveillance and disclosure. But, that does not mean that, these societies have considered Privacy as an absolute right. Though these societies are taking liberal view with respect to Privacy, but they also feel that, Right to Privacy should be curtailed by imposing reasonable restrictions on this right, as and when required in the interests of the state.

2.3.4.5. Restrictions on Privacy in the Modern Democratic State

Accordingly, Privacy should be restricted by liberal democratic states on the following grounds:-

- (a) Unlimited exercise of Privacy creates dangers for a democratic society.
- (b) If private-life commitments gain prominence over political and governmental commitments, then citizens may fail to fulfill their public duties.
- (c) In some situations, the right to organizational privacy can give rise to anonymous influences over public life, which can increase the growth of conspiracies, that will threaten the democracy's survival.
- (d) Persons having public life may claim an unjustified right to privacy from their criticism.

- (e) Unlimited growth of privacy protection rules can prevent the protection of the public from crime and disturb the national security.
- (f) Privacy may prevent the public's right to know about administration of government and business.
- (g) Recognition of unlimited Privacy on governmental affairs, may increase manipulation of the public, misuse of office and power by government agencies.

If Privacy is not restricted by imposing reasonable restrictions on it, by the liberal democracies, then it may threaten the survival of democracies due to the above reasons. Hence, the democratic states should try to create a balance between recognition of Privacy and protection of public interest, for the sake of their survival.

2.3.5. History of Privacy in different Western Democratic Societies

History of Privacy in different Western Democratic Societies generally varies from one another. The reason is being that, different historical and political traditions in contemporary democratic societies have created different types of social balances on the aspect of Privacy. This point can be further illustrated with the examples of Britain, West Germany and the United States of America.

2.3.5.1. The History of Privacy in Britain

The pattern of democracy in Britain is called 'deferential democratic balance'. It is a peculiar system based on the English social structure. The basic elements of English democracy are homogenous population, strong family structure, surviving class system, positive public attitude to the government and elite education as well as government service systems. Englishmen are highly disciplined, men of etiquette and personal reserve. As such, they do not share all information with everyone and Privacy plays an important role in their lives. They usually show respect to the Privacy of their family, home, correspondence and private associations. Apart from individual Privacy, Britain also has organizational Privacy and Privacy of government operations. The balancing of Privacy, disclosure and surveillance is the basic characteristic of British democracy. But, due to the strong deference system, disclosure or surveillance of governmental activities are found in

less frequent manner in Britain, in comparison to other democratic countries of weak deference system.⁵⁰

2.3.5.2. The History of Privacy in West Germany

The pattern of democracy in West Germany is called 'authoritarian democratic balance'. In Bonn republic, the practice of democratic self-government came late, only in the post World War-II era. As such, it has no history or long traditions of practice of Privacy rights. The concept of Privacy has also come with the emergence of Bonn Republic after the Second World War. The authoritarian patterns of democracy are based on the German family structure and German social life. Both law and government are based on high public respect for office and experts. Though German system pays homage to high official capacities, but those capacities are also flourished only after the Second World War. The idea of civil liberties to act as guards against governmental violations of human rights, have also been developed in the post World War-II era and there were no provisions for the enforcement of those rights before that era. As soon as the idea of civil liberties has been emerged, the idea of Right to Privacy has come simultaneously. In the democratic state of West Germany, gradually the right to privacy of family, wealth and office has been recognized. Apart from the individual Privacy in these matters, secrecy of governmental activities has also been maintained. Though individual Privacy is a secured right therein, but the Privacy of critics and non-conformists is not protected in West Germany. This situation shows the evidence of limited extent of Privacy in West Germany. Moreover, the instance of mid-night government raid in the office of Spiegel Magazine in 1962 proves the absence of freedom of Press and Media in West Germany, which is the cornerstone of every democratic set up. Therefore, the German democracy cannot be called an ideal democracy protecting the individual freedom absolutely. Above all, the right to respect for Privacy of person, home, office and press is still subjected to governmental surveillance and disclosure in the German political system, which is unexpected in a Western democracy for the sake of good life of the individual citizens.⁵¹

⁵⁰ Edward A. Shils, *The Torment of Secrecy*, Glencoe, III, 1956, pp.47-57; H. H. Hyman, "England and America : Climates of Tolerance and Intolerance", in Daniel Bell (ed.), *The Radical Right*, New York, 1963, Ch.12.

⁵¹ Otto Kirchheimer and Constantine Menges, "A Free Press in a Democratic State : The Spiegel Case", in G. M. Carter and A. F. Westin (eds.), *Politics in Europe*, New York, 1965, pp.87-135.

2.3.5.3. The History of Privacy in America

The pattern of democracy in America is called ‘an egalitarian democratic balance’. The essential elements of this democratic set up are:-

- (a) Privacy – supporting values of individualism.
- (b) Associational life and civil liberties.
- (c) Constant pressure of Privacy-denying tendencies.
- (d) Strive towards achieving social egalitarian, personal activism and political fundamentalism.⁵²

The countries having an egalitarian democratic set up, like America are always in a position to face a constant tussle between the privacy-supporting values and privacy-denying tendencies. It is their job to create a balance between the two for establishing an egalitarian social order. American society is subjected to individualism based on religious, political and legal freedom, which attitude shows the tendency towards individual Privacy. The American individualism is based on the factors, like frontier life, freedom from the feudal heritage, Protestant religious base, private-property system and the English legal heritage. All these factors are responsible for the growth of Right to Privacy in America. This right has been developed in America as a part of their long established culture and to give protection to the individual citizens against government surveillance as well as compulsory public disclosure. In this sense, the idea of civil liberties has come into being to impose limits on governmental activities and to provide freedom of expression to every American citizen. Right to Privacy and Freedom of Expression are two important fundamental rights available in America. Americans have also realized the need for institutionalized mechanisms of independent courts and legal system for the enforcement of these rights.

Though Right to Privacy is guaranteed in America, but due to the egalitarian tendencies of American democracy, the balance of Privacy has always been threatened therein. The egalitarian pattern of democracy always demands disclosure and surveillance of individual information violating the individual Right to Privacy, which is never expected from a libertarian society. Hence, it can be said that, though

⁵² R. M. Williams, Jr., *American Society : A Sociological Interpretation*, New York, 1960, Ch.11; E. E. Morison (ed.), *The American Style*, New York, 1958; Michael McGiffert (ed.), *The Character of Americans*, Homewood, III., 1964.

civil liberties have an important role to play in the American society, but the egalitarian social order always supersedes the libertarian tendencies therein. Owing to this situation, the balance of Privacy has been threatened in America during late 1940s and early 1950s. History shows that, during that period, American society was induced by the fear of cold war, atomic holocaust, internal subversion and fundamentalism, all of which jointly brought the McCarthy era, when Right to Privacy was severely threatened by way of strict surveillance over the individual citizens, in the interest of national security. However, by the late 1950s, the equilibrium in the American society was restored back with the beginning of the anti-communist era and the approach of individualism towards the rights of the citizens.⁵³

2.3.5.4. Comparative Analysis of the History of Privacy in Britain, West Germany and America

The study conducted on the idea of Privacy in different democratic societies, gives a clear picture of state of Privacy in Britain, West Germany and America. If a comparative analysis is made on the idea of Privacy in these democracies, then it is found that, in Britain individual Privacy is given importance over constant surveillance and disclosure and hence, citizens therein, enjoy much more privacy than various other countries. On the other hand, West Germany is having strict state control over the lives of citizens and even midnight police surveillance is allowed there. Though individual citizens are having their Right to Privacy in West Germany, but government enjoys much more secrecy there. Individual Privacy can be curtailed there by strict surveillance, but governmental activities can never be challenged by the general public. From the old period, totalitarian nature of State activities were prevailed there. The idea of individual Privacy is a product of recent origin there, which has gained importance only after the Second World War.

Over and above, American society is much more balanced on the aspect of Privacy and surveillance, in comparison to other two societies. Americans have given impetus to idea of Privacy and have considered it as a valuable human right since the inception of modern democratic state in America. In furtherance of this object, provisions have been incorporated in the U. S. Constitution for prevention of

⁵³ Shils, *op.cit.*

unreasonable searches and seizures strictly. Also strict surveillance on the lives of individual citizens is prohibited, except when the national security is threatened. Therefore, American Society is the most balanced society among these three societies, which always has tried to maintain a balance between privacy and surveillance only exception is that, during the period of cold war, when the national security has been threatened seriously, strict surveillance has been imposed on human lives in the interests of the State.

2.3.6. History of Privacy in different Western Cultures

The idea of Privacy varies from country to country not only due to different political systems or systems of government, but it also varies due to the cultural differences among various countries. Variation in cultural norms may be found among different countries, which are having important impacts on the norms of Privacy in each and every society.

Cultural differences are having important impacts on interpersonal relations among human beings, consequent to which the idea of Privacy varies with the cultural variations. A number of Anthropologists,⁵⁴ psychologists,⁵⁵ and sociologists⁵⁶ have supported this view. Among all these persons, the most extensive study has been conducted by the cultural anthropologist T. Hall. According to him, people in different cultures usually visualize the world from different perspectives in terms of language as well as sensory perceptions.⁵⁷ In this sense, they '*inhabit different sensory worlds*',⁵⁸ which are having effects on every sphere of their lives, ranging from living style to creating the social distance in interpersonal relations. With all these differences, their notions of Privacy are also subjected to important differences.

Edward T. Hall has studied a number of contemporary cultures in order to compare their differences of sensory perceptions measuring the pleasure or displeasure controlling their interpersonal relations. In this context, Hall has examined the cultural differences of American society with the three dominant European cultures of England, France and Germany. Practically, he has made a

⁵⁴ F. L. K. Hsu, *Americans and Chinese*, New York, 1953, pp.68-93.

⁵⁵ Kurt Lewin, *Resolving Social Conflicts*, New York, 1948, pp.18-33.

⁵⁶ Erving Goffman, *The Presentation of Self in Everyday Life*, New York, 1959.

⁵⁷ Edward T. Hall, *The Silent Language*, New York, 1959.

⁵⁸ Edward T. Hall, *Supra* Note 13 at p.2.

comparison between the cultural norms of all these societies, which are discussed hereunder.

2.3.6.1. The Cultural Norms of Privacy in Germany

Germans are having great respect for Privacy and generally they prefer individual and enclosed places to enjoy the sense of Privacy. For this purpose, they usually established closed door rooms at business houses and government offices as well as fenced yards and separate close rooms in the home. They maintain norms of Privacy in matters of sharing information with others. In this respect, they have created strict rules of trespass for regulating interpersonal relations at every sphere of human lives, including social, business and ceremonial relations. They always try to acquire '*private space*' in and around themselves and generally constitute a '*private territory*' for each individual, which system is contrary to the systems prevalent in America or England. In order to protect the individual norms of Privacy, German Law has prohibited photographing strangers at public places without their consent. Hence, it can be said that, Germans have established strict norms of Privacy induced by their cultures.

2.3.6.2. The Cultural Norms of Privacy in America

Americans have established an elaborate edifice of Privacy in their country by incorporating the rules of Privacy protection in the U. S. Constitution. They have guaranteed it as an important human right by making express legislations and have tried to implement it in every sphere of their lives. But, they are not the men of well-manners and etiquette only like the Britishers, so that, they will always confine themselves within the four corners of their personal territory in somewhat inexpressive manner. They are the free mixing race of expressive attitude and do not bother in sharing office rooms or rooms at homes with others. In this sense, they are ready to sacrifice their '*private space*' for the sake of happiness and enjoyment. Their sensory perceptions do not feel violation of Privacy in these cases. In their cultural norms, they are having open door offices, homes without fencing or screening and informal approach in maintaining interpersonal relations with others. They usually enjoy their Privacy rights in maintenance of their records and documents, but not in maintaining personal relations with other people. In case of close contact with other people, they do not feel intrusion of Privacy or trespass in

their personal matters. Hence, the cultural norms of Privacy in America are not induced by the strict compliance with the idea of '*private space*' in comparison to German cultural norms of Privacy.

2.3.6.3. The Cultural Norms of Privacy in France

The French people are deeply influenced by the Mediterranean culture. Mediterranean culture prescribes closeness among the people. Practically, these people enjoy closeness with one another, togetherness and physical contacts in public places and are generally involved with each other in more emotional manner. Their sensitiveness make the bondage of their personal relationships more stronger. As they are culturally more sensitive, their sensory perceptions do not require more '*private space*' for maintaining interpersonal relations among them. Therefore, they do not feel violation of Privacy in these cases. But, inside the home they usually maintain their Privacy. They strongly believe in Family Privacy, they do not allow the outsiders, long standing co-workers or social acquaintances within their family. They prefer to maintain reserveness within their home rather than in maintaining interpersonal relations with others. This is a sort of peculiarity of their culture that, they are having somewhat opposite characteristics in and outside the home. Hence, French cultural norms show more respect towards Family Privacy rather than Individual Privacy.

2.3.6.4. The Cultural Norms of Privacy in England

English people are by nature reserve people and for this reason, their cultural norms of Privacy is based on '*reserveness*'. They do not share every information with everyone, but for this purpose, they usually do not prefer to keep themselves within closed doors like the Germans, but actually they say everything by maintaining silence or reserveness. They prefer shared accommodation instead of solitary quarters for preserving the Privacy of their lives. For instance, their children of middle and upper classes generally do not have separate rooms, but shared nurseries with other brothers and sisters. Later on, they usually go to the dormitories of boarding schools. Therefore, Englishmen generally learn from the very childhood to maintain their Individual Privacy in shared spaces. The instances of maintaining reserveness in front of everybody or in public places are found everywhere in the English culture. In fact, English political leaders and business figures usually do not

have private offices, the members of Parliament do not occupy private rooms and as such, they meet their constituents in the lobbies or terrace of the House of Commons. They do not feel the violation of their Privacy in these cases and usually try to maintain their Privacy in these situations by their body languages.

The English people show their resrveness by the soft spoken attitude and low voice directed to the person or persons only, with whom the conversation is going on. Their eyes are focused on the person talking and they stop talking in case of feeling of violation of Privacy. Their silence is the signal of Privacy and this custom is maintained by everyone, be the family, friends or associates. The English pattern of Privacy is called the '*internalized privacy mechanism*', where the mere physical existence of '*private space*' is not required. An Englishman does not depend on physical '*private space*', rather he acquires his '*private space*' through his attitude and body language, in a shared accommodation, office space or in a public place surrounded by others. Hence, the English cultural norms of Privacy are different from French, German or Americans in the sense that, they believe in Privacy not in the physical sense of the term only, but in psychological terms also.

2.3.6.5. Comparison between the Cultural Norms of Privacy in Germany, America, France and England

The study of *Edward T. Hall* on the idea of Privacy, which varies with the cultural variations gives us an idea of Privacy existent in the cultures of Germany, America, France and England. If a comparative analysis is made on the norms of Privacy in different Western Cultures mentioned above, then a clearer picture will be found.

In fact, German people are closed doors and inexpressive persons. They require Privacy in every aspect of their lives and cannot share themselves with others. As such, they feel intrusion on Privacy as well as trespass in very small matters of their lives. On the contrary, Americans are open hearted and expressive nature of persons. They do not feel violation of Privacy in case of close contact with others. French people are much more conservative and orthodox people than the Americans. But, they show their conservativeness in preserving their Family Privacy and not for maintenance of interpersonal relations. They do not feel shy to have physical contacts with others in public places. They do not treat these cases as

intrusion of Privacy. The French Mediterranean culture is not found in America, England or Germany. On the other hand, the English norms of Privacy are lying between the Americans and Germans. The English people usually maintain reserveness to preserve their Privacy as opposed to German culture of closed doors, walls and trespass rules. While in America, Privacy is observed by going to a closed door private room, in England it can be maintained by keeping silence. In England, silence is the signal of Privacy, whereas, in America silence is the signal of punishment. As the Americans always prefer physical Privacy, English people are happy with psychological Privacy. According to Hall, English pattern of Privacy is called '*internalized privacy mechanism*' in contrast with the '*physical privacy screen*' of the Americans. Americans use Privacy for defining social status, but Englishmen determine social status from the root of their social system and Privacy has no role to play in this respect. Hence, the comparison of all these Western societies gives the idea that, though Privacy is present in all the social systems, but nature of Privacy varies with the cultural variations. What is called the violation of Privacy in one culture, may not amount to same in another culture.

Moreover, different forms of Privacy are found in different sub-cultures within one country also. As for example, the idea of Privacy among the lower-class Negro-Americans, Puerto Ricans and American Indians are different from the idea of Privacy among the middle and upper-class Americans. Hence, Privacy among different Western Cultures produces ample evidences to show that, '*Privacy*' is not a static, rather a dynamic concept, because its variation is always found with the cultural variations. In this sense, it can be said that, what is considered as '*Privacy*' in one culture, may not be considered as the same in another and can be easily intruded.

2.3.7. The Basic Postulates of Individual Privacy in the Western Democracies

According to *Prof. Alan F. Westin*, there are four basic postulates of Individual Privacy, which are common to all Western Democracies. Basically, the idea of Privacy is determined by these basic postulates of Privacy and whatever may be the norms of Privacy in different Western Democracies due to the violation of socio-political or cultural ideologies, these basic postulates of Privacy would always remain the same. Above all, these are considered as basic principles or factors, by

way of which the notion of Privacy is fixed in each Western Democracy. These basic postulates are – Solitude, Intimacy, Anonymity and Reserve.

(i) Solitude

The first basic postulate of Individual Privacy is Solitude. It is a state of affairs, when an individual is separated from the group and enjoys freedom from the observation by other persons. In case of solitude, it is expected that, a person would live alone and enjoy acute freedom from outside interference. But, practically absolute state of Solitude is not possible physically. An individual may be free from the interference from other individuals, but may not be free from the interference by various stimulations, like noise, odours and vibrations. An individual needs solitude for concentration, meditation and intellectual development of mind. But, in case of physical solitude also, one's peace of mind may be disturbed by the physical sensations of heat, cold, itching and pain. Therefore, achievement of acute Solitude is a question of fact. In the state of Solitude, one may become familiar with the mind or conscience. It is a state of Privacy, when an individual shares no information with others. Hence, Solitude is the most complete state of Privacy which individuals can achieve as utmost state of freedom.⁵⁹

(ii) Intimacy

Intimacy is the second basic postulate of Individual Privacy. In case of intimacy, one does not enjoy acute freedom from the outside world, but enjoys the freedom within a group. This is a state of affairs, when small groups or units are formed surrounding a person and that person shares information with the group-members only and not with the individuals outside the group. The relations within the group are called intimate relations and an individual is having intimacy with them only typical examples of intimacy are husband and wife, family, friendship circle, working groups etc. As human beings are social beings, they cannot live in the acute state of Privacy, like Solitude. They need to share certain information with others for the fulfillment of basic needs of human life. As such, they need a few intimate relations, with whom they can share information freely without the fear of violation of Privacy. Consequently, the state of affairs called Intimacy has come into being. Solitude is a state of acute seclusion, where an individual enjoys absolute

⁵⁹ Alan F. Westin, *Op.cit.*, p.31.

Privacy. But, Intimacy is the enjoyment of Privacy within very close relationships. Achievement of Intimacy is far more practical than Solitude and hence, this type of relationship is physically expected to achieve.⁶⁰

(iii) Anonymity

The third basic postulate of Individual Privacy is Anonymity. In case of Anonymity, one does not enjoy acute state of Privacy, like Solitude or small-group Privacy, like Intimacy. Actually, Anonymity is living in front of everybody, surrounded by the general public, but still enjoying Privacy. It is a state of affairs, when an individual stays in public place, performs public acts, but still wants freedom from identification and surveillance by the general public. Practically, Anonymity is achieved, when one succeeds in hiding ones identification from others in public place. In case of Anonymity, an individual may be going through a subway, playing a ball game or walking in the streets among the people, knowing fully about the observation by others, but sure about the non-identification by others. Unless and until, one is a celebrity, the state of Anonymity is possible, which means nobody is going to personally identify the person. An individual seeks Anonymity in public places, because he or she is not interested to share all information with others, but still wants to relax in public arenas or open spaces. In these cases, actually one seeks freedom from observation by others and would like to remain anonymous by merging oneself into the 'situational landscape'. This is a sort of Privacy, which needs no Solitude or Intimacy for its enjoyment. It can be enjoyed being anonymous in the public place and hence, it is called 'Public Privacy'. Practically, Anonymity is more hygienic and possible rather than Solitude and thereby, it goes side by side with Intimacy.

(iv) Reserve

Reserve is the fourth basis postulate of Individual Privacy. It is the most subtle state of Privacy, where an individual creates a psychological barrier surrounding oneself for preventing unwanted intrusion within one's territory. This psychological barrier of withholding information about oneself from others is called Reserve. It is a state of Privacy, when one interacts with others in every spheres of life, but keeps control of sharing information with others. It is a sort of freedom that

⁶⁰ H. S. Sullivan, *The Interpersonal Theory of Psychiatry*, New York, 1953, p.290.

one enjoys by way of limited and protected communication of information about oneself. In fact, the greater parts of individual lives are spent not in the state of Solitude or Anonymity, but in the state of Intimacy or public spheres, where one is known to everybody. Therefore, unlimited and unprotected communication of information is not possible by oneself and some information should always be kept secret due to the personal and sacred nature or shameful and profane nature. Hence, every communication remains incomplete and one cannot express oneself totally. The choice of withholding or disclosure of information about oneself is the essential element of Reserve. Reserve is the dynamic aspect of Privacy for maintaining interpersonal relations. The manner of claiming Reserve and the extent of its acceptance by others is the core element of Privacy in a modern industrial society and obviously it varies from society to society and culture and culture. Last but not the least, Reserve is the most practical state of Privacy, which is expected to achieve by everybody in comparison to Solitude, Intimacy and Anonymity.⁶¹

Hence, the discussion on the four basic postulates of Privacy produces a clear idea regarding the purpose each postulate serves. Solitude is a state of total seclusion by an individual from others, which is needed for meditation, but practically impossible to achieve at all times. Intimacy is sharing of information within a close group or family, but seclusion from others. It can be practically achieved and possible always anonymity is being public without disclosure of the 'self' by remaining anonymous and avoiding surveillance. It is practically possible always for everyone except the celebrities. In case of Reserve one remains in public, shares information with others, but keeps the control of information in one's own hands. Practically, Reserve maintains a balance between Privacy and Disclosure. It is the most expected state of affairs and possible always.

Finally, it is important to mention that, though all the four basis postulates of Privacy are needed by every individual in democratic societies, but Reserve is the most expected state of affairs. An individual, who maintains 'Reserve' in practical sense of the term, is considered as a balanced individual by the theorists of Privacy.

⁶¹ Hall, *The Hidden Dimension, op.cit.*, pp.108-112, 131.

2.4. The Origin of Privacy in India

The idea of Right to Privacy has been originated in the animal world and with the passage of time gradually has been incorporated in the human society. The origin of Right to Privacy in the human society can be traced back from the primitive human society, gradually it passes through the age of transformation of primitive society to modern human society and finally, it has reached the history of Privacy in the modern human society. The process of development of this right from the primitive society to the modern society has been understood, at the first instance, about the Western societies. The main reason behind it is that, Western Scholars have been the first scholars, who have taken initiatives for the reporting of the origin and history of this right in their society not only that, many Western Scholars have performed thorough Research Works on different primitive societies to understand the existence of this right therein. Apart from that, the Human Relations Area Files at Yale University have also collected and maintained good amount of data relating to the origin and history of Right to Privacy in the Western World. Therefore, the western society has been in a position to produce ample evidences of the existence of this right in the primitive society, in the era of transformation of human society and in the times of modern society. Hence, there is no doubt about the existence of this right in the Western societies.

The above discussion, though mentions about the existence of Right to Privacy in the Western Society, but that does not mean that, no existence of this right is found in the eastern parts of the World. Actually, it was present in the primitive human societies in every part of the world, both Western and Eastern. But, the Eastern Scholars have not taken such initiatives at the beginning, like the Western Scholars to find out the origin and history of this right in the Eastern world. Due to this reason, most part of the evidences of origin and history of this right in the Eastern society has been lost. India is not an exception to this general situation. Right to Privacy has been originated in India since the very old period, existed here in the ancient period, lost in the medieval period and revived in the modern period. Therefore, Right to Privacy had been and is very much present in the Indian Society. Next part of the study will concentrate on the origin and history of this right in India.

2.4.1. The Origin of Privacy in Ancient India

Indian sub-continent has always preferred social relations among the people and not seclusion from one another. Traditionally Indians were people religious sentiments. Hence, they were always busy in performing various religious ceremonies, where usually '*homa*' or '*yajnas*' had been organized in gatherings of large number of people. Kings had shown respect to the Sages and a number of great kings were found who were famous for their religious, pious and charitable activities. Moreover, family occupied an important role in ancient India. Head of the family was called '*Karta*' and he was in the decision-making position in a family. Everyone within the family used to obey '*Karta*'. Family bonding was the most important part, which could not be compromised in any manner. For the sake of the family tie, '*Privacy*' within the family and among the family members had always been maintained. As the *Family Privacy* occupied a dominant place in ancient India, therefore, *Individual Privacy* was not recognized therein. Hence, the existence of Privacy was found in ancient India.

Privacy was embedded in the Indian cultural heritage and Indian social structure, as such; it was not alien to India. Various *Indian Scholars, Eminent Writers, Smritikaras, Commentators and the Authors of different Epics* had defined the term '*Privacy*' in their writings.

Accordingly, **Valmiki** defined Privacy as follows:-

*“Na Greehani Na Vastrani Na Prakarastiraskriya,
Ne Dreesha Raja Satkara Vrittamanavarang Striyah”.*⁶²

(Neither the shelter of a house nor the veil, nor honours such as these are the proper safeguards for a woman's modesty; it is her own conduct that should guard her.)⁶³

The term '*Avarana*' used in the text is the most important term. Actually, inner meaning of the above text provides that, '*Avarana*' gives the same protection like the shelter of a house, the veil, the compound wall or a royal honour. *Prof. Wilson* has defined the term '*Avarana*' to mean '*a shield, covering and to screen*'.⁶⁴ *Shabdakalpadrum*⁶⁵ and *Vachaspatyam*⁶⁶ have also used this term in the

⁶² N.Ragunathan (Transl.), *Srimad Valmiki Ramayanam*, Vol.III, p.344.

⁶³ *Ibid.*

⁶⁴ Prof. Wilson, *Sanskrit-English Dictionary*, p.89.

⁶⁵ Raja Radhakant Deva, *Shabda-Kalpadrum*, Part I, p.192.

⁶⁶ Taranatha Tarkavachaspati (compiled), *Vachaspatyam*, Vol.II, p.87.

same sense. If all the meanings of 'Avarana' are coupled together, then only one idea is found and that is the idea of 'exclusion', which is the basis of Privacy in India. In this sense, it can be said that, 'Avarana' is the Sanskrit equivalent of 'Privacy'. In the light of the term 'exclusion', if the text of Valmiki is interpreted, then ultimately it is found that, Valmiki has tried to identify Privacy with one's conduct and has propounded that, only the pattern of one's behavior can determine the elements of Privacy and in no manner, the house or the veil or the compound wall or the royal honour. Hence, this idea of Privacy propounded by Valmiki has shown the strong basis of 'Privacy' in the ancient India, which is subjected to elasticity and dynamism and not by the orthodox thinking. In this sense, Indian view of Privacy 'embedded in one's own conduct' is much more dynamic than the Western view of Privacy 'embedded in the idea of freedom'. As such, Indianized version of Privacy is far better than the Westernized version of Privacy since the ancient period.

Apart from the term 'Avarana', various other words had been used in the ancient India, which usually denoted Privacy. Those are as follows:-

(i) **Ekant** – It signifies a lonely or retired or secret place, in a lonely or solitary place, alone, apart, privately.⁶⁷

(ii) **Raha** – Prof. Wilson has defined the word 'Raha' to mean privacy, solitariness and to be private.⁶⁸

(iii) **Rahasya** – It means secret, private, Clandestine and Concealed.⁶⁹ Prof. Wilson has also defined it in the same manner.⁷⁰

(iv) **Tiraskarinee** – 'Tiraskarinee' is a compound word made of 'Tiras' which means 'secret' and 'Karinee' which signifies 'making'. As a whole, it means an outer tent, a wall or screen of cloth surrounding the principal tent, a veil and a curtain.⁷¹

(v) **Vivikta** – It denotes lonely, solitary, retired, sequestered, single, alone.⁷²

(vi) **Gupta** – The word 'Gupta' has the following meanings:-

(a) protected, preserved, guarded;

⁶⁷ Sir Monier-Williams, A Sanskrit-English Dictionary, 1970, p.230.

⁶⁸ *Supra Note 64 at p.513.*

⁶⁹ *Supra Note 67 at p.871.*

⁷⁰ *Supra Note 64 at p.797.*

⁷¹ *Id at p.278.*

⁷² V.S.Apte, Sanskrit-English Dictionary, p.872.

- (b) hidden, concealed, kept secret;
- (c) secret, private; and
- (d) invisible, withdrawn from sight.⁷³

(vii) **Avagunthanvatee Naree** – It emphasizes the woman whose eyes are veiled.⁷⁴

The regular use of the above words in Sanskrit texts as well as daily lives in ancient India shows the evidence of existence of Right to Privacy during that period. Though a number of studies are not found in support of the Privacy rules in the ancient Indian society, but the general life-style of the individuals, their interpersonal relationships, construction of houses, family structure and customary rules and regulations are enough to show that, Privacy was not alien to ancient India.

2.4.2. The Origin of Privacy in the Vedas and Upanishads

A famous quoted phrase denoting Right to Privacy in the Western world is, “*Every man’s house is his Castle*”. It means, every man is the controller of his own house and thereby he can do whatever he likes, within his house, without the outside interference. Practically, it signifies the Right to Privacy at home. This situation does not only applicable in the Western World, but applicable in India also. As such it has an Indian counterpart, which says, “*Sarva Swa Swa Grihe Raja*”. This phrase is provided by some ancient Hindu Law giver. It means, every man is the king of his own house. Therefore, it also serves the same meaning along with its Western counterpart. Accordingly, it can be said that, the traces of Privacy at home was found in the ancient Indian society. Apart from that, the ancient Indian Dharmasutras, Dharmashastras, Digests and Commentaries had thrown light on the aspects of Privacy in their social structure. Law was equated with Dharma at that period, which was considered above all and even a king could not override law. In this sense, it was called, “*Law is the King of Kings*”, which meant, Kings were also subjected to law. In fact, in the ancient period, Kings were found to uphold Dharma and to respect the Privacy of the citizens.⁷⁵

In the ancient period, Dharma was considered above all, everything including the Jurisprudence or legal system was embedded in Dharma. The word ‘*Dharma*’ was used to mean justice (*Nyaya*), what is right in a given circumstance,

⁷³ *Ibid.*

⁷⁴ H.H.Wilson, Sanskrit-English Dictionary, p.63.

⁷⁵ E.Jeremy Hutton et.al., *The Right to Privacy in the United States, Great Britain and India*, in Richard P. Clande (ed.), *Comparative Human Rights*, 1976, p.151.

moral, religious, pious or righteous conducts, being helpful to living beings, giving charity or alms, natural qualities or characteristics or properties of living beings and things, duty, law and usage or custom having the force of law and also a valid *Rajashasana (royal edict)*.⁷⁶ In this sense, *Dharma* denoted the rights and duties of Kings as well as citizens in ancient Indian society. Therefore, *Dharma* had also propounded the Right to Privacy of the citizens.

The ancient Indian Literatures were based on the concept of *Dharma*. As such, the religious injunctions and rules and regulations of everyday life-style, prescribed by those literatures were also engulfed into the idea of *Dharma*. The most important ancient literatures were *Vedas* and *Upanishads*. *Vedas* were the first scriptures of ancient Indian society, which propounded the religious as well as legal injunctions. *Upanishads* were created for the analysis and interpretation of the *Vedas*. The ancient Indian theory of knowledge was based on the *Upanishads*, the main aim of which is to know the ultimate reality of the Universe. Perception and inference are the two hands of the human mind, through which human brain acquires knowledge. But, when perception and inference both fail, to provide knowledge, *Upanishad* comes into being. *Upanishad* propounds the path, called *Upasana or meditation*. It means to withdraw the aspirants' mind from the external objects and divert it towards eternal aspects, so that one may be free from the earthly objective world and can move towards the eternal world.⁷⁷ Hence, the ultimate motive of *Upanishad* is to attain *moksha or salvation* by way of *Upasana or meditation*.

Upasana or meditation propounded in the *Upanishad* cannot be possible without *concentration*. As *meditation* was prescribed by *Upanishad* in the ancient period, *concentration* was prescribed simultaneously. *Concentration* was not possible in presence of others or in public, thereby prescribing *meditation or concentration*; *Upanishad* actually prescribed the state of '*Privacy*'. The underlying meaning of the basic objective of *Upanishad* was to achieve '*Privacy*' for *concentration*, which ultimately would be fruitful for an individual to gain knowledge required for attaining *salvation*. In this sense, the need for Privacy in India was similar with the western view of *Psychological Privacy*, which would be

⁷⁶ Justice M. Rama Joice, *Legal and Constitutional History of India : Ancient Legal, Judicial and Constitutional System*, Universal law Publishing Co.Pvt.Ltd., 2004, p.3.

⁷⁷ S. Radhakrishnan (ed.), *The Cultural Heritage of India*, Vol.1, 1970, pp.349-350.

necessary for emotional and intellectual development of mind. Therefore, Privacy would always be necessary for the development of mind, be it Western world or Eastern world including India.

As a matter of fact, from the beginning of the *Vedic* civilization, disturbing a meditating sage was considered as a sin or wrong of very serious nature in the Indian society, which was, in other words, an acute case of intrusion of Privacy of the meditating sage. It would be clear from the following text of epic **Ramayana** :-

*“Yanman lobhayase Rambhe kama krodh jayaisinam,
Dash varsh sahasrani shailee sthasyasi durbhaga”.*⁷⁸

(In order to win over sex and anger I was meditating, you have disturbed my meditation as punishment for which you turn to be stone for ten thousand years.)⁷⁹

The above-mentioned text of the *Ramayana* has proved clearly the existence of Privacy in the ancient India. Apart from that, there are also other instances. As for example, *Lord Shiva*, while in meditation, was said to have been disturbed by *Kamdeva*, the god of love and sex in the Indian mythology, who was burnt as punishment thereof when *Lord Shiva* opened his third eye.⁸⁰ This case is a clear example of violation of Privacy of *Lord Shiva* by *Kamdeva*, which is found in an ancient Indian text.

Besides *Upanishad* and other religious texts *Vedas* were also concerned with the rules relating to Privacy in ancient India. It was found that, any kind of disturbance or interference was prohibited in matters of religious or spiritual activities. Privacy was always prescribed in these cases. Privacy was also required to be exercised at the time of the study of *Vedas*. In this respect, the necessity and awareness of Privacy in the ancient Indian society was clearly expressed by a text of the *Rig Veda*, which is stated below:-

*“Ya Aaste Yascha Charati Yascha Pashyati No Janah,
Teshang Sang Hanmo Akshani Yathedang Harmyang Tatha”.*⁸¹

⁷⁸ Ramnarayan Dutta Shastri (ed.), *Valmiki Ramayanam*, p.154.

⁷⁹ Ibid.

⁸⁰ Kalidas, *Kumarsambhavam*, 3171.

⁸¹ *Rigveda*, Mandal 7, Sukta 55, Hymn 6; *Maharshi Dayanand Saraswati Rigveda Bhasa Bhasya Sampurna*, 1st. edn.

(One ought to build such house which may sustain and protect the inmates in all seasons and be comfortable. The passers-by may not see the inmates nor the inmates see them.)

Hence, the origin of Privacy was found in India in the same manner as in case of Western societies. The ancient Indian literatures, like the *Dharmasutras*, *Dharmashastras*, *Vedas* and *Upanishads* are the burning examples of it. The necessity of Privacy as shown in the above-mentioned text of *Rig Veda* clearly proves the existence of physical and psychological Privacy at home including the existence of Family privacy in ancient India. It also in other way, justifies the Western view of “*Every man’s house is his castle*” and its Indian counterpart “*Sarva Swa Swa Grihe Raja*”.

2.5. The History of Privacy in India

The idea of Privacy was originated in ancient India. Gradually, it passed through the stages of historical development and finally reached the modern period. There were various stages of development of this right in the historical period in India. The history of this right was actually started in the ancient Hindu period, which could be divided into the periods of *Vedas*, *Upanishads*, *Ramayana*, *Mahabharata*, *Grihya-Sutras*, *the Smriti* period and the period of *Arthashastra*. Next important period in the history of this right was the *Muslim period*. Finally, the *British and post-British* period came which was marked as an important era in the development of this right in India. In fact, Right to Privacy was originated in ancient India from the era of *Vedas and Upanishads*. After its origin, the history of this right was mainly subjected to the *Hindu period and Muslim period*.

2.5.1. The History of Privacy in the Hindu Period

India was originally a Hindu country. Right from the Dravidians or the Aborigines to the Aryans, all were Hindus. The Dravidians, who were the original Indian habitants, were essentially Hindus by way of worshipping a number of Gods and Goddesses, sometimes in the forms of stones or trees, whom they worshipped. Thereby, they were all Hindus including the Tribal people. As such, the history of Right to Privacy in India should be counted from the Hindu period.

The history of Right to Privacy in the ancient India was started in the *Hindu period*, which was divided into the following stages:-

- (i) Privacy in the *Grihya-Sutras*.
- (ii) Privacy in the *Great Epics*.
- (iii) Privacy in the *Manusmriti*.
- (iv) Privacy in the *Kautilya's Arthashastra*.

The actual situation of Privacy during all these stages in India, is discussed hereunder.

2.5.1.1. Privacy in the Grihya-Sutras

After the end of the *Vedic Age*, the period of *Sutras* came into being. There were various types of *Sutras* at that period. *Grihya-Sutra* was the prominent among them, which promulgated the rights and duties of a house holder in the family life. It contained detailed norms relating to construction of houses in the ancient India. These rules prescribed elaborate norms for preserving Privacy at the time of construction of houses in ancient Indian social system. According to *Grihya-Sutras*, generally the houses had been constructed with a *bed-room (Sayaniya)*, a *store room*, a *kitchen (Bhakta-Sarana)*, a *hall or drawing room (Sabha)* and a *compound*.⁸² Supporting the above structure, *Dr. V. M. Apte* has written that, usually the houses contained a bed-room, a drawing room, provision room and a nursery.⁸³ He has further propounded that, the main door of the house would not be constructed facing the door of another house and the houses were built in such manner, so that the house-holder could not be seen by unholy persons during performance of religious rites and dining within the house as well as the valuables of the house could not be seen by the passers-by.⁸⁴ Moreover at the time of selection of the site of dwelling house, avoidance of the sight of the persons or things creating impediments towards the study of the *Vedas* was always preferred.⁸⁵

The basic objectives of the rules and regulations of the *Grihya-Sutras*, were to generate awareness and concern of the society towards exclusion of the rights of the strangers within the house, to preserve the sanctity of the house and to respect the Privacy of performing religious rites, of the study of the *Vedas* as well as the

⁸² Dr. Ram Gopal, *India of Vedic Kalpasutras*, p.151.

⁸³ Dr. V.M.Apte, *Social and Religious Life in the Grihya Sutras*, p.142.

⁸⁴ *Id at p.141*.

⁸⁵ *Id at p.180*.

dining.⁸⁶ Above all, the system of separate bed-room and nursery showed the need for Privacy in the residential houses in the ancient period, which also reflected the modern psychiatric thoughts regarding the necessity of Privacy in a house.⁸⁷ Hence, the *Grihya-Sutras* were so advanced that, those can be called the forefather of the modern systems of Privacy in the everyday life of human beings.

According to the ancient theorists, the most important areas, where Privacy was usually maintained by following the rules of *Grihya-Sutras*, were the study of Vedas, dining and performing religious rituals. But, apart from that, there were other areas stated in the *Grihya-Sutras*, where Privacy was maintained. As for example, a *Snataka* was prohibited to look at a naked woman, even if she was his wife, except during sexual intercourse. He was also prohibited to take meal together with his wife.⁸⁸ In this respect, it is pertinent to mention that, *Dr. V. M. Apte* remarked that, no *purdah* (veil) system was prevalent in the social and religious lives of the *Sutra* period.⁸⁹

But, *Prof. Govind Mishra* has raised the following objections against the contention of *Dr. Apte* and in support of the existence of 'purdah' system⁹⁰:-

“ 1. The absence of purdah system in those days is deduced solely from a single incident of life i.e. the marriage ceremony. He has not substantiated it either by pre or post marital situations.

2. The ritual of taking the bride out of the house to pay homage to the polar or other stars was and is limited to a small section of Brahmins called 'Chahandogya' only. Moreover, during the night visibility being poor, there would be less chance of the bride being seen by strangers.

3. He maintains that the fact that the people were invited to have a look at the auspicious bride signifies the absence of

⁸⁶ The members of the denomination known as “Ramanuj Sampradaya” do not eat and drink in presence of any one else. This practice is still prevalent in the Southern India. G.Mishra, *Right to Privacy in India*, Preeti Publications, New Delhi, 1994, p.49.

⁸⁷ Privacy in the bed-room is a necessity for both children and parents and faulty sleeping arrangements represent a subtle form of sexual abuse, observes psychiatrist Gabriel V. Lawry of the State University of New York. “Such arrangements are generally made by well meaning parents who are unaware that their child has become an individual with his own personality, his own sexuality and with a right to modesty and Privacy”. “Privacy begins with birth”, advised Dr.Sugar: Keep an infant in a bed-room separate from yours. Many parents keep infants in their bed-room as a convenience for night time feeding or in case the baby wakes up at night. Not a wise arrangement, warns psychiatrist Stuart Finch of the University of Arizona Medical School. ... R.Howard and E.Lewis Martha, “Bedrooms”, *Sexology Today*, Sept.1980, pp.41-42; G.Mishra, *op.cit.*, pp.49-50; Kiran Deshta, *op.cit.*, pp.85-86.

⁸⁸ Dr.V.M.Apte, *op.cit.*, pp.86-87.

⁸⁹ *Id* at p.42.

⁹⁰ G.Mishra, *op.cit.*, pp.50-51.

pardah system. The fact that the people needed invitation to have a look at the bride might signify just the contrary to what he maintains. It may be inferred that but for such invitation a look at the auspicious bride was not permissible. He has not clarified the position whether or not it was open to all to have a look at the bride even to have such invitation.

4. To maintain that there was no telephone in the Vedic society purports to inform nothing about the Vedic society. To apply contemporary standards to judge the primitive society may lead to misleading conclusions. The anxious efforts of Dr. Apte to establish that there was no pardah system in those days is neither warranted nor well substantiated by facts, for he is trying to give the impression that was seeing India of Grihya Sutras through the "Indian glass of nineteen thirties".

Hence, the rules contained in the *Grihya-Sutras* give an extensive allocation of the presence of Right to Privacy in various aspects of human lives in ancient India. The ultimate analysis of the rules and the contentions of various theorists show that, '*pardah*' system was found, to some extent, in the Hindu period. Though all the theorists are not unanimous on the point of presence or absence of '*pardah*' system during that period, but nobody can speak in favour of absolute absence of this system, which would, in other way, prove its existence. Over and above, it should be remembered that, as per the norms of *Grihya-Sutras*, Privacy would always be maintained in the construction of houses in the ancient Hindu period.

2.5.1.2. Privacy in the Great Epics

Apart from the *Grihya-Sutras*, elaborate rules regulating Privacy in the *Hindu period* were found in the two *Great Epics of India*, the *Ramayana* and the *Mahabharata*. *Ramayana* and *Mahabharata* were not only the holy religious books of the *Hindus*, but those books were the total reflection of the *Hindu* social and family system of the then period. Those books portrayed the *Hindu* social structure, rules of *Dharma*, *Rajashasana* or *royal edict*, norms relating to Council of Ministers, administration of justice, family structure and family customs as well as the norms of religious ceremony and religious rites. Therefore, a complete code of conduct of the then period can be found from those books. As such, it is obvious that, rules relating to Privacy should be found from these two books. Next part of the study will highlight these areas.

2.5.1.2.1. Existence of Privacy in the Ramayana

Hindu religious heads believe that, *Lord Vishnu* was born in the '*treta yug*' as a human being in *Ayodhya*, named '*Rama*' and '*Ramayana*' was the story of

'Rama', originally written by Valmiki. As *Ramayana* was the story of an ideal human being, called 'Rama' (projected as 'Avatar' of Lord Vishnu), therefore, ideal lifestyle of human beings was described in the *Ramayana*, from which ancient social structure of the then period was found. It elaborated every aspect of human lives, including Right to Privacy.

The following rules have been found in the *Ramayana* relating to Privacy:-

Rule – 1

The rule that a woman should not be seen by a male stranger was well established in the society as propounded by the *Ramayana*. The exceptions to the rule were provided in the following text, which would otherwise prove the rule:-

*“Vyasanesu na krichheshu na Yudhsheshu swayangbare,
Na kratton no vivahe va darshanang dushyate striyah”.*⁹¹

(At the time of calamity, during physical and mental ailment, during war, in Swayambar, during performance of religious rites, during marriage ceremony, if a woman is seen by strangers, no wrong is said to have been committed.)⁹²

Rule – 2

The rule describing the situation when a woman was accompanied by her husband, was propounded by the dialogue of *Lord Rama*, which is stated below:-

*“Saishang vipadgatachaiba krichhena cha Samanwita,
Darshanang nasty doshotsya matsamipe visheshatah”.*⁹³

(Sita is in distress and not well composed mentally and specially audience is with me she may give audience to all. And it may not amount to any wrong.)⁹⁴

Rule – 3

The limitation on the observance of a woman by a man was found from the following dialogue between *Lakshman* and *Sita*, where *Lakshman* said:-

*“Drishta purbang naterupang padou drishton tabaghane,
Kathamatra hi pashyami Ramena rahita vane”.*⁹⁵

(I have never seen your whole body before. I have seen your feet only. How can I see you here in the forest, specially in the absence of Ram.)⁹⁶

⁹¹ Ramnarayan Dutta Shastri Ram (trnsld.), *Valmiki Ramayanam, Yuddha Kand*, p.1412.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid, Uttar Kand, p.1576.*

Rule – 4

Though limitation was imposed on the observance of a woman, but a mere glance of a woman was permitted. The practice was found among the women, of putting veil on the face, while going out of the house. The evidence of this rule was found, when the demon *King Ravana* was killed in the battlefield and his wife *Mandodari* came out of the palace without putting any veil and without using any conveyance. The following texts show the evidence, where she was addressing her deceased husband:-

*“Drishtawa na khalbavikruddho mamihanabagunthitam,
Nirgata nagara dwarat padvyamebagatang prabho”.*⁹⁷

(Why don't you get angry seeing me coming all the way from the city-gate as pedestrian and without veil?)⁹⁸

*“Pashyeshadara darangste vrashtalajjabagunthanan,
Bahirnishpatitan Sarbankathang drishtawa na kupyasi”.*⁹⁹

(Discarding their veils and thereby disregarding shame, all your wives have come out. Seeing all these why don't you get angry?)¹⁰⁰

Rule – 5

Another rule of the society prohibited the seeing of a sleeping woman, except one's wife. The evidence of this rule was found, when *Hanuman* reached *Lanka* and started inspecting the inner section of the palace for searching *Sita*. The following texts show the evidences of the doubts in the mind of Hanuman regarding the sanctity of his action:-

*“Nireekshamanashcha tatastah striyah sa mahakapih,
Jagam mahating Shangka dharmasadhvasashangkitah”.*¹⁰¹

(Hanuman, having inspected the inner apartment of the Palace and having seen several sleeping women, entertained a great doubt regarding the propriety of his action.)¹⁰²

“Paradaravarodhasya prasupatasya nireekshanam,

⁹⁶ *Ibid.*

⁹⁷ *Ibid, Yuddha Kand, p.1401.*

⁹⁸ *Ibid.*

⁹⁹ *Id at p.1402.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid, Sundar Kand, p.891.*

¹⁰² *Ibid.*

Idang khalu mamatyarthang dharmalopang karishyati".¹⁰³

(To behold other women while sleeping causes evil consequences and diminishes one's acquired merit.)¹⁰⁴

Rule – 6

An important rule was found in the *Ramayana* stating that, not only to see other women, but to touch them was prohibited as a wrong. Also it was expressed that, one should not touch voluntarily the body of other man, except her husband. The following texts show the evidences of these rules:-

*"Parasparshat tu vaidehya na dukkhataramastime,
Piturbinashat soumitre swarajya haranat tatha*".¹⁰⁵

(The fact that same one else may touch my wife is a matter of greatest unhappiness for me. Even my father's death or losing my Kingdom would not give me that sorrow what I am subjected to by the above fact.)¹⁰⁶

*"Etat te devi Sadrishang patnyastasya mahatmanah,
Kahyanya twamrite devi buyadvachanameedrisham*".¹⁰⁷

(One ought not to touch voluntarily the body of other man except her husband is justified and proper reason for you not to go with me.)¹⁰⁸

Rule – 7

Another rule was found, according to which, disturb one's meditation was considered a punishable wrong. Following text speaks in support of that rule:-

*"Deshasya remaneeyatwal Pulastyo Yatra sa dwijah,
Gayanto vadyantyashcha lasyantyastathaiva cha,
Munestapaswinastasya vidhwang chakrura nindritah*".¹⁰⁹

(The natural scenario of the place where Pulastya, a sage, was living, was so attractive that girls used to sing, dance and play there. This used to disturb the sage's meditation. He, therefore, cursed that any girl found within his sight would be pregnant.)¹¹⁰

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid, Aranya Kand, p.496.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid, Sundar Kand, p.963.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid, Yuddha Kand, p.1456.*

¹¹⁰ *Ibid.*

Rule – 8

Rules were also found relating to construction of houses. Accordingly, in the description of palaces and other houses, secret apartments for ladies, bedrooms and drawing rooms had been suggested. The following text shows the example of that rule:-

*“Prasadai ratnavikritaih parvatairiva shovitam,
Kuta garaishcha Sampurnamindrasyemaravateem”*.¹¹¹

(Studded with precious stones the palaces resembled the high mountains. With several secret apartments for ladies in the palaces, the whole city of Ayodhya looked like Amaravati of Indra, the king of gods.)¹¹²

Rule -9

A rule was found in support of the use of curtain in the house. The following text describes the rule:-

*“Shayaneeyang narendrasya tadasadya vyatishthata,
Sottyasadya tu tadveshma tiraskaranimantarah”*.¹¹³

(Having gone very near to the sleeping room where there was a curtain only, the ministers started blessing the King.)¹¹⁴

Rule – 10

The next rule prescribed that, an attempt to see or over hear any confidential deliberation between two persons was prohibited as a wrong and capital punishment was awarded therefor. The following text proves that rule:-

*“Yah Shrinoti nireekshedra Savdhyo vavitataba,
Vabeda vai muni mukhyasya vachanang yadyavekshase”*.¹¹⁵

(Regard being had to the words of the sage, let others know that anybody who will over hear our conversations or see us talking shall be killed.)¹¹⁶

In this respect, it is also pertinent to mention that, this rule had received a prominent place in the period of Ramayana. It had universal application without any discrimination. As for example, *Lakshman*, the younger brother of *Rama*, had violated the order for certain obvious reasons. In consequence, he was awarded the

¹¹¹ *Ibid*, Bal Kand, p.40.

¹¹² *Ibid*.

¹¹³ *Ibid*, Ayodhya Kand, p.229.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*, Uttar Kand, p.1666.

¹¹⁶ *Ibid*.

punishment by the royal committee headed by the sage *Vasistha*. However, the capital punishment was commuted to his banishment.

In a complete analysis of the rules of Privacy in the *Ramayana*, the following points may be emerged:-

- (1) There were elaborate rules of Privacy contained in the *Ramayana*.
- (2) Privacy was maintained in matters of male exposure by the women.
- (3) The place of women was usually inside the house, except in exceptional circumstances.
- (4) In certain cases, the rules of Privacy were relaxed and a woman could visit the outside places accompanied by her husband.
- (5) To some extent, limitation was imposed on the observance of women by men.
- (6) '*Purdah*' or *veil* system was prevalent among the women for protection of their Privacy.
- (7) Watching a sleeping woman was prohibited, except one's wife.
- (8) Apart from watching, touching of females by males or vice-versa was prohibited in the society for the sake of the protection of individual Privacy.
- (9) Disturbing a meditating sage was considered a punishable wrong on account of violation of Privacy.
- (10) Rules of Privacy were maintained at the time of construction of houses and secret apartments were available for the ladies.
- (11) Use of curtains was practiced in the houses for the protection of Privacy of the inmates.
- (12) Privacy was maintained in case of confidential deliberations. Overhearing such discussion was prohibited as a wrong for which capital punishment was awarded.

Hence, it can be said that, at the period of *Ramayana*, Privacy was prevalent in India and a complete code of conduct was prescribed by the *Ramayana* for the protection of the Privacy.

2.5.1.2.2. Existence of Privacy in the Mahabharata

Mahabharata was the second great epic of India, which came into being after the *Ramayana*. *Hindus* believe that, *Lord Vishnu* was again born after *Ramayana*, in the '*dwapar yug*' as the prince '*Krishna*' at Mathura and later on, became the *King of Dwarka*. But, the story of *Mahabharata* was not only the story

of *Sri Krishna*, but actually the story of the two sets of cousin brothers, called ‘*Pandava*’ and ‘*Kaurava*’. The story revolved around the complex relationships and enmity between *Pandava* and *Kaurava*. In practical sense of the term, it was not the story of two sets of cousin brothers, but also a reflection of the complex social structure. The social structure reflected in the *Mahabharata* was so complex and dynamic that, it was not ended therein, rather it is applicable in the present society as well as would be applicable in the future society also due to its dynamic nature. It contained rules and regulations of every nature relating to human lives and as such, there was a number of rules regarding the Right to Privacy of human beings.

The following rules have been found in the *Mahabharata* relating to Privacy:-

Rule – 1

Draupadi was the common wife of all the five *Pandavas*. Hence, a special rule of Privacy was created for co-habitation with *Draupadi*. That rule was created for preventing embarrassment of *Draupadi*, which was also accepted by all the five brothers. The rule runs as follows:-

“*Draupadya nah sahaseenamanyotnyang yotvidarshayet,
Sa no dwadasha varshami brahmacharee vane vaset*”.¹¹⁷

(If any one of us happen to see *Draupadi* while she is in company of one of us, he will have to undergo the punishment of banishment for twelve years in the forest as

Bramhachari.)¹¹⁸

In fact, once *Draupadi* was with *Yudhishthir* in a room, wherein *Arjun* was forced to go, under the urgent need of collecting the weapon kept therein. As *Arjun* had violated the rule by intruding upon their Privacy, he had to observe the above-mentioned punishment of twelve years banishment.

Rule – 2

Killing of a person while he or she was sleeping was prohibited by a rule contained in the *Mahabharata*.¹¹⁹

Rule – 3

¹¹⁷ Shreepad Damodar Satavalekar (ed.), *Mahabharata, Adi Parva*, p.1000.

¹¹⁸ *Ibid.*

¹¹⁹ *Id at pp.34 and 424.*

Feeling of shame was peculiar to human nature, which distinguishes human sex from animal sex. *Mahabharata* prescribed the rule of enjoyment of sex at a lonely place in support of the feeling of shame of human beings. The following texts show the evidence of this rule:-

“*Ahang hi Kingdamonan tapasa pratimo munih,*

Vyapatra parmanushyanang mrigyang maithuna macharam”.¹²⁰

(I am a sage named *Kindam*. To avoid the feeling of shame I became a deer and was enjoying sex with a she-deer.)

In the instant case, *King Pandu* killed a he-deer at the time of enjoying sex with a she-deer. The deer was a transmigrated sage named *Kindam*, who made the above dying declaration. This example shows the observance of Privacy during the enjoyment of sex in the period of *Mahabharata*.

“*Sabraveetpashya vagavanpara vare reesheeninsthatan,*

Aawaryodrishya torevih kathang tusyatsamagamah”.¹²¹

(Don't you see many sages standing on both sides of the river! How can I have sexual intercourse with you within the reach of their sight.)¹²²

In the instant case, the sage named *Parasara* desired to have sexual intercourse with a girl, named *Matsyagandha* expressed his desire to her. It was happened near a river on both sides of which several *rishis* were bathing. Hence, *Matsyagandha* replied in the above-stated manner. Therefore, the sage produced mist using his supernatural power and enjoyed sex with the girl. This example again shows the practice of Privacy at the time of sexual enjoyment during the period of *Mahabharata*.

Rule – 4

The meeting of a woman and a man in a lonely place was prohibited by a rule described in the *Mahabharata*. The following texts express the rule:-

“*Madang pramadang purusheshu hitya sangyachhavabang pratigrihya mounam,*

Pradyumna Sambavapite kumaron nopasitabyon rahite kadachit”.¹²³

(With care and modesty, do not express your desire to another man. Although *Praduman* and *Samba* are your sons yet never sit with them in a lonely place.)¹²⁴

¹²⁰ *Id at p.595.*

¹²¹ *Id at p.301.*

¹²² *Ibid.*

¹²³ *Ibid, Aranyak Parva, p.1197.*

“*Tathaiva paradaranye kamabrittanra ho gatam,
Manasapi na hingranti te narah swargagaminah*”.¹²⁵

(Those who do not even think to have sex with other women in lonely place, go to heaven.)¹²⁶

Rule – 5

Another rule of *Mahabharata* expressly prohibited seeing of a naked woman. The following text expresses the rule:-

“*Na nagnameekshate nareeng na vidyanpurushanapi,
Maithunang satatang guptamaharanmg cha samacharet*”.¹²⁷

(A naked woman ought not to be seen and the learned ones ought to avoid seeing a naked man as well. Sex and food are to be enjoyed in a lonely place alone.)¹²⁸

Rule – 6

A rule of *Mahabharata* prohibited disturbing a meditating sage as a punishable wrong. The following text exemplifies the rule:-

“*Tapovighnakaree chaiba panchachuda susangmata,
Ramvanamapsarah shapadyasya shailatvyavagata*”.¹²⁹

(*Rambha*, a nymph, was turned into stone as the punishment for disturbing the meditating sage.)¹³⁰

Rule – 7

According to as rule of *Mahabharata*, confidentiality would be maintained within the relationship of husband and wife. The following text proves the existence of that rule:-

“*Tvatsyangnidhon yatkaretpatiste yadyapyaguhyang parirakshitavyam,
Kachitsa patnee taba Vasudevang pratyadishettena Vabedviragah*”.¹³¹

(Even a casual conversation with your husband ought to be kept confidential. Otherwise your co-wife may complain to *Krishna* who may entertain adverse opinion for you.)¹³²

¹²⁴ *Ibid.*

¹²⁵ *Ibid*, *Anushasan Parva*, p.850.

¹²⁶ *Ibid.*

¹²⁷ *Id at p.954.*

¹²⁸ *Ibid.*

¹²⁹ *Id at p.29.*

¹³⁰ *Ibid.*

¹³¹ *Ibid*, *Aranyak Parva*, p.1197.

¹³² *Ibid.*

Rule – 8

Strangers were prohibited to enter into one's house at odd hours by a rule of *the Mahabharata*. The following text shows the existence of that rule:-

“*Na vishravasajjata parasyagehang gachhennarashcheta yano vikale,
Na chatvare nishi tishthe nnigurho na rajanyang yoshitang prarthayeeta*”.¹³³

(One should not visit other's house at odd hours, one should not sit near a cross-road in the night and one should not try to make the King's wife his own.)¹³⁴

Rule – 9

Another rule contained in the *Mahabharata* expressed that, secret affairs of the sages should be kept confidential and should not be divulged anywhere. The following text clearly explains the rule:-

“*Amangalyani chaitani tatha krosho mahatmanam,
Mahatmanang cha guhyami na vaktavyani karhichit*”.¹³⁵

(The secret affairs of the sages must not be divulged any where...)¹³⁶

In a complete analysis of the rules of Privacy in the *Mahabharata*, the following points may be emerged:-

- (1) There were explicit rules of Privacy contained in the *Mahabharata*, like the *Ramayana*.
- (2) A number of exclusive rules of Privacy were prescribed for *Draupadi*, being the common wife of *Pancha Pandavas*.
- (3) Rules of Privacy were maintained at the times of meditating, sleeping and studying.
- (4) Privacy was also recommended for enjoyment of sex, having food and at the call of nature. All these activities were performed in secluded places, being not observed by others.
- (5) Privacy of prisoners and slaves had been guaranteed during their daily activities of sleeping, eating, sitting and exercising.
- (6) Privacy of women was an important right and watching, touching or meeting a woman in a lonely place was prohibited for men.

¹³³ *Ibid*, Udyog Parva, p.207.

¹³⁴ *Ibid*.

¹³⁵ *Ibid*, Anushasan Parva, p.688.

¹³⁶ *Ibid*.

- (7) Privacy of home was protected and visitors were not allowed in one's house without the consent of the owner during odd hours and at night.
- (8) Veil system was prevalent among the women for protection of their Privacy.
- (9) Privacy of meditating sage was an important aspect and intrusion of it was punishable.
- (10) Divulgence of confidential information was prevented. As such, Privacy of Information was recognized.

Over and above, the existence of Privacy could be evidenced from various incidents of *Mahabharata*. As for example, the incident of '*Vastraharana of Draupadi*', wherein she was forcibly brought to the '*Sabhagriha*' violating her Privacy with the intention of being unclothed and molested in front of everybody. At that time, *Sri Krishna* supplied her additional clothes and protected her from nakedness and shame in the public. Protecting her from denudation was actually the protection of her Privacy. Therefore, preventing the denudation of *Draupadi* was a remarkable event of upholding the Privacy of women during the period of *Mahabharata*. Hence, Privacy was found to be existent in *Mahabharata* by way of prescribing rules and regulations in this respect.

The study of the two epics of *Ramayana and Mahabharata*, gives us the examples of rules and regulations of Privacy existed therein. More or less the rules and regulations of Privacy were similar in *Ramayana and Mahabharata*. But, there were slight differences in case of veil system of women, because women of *Mahabharata* were far more advanced than *Ramayana* and even they had participated with men at the war. Also in the question of banishment of Privacy violated women, *Mahabharata* was much more liberal than *Ramayana* as evidenced from the banishment of *Sita* during *Uttarkand*, but no banishment of *Draupadi* at any time. Hence, after comparing the rules of Privacy contained in the two epics, it is found that, *Mahabharata* was far more liberal and advanced than *Ramayana*.

2.5.1.3. Privacy in the Manusmriti

Manusmriti or the code of *Manu* was considered as a landmark in the ancient Indian legal history. It was compiled approximately at 200 B.C. The subject matter of *Manusmriti* was divided into 12 chapters and 2694 verses. Eminent *Hindu* jurists viewed that, *Manusmriti* was a great reservoir of concepts of law, legal rules and

institutions. Even in the present era, it gives a vivid idea of the customs of the then society and social and religious observances of the then Indian people.¹³⁷ As *Manusmriti* was considered as a total code of conduct of the ancient Indian social and legal system, it contained elaborate rules relating to every aspect of human lives during that period. In this sense, it also contained a number of rules relating to Right to Privacy in ancient India.

The following rules are found in the *Manusmriti* relating to Privacy:-

Rule – 1

Rules had been prescribed for meditation alone in a lonely place, so that Privacy would be maintained. The following text gives the example of this rule:-

*“Ekakee chintayennityang vivikte hitamatmanah,
Ekakee chintayano hi parang shreyotdhigachhati”*.¹³⁸

(One should meditate alone in a lonely place for only by meditating alone one attains salvation.)

Rule – 2

Rules regulating Privacy were prescribed at the time of taking food and eating with certain persons was prohibited. The following text explains that rule:-

*“Chandalashcha varashcha kukkudah shrva tathaiva cha,
Rajaswala cha shandashcha neksherannashnato dwijan”*.¹³⁹

(The twice-born should avoid eating within the reach of sight of the followings, viz. the persons who execute human beings, persons who are impotent, a woman during her menses, pigs, dogs and cocks.)

Rule – 3

Eating with a woman was prohibited and at the same time Privacy of women was recognized by rules. The following text describes that rule:-

*“Nashneeyadvaryaya sardhang nainameeksheta chashnateem
Kshuvateeng jremvamanang van a chaseemnanng yatha sukham”*.¹⁴⁰

(One should not take his meal with woman in one plate and one should not see a woman taking her meal, sneezing, yawning and while sitting at her leisure.)

¹³⁷ Dr.Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency Publications, Haryana, 18th Edn., 2007, p.33.

¹³⁸ Hargovind Shastri (ed.), *Manusmriti*, p.276; G.Mishra, *op.cit.*, p.64.

¹³⁹ *Id at p.159.*

¹⁴⁰ *Id at p.187.*

Rule – 4

Seeing a naked woman was prohibited by rules and as such Privacy of women was upheld. The following text elaborates that rule:-

*“Upetya snatako vidwannekshennagnang parastriyam,
Sa rahasyang cha sangbada para streeshu vivarjayet”.*¹⁴¹

(A learned and wise person should not see a naked woman. He should avoid talking to a woman other than his family member in a lonely place.)

Rule – 5

Talking and meeting with a woman at a lonely place was prohibited as a punishable wrong. It also amounted to violation of Privacy of a woman. The following text explains the rule:-

*“Parastriyang yotvibadaitteerthetranye vanetpi na,
Nadeenang vatpi sangvede sa sangrahanamapnuyat”.*¹⁴²

(A person, not ill-famed for adulterous act, is said to commit the crime of ‘*Strisangrahana*’ if he talks to another woman at the bank of a river, in a forest and in a lonely place and shall be fined one thousand *panas*.)

Rule – 6

Living with a woman of any relation at a lonely place was prohibited by rules as an intrusion on her Privacy. The following text exemplifies that rule:-

*“Matra Swasra duhitra van a vivikta sano vabet,
Balavamindriya gramo vidwangsamapi kashati”.*¹⁴³

(One should avoid living even with his grown up mother, sister and daughter in a lonely place, for even a wise person may be over-powered by passion.)

Rule – 7

Rules had been prescribed for protection of Privacy of certain persons. Killing of a sleeping person was prohibited. The following text clearly explains the rule:-

“Na suptang na visannahang na nagnang na nirayudham,

¹⁴¹ *Id at p.188.*

¹⁴² *Id at p.463.*

¹⁴³ *Id at p.88.*

Nayuddhamanang pashyantang nap arena samagatam".¹⁴⁴

(One who is sleeping, one who is deprived of his shield, one who is naked, one who is without arms, one who does not participate in the battle and one who is busy fighting with another, should not be killed.)

Rule – 8

Privacy of sleeping persons was protected and their disturbance was prohibited by rules. The following text shows the evidence of that rule:-

"Shreyasang na pravodhayet".¹⁴⁵

(The elders should not be disturbed while sleeping.)

Rule – 9

Privacy was practiced at the time of attending the call of nature and rules had been prescribed therefor. The following text gives the instance of that rule:-

"Tiraskrityochretkashtha loshtha patra trina dina,

Niyamya prayato vachang sangveetandagotvagunthitah".¹⁴⁶

After analyzing the rules of Privacy in *the Manusmriti*, the following points may be emerged:-

- (1) *Manusmriti* contained elaborate rules relating to Right to Privacy in ancient India.
- (2) There were various similarities regarding the rules of Privacy in *Ramayana-Mahabharata* and in the *Manusmriti*.
- (3) Privacy was prescribed for a meditating sage in a lonely place for attaining salvation.
- (4) Rules of Privacy were found for taking food, sleeping, enjoying sex and for other personal matters. Therefore, individual Privacy was recognized.
- (5) Right to Privacy of a woman got a prominent place in the *Manusmriti*.
- (6) Watching a naked woman was prohibited as well as women should not be seen or disturbed at their private moments. As such, liberty of women was recognized in the *Manusmriti*.
- (7) Taking a woman to a lonely place or living with a woman in such a place was prohibited by express rules.

¹⁴⁴ *Id at p.339.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Id at p.189.*

(8) Killing of a sleeping, naked or unguarded person was prohibited and thereby their Privacy was recognized.

(9) A sleeping person would not be disturbed, this rule declared the Privacy of a person while sleeping.

(10) Openly attending the call of nature was prohibited and certain amount of coverage was prescribed, which means, Privacy of a person attending the call of nature was recognized.

The above stated analysis clearly shows the existence of Privacy during the period of *Manusmriti*. As the *Manusmriti* prescribed norms covering every aspect of human lives, Privacy was not neglected therein. Privacy is an essential element of a civilized society. Indians described in the *Manusmriti* were civilized people of ancient Indian society. Hence, they could not overlook Privacy in their daily lives and as such, *Manusmriti* prescribed elaborate norms of Privacy therein.

2.5.1.4. Privacy in the Kautilya's Arthashastra

Kautilya's Arthashastra was the most important and masterly treatise on statecraft of ancient India. The Prime Minister of the *Maghadha Empire* during the reign of *Chandragupta Maurya*, *Chanakya* or *Vishnugupta* was the author of this great work.¹⁴⁷ It was called an *encyclopaedia* of statecraft and legal system of the ancient India. This famous work was created sometimes between 322 and 300 B.C.¹⁴⁸ It had propounded elaborate rules relating to duties of King and procedures of administration of justice in ancient India. The necessity of Council of Ministers to assist the King in the administration of justice was also highlighted therein. It reflected the social system of ancient India during the reign of *Chandragupta Maurya*. As it highlighted every aspect of human lives of the then Indian society, Right to Privacy was not overlooked by it. In fact, *Kautilya* realized the necessity of Privacy in various spheres of human lives as well as in the administration of justice in the society. Therefore, he had prescribed various norms of Privacy in the *Arthashastra*.

Various norms of Privacy had been found in the *Arthashastra*. Most important among them are as follows:-

¹⁴⁷ *Ancient India*, p.104.

¹⁴⁸ *Supra Note 76* at pp.37-38.

(1) Privacy and Confidentiality was maintained at the time of consultation of ministers.¹⁴⁹

The main purpose of prescribing Privacy during the consultation of ministers was to prevent the leakage or divulgence of the State Policies, based on which the *Indian Official Secrets Act, 1923* was enacted. Therefore, the importance of secrecy in official procedure could be easily understood. In this sense, *Kautilya's Arthashastra* was the father of Indian statecraft. According to *Arthashastra*, citizens' Privacy was protected, which could be violated by the Kings only in the interest of national security and for this purpose, though spying was allowed, but eavesdropping was prevented. *Kautilya* prescribed the urge or loyal spies of the King to infiltrate congregations of people in groups and to start a debate on the affairs of the state. In this way, people were encouraged to join the debate on state affairs to provide their views publicly.¹⁵⁰ This system was the most scientific system, by which a King could be criticized with the most scientific system, by which a King could be criticized with the most unbiased attitude. Hence, these rules and regulations propounded by *Kautilya* clearly emphasized the need and awareness of Privacy in the ancient India.

(2) *Kautilya's Arthashastra* had also prescribed elaborate rules regulating the construction of houses like the *Grihya-Sutras*. Norms of Privacy were also prescribed therein. Those rules are as follows:-

"The owners of houses may construct their houses in any other way they collectively like, but they shall avoid whatever is injurious. With a view to ward off the evil consequences of rain, the top of the roof shall be covered over with a broad mat, not blowable by the wind. Neither shall the roof to be such as will easily bend or break. Violation of this rule shall be punished with the first amercement. The same punishment shall be meted out for causing annoyance by constructing doors or windows facing those of others' houses, except when these houses are separated by the King's road or the high road..."¹⁵¹

With the exception of private rooms and parlours (angina) all other open parts of houses as well as apartments where fire is ever kindled for worship or a mortar is situated shall be thrown open for common use".¹⁵²

¹⁴⁹ R.Sharma Shastri (trnsld.), *Kautilya's Arthashastra*, 1961, p.19; Kiran Deshta, *op.cit.*, p.95.

¹⁵⁰ E.Jeremy Hutton et.al., "*The Right to Privacy in the United States, Great Britain and India*", in Richard P.Clande (ed.), *Comparative Human Rights*, 1976, p.151.

¹⁵¹ R.Sharma Shastri, *op.cit.*, pp.189-190.

¹⁵² *Id* at p.190; G.Mishra, *op.cit.*, pp.67-68.

The above-stated extracts from the texts of *R. Sharma Shastri* clearly show that, the houses were divided into two parts – **(a)** private rooms and parlours constructed exclusively for the use of the ladies, and **(b)** the rest of the house was open for common use of the family members alone. Hence, the entry of outsiders was restricted. Moreover, the sanctity of the family house was considered above all. For this purpose, entry of outsiders was prohibited without the consent of the owner during the day and night, both, violation of which was punishable with amercement.¹⁵³ Even, constructing doors and windows facing others houses were prohibited on account of creating annoyance to the neighbours, which was punishable wrong also. The main reason behind such provision was that, in those cases the private rooms and parlours meant exclusively for ladies would be seen by male strangers from their houses, which should not be allowed. This provision was similar with the contemporary *wrong of Nuisance under the Law of Torts*, where construction of a house obstructing the air or light of others' houses would be prohibited as actionable Nuisance. Moreover, the impact of this prescription of *Arthashastra* was not ended therein, it has been accepted by the British Indian Courts as the contemporary customary right to Privacy, which has later been codified as an *Easement Right under Section 18 of the Indian Easements Act, 1882*.¹⁵⁴

(3) Privacy of women was recognized and as such, the women working from home usually worked through the maid servants. Alongside, Superintendents were prohibited to look at the faces of the women visiting the work place, it was punishable with first amercement.¹⁵⁵

(4) Human Rights of Slaves were recognized including their Right to Privacy and human dignity. More specifically protection was provided to female slaves. They could not be forced to attend their master, when bathing naked, hurting or abusing them or violating their chastity was also prohibited. In all these cases, forfeiture of the value paid for the slave was prescribed as punishment.¹⁵⁶

¹⁵³ *Id at p.261.*

¹⁵⁴ Govind Mishra, *Privacy and the Indian Legal System*, Delhi Law Review, Vol.12, 1990, pp.46-83 at p.62.

¹⁵⁵ R.Sharma Shastri, *op.cit.*, p.126.

¹⁵⁶ *Id at p.206.*

(5) Unreasonable teaching, striking or hurting was punishable as assault as well as violation of one's Privacy.¹⁵⁷

(6) Human Rights including the Right to Privacy and human dignity of the Prisoners were recognized. Hence, obstructing their Privacy during sleeping, sitting, eating, and exercising was punishable.¹⁵⁸

(7) Abusing the habits of other persons was punishable as intrusion on Privacy.¹⁵⁹

(8) As the Privacy of the women was recognized, sexual intercourse with a woman without the consent and against the will was prohibited.¹⁶⁰

(9) Even the Privacy of a Prostitute was recognized and forcing connection with a Prostitute was punishable.¹⁶¹

(10) Other instances were also called violation of Privacy, like spreading false rumours, insulting the elders and violating the sanctity of kitchen, all of which were punishable.¹⁶²

(11) Privacy of Information was protected and the persons inquisitive to gather information about the woman and property of others were suspected as criminals.¹⁶³

(12) Though Individual Privacy was considered as an important human right under the *Kautilya's Arthashastra* and was protected therein, but provisions were also found where those rights could be curtailed in the interests of society and national security. As for example, moving in disguise at night was forbidden as punishable and secret agreements inside the house, at night or in the forest were declared as void. All those are instances of Social Privacy.¹⁶⁴

Apart from the above-mentioned provisions, *Kautilya's Arthashastra* had also prescribed Privacy of Information in different aspects of human lives. The following Sanskrit texts will provide the instances of such aspects of Privacy:-

Rule – 1

*“Susiddha moushadhang dharmang grihachhidrangcha maithunam,
Kuvuktang kushrutang chaiba matimanna prakashayet”.*¹⁶⁵

¹⁵⁷ *Id at p.219.*

¹⁵⁸ *Id at p.253.*

¹⁵⁹ *Id at p.218.*

¹⁶⁰ *Id at p.258.*

¹⁶¹ *Id at p.264.*

¹⁶² *Id at p.256-257.*

¹⁶³ *Id at p.245.*

¹⁶⁴ *Id at pp.164,167.*

¹⁶⁵ R.Pande (trnsld.), *Chanakyaniti Darpan*, p.103; G.Mishra, *op.cit.*, pp.76-77.

(The medicine, effectiveness of which has been tested and proved, acts pertaining to religion, defects of one's family, sexual matters, eating prohibited food and hearing insulting words ought not to be made public.)

Rule – 2

*“Aayurvitang grihachhidrang mantramoushadha maithune,
Danang manapamanocha naba goupyani karyet”*.¹⁶⁶

(Informations pertaining to the following nine subjects, viz. (a) age, (b) wealth, (c) defects of one's family, (d) mantra, (e) tested and effective medicine, (f) sexual matters, (g) honour, (h) insult and (i) gifts, ought to be kept secret.)

Rule – 3

*“Arthanashang manastapang grihineecharitani cha,
Neexha vakyang chapmanang matimanna prakashayet”*.¹⁶⁷

(A prudent man should not disclose the destruction of his wealth, mental agony, wife's character and insulting words spoken to him.)

Rule – 4

*“Na viswasetku mitre cha mitrechapi na vishyasat,
Kadachitakupitang mitrang sarvang gerhya prakashayet”*.¹⁶⁸

(One should never believe bad friends and also good friends entirely. For, in case, the friend turns out to be hostile, there is every possibility that all the secret and confidential matters may be divulged.)

The above mentioned study of *Kautilya's Arthashastra* produces ample evidences of existence of Privacy therein. Privacy was not only prescribed in the construction of houses or during consultation of ministers, but in every aspect of human lives. Therefore, it can be proved that, Privacy was prescribed as a code of human conduct in the then Indian society for upholding their human dignity. It was not an isolated affair, but it was the result of a constructive and well-built thought of statecraft, which was necessary to establish a great human civilization. Moreover, when control was prescribed on the withhold and disclosure of information, the ultimate goal of Privacy would be completed. The ultimate goal of Privacy is to

¹⁶⁶ *Ibid.*

¹⁶⁷ *Id at p.44.*

¹⁶⁸ *Id at p.8.*

maintain a balance between Individual and Social aspects of Privacy for the peaceful co-existence of a civilized society, which was found extensively in the rule making system of the *Arthashastra* as well as in the then Indian society. Hence, the *Arthashastra* was proved to be a fruitful work on Privacy.

Along with the discussion of *Kautilya's Arthashastra*, the history of Privacy in the *Hindu* period will become complete. The most important works on Privacy during this period are the *Grihya-Sutras*, *Ramayana*, *Mahabharata*, *Manusmriti* and the *Kautilya's Arthashastra*. All these works have projected over extensive rules of Privacy in the Hindu period. But, apart from these works, there were few other works, which also had dealt with the idea of Privacy in the Hindu period. In this respect, the following rules of **Panchatantra** in the Sanskrit texts can be mentioned:-

Rule – 1

*“Na vittang darshayetpraggah kasyachittaswalpampyaho,
Munarepi yatastasya darshanachchalate manah”.*¹⁶⁹

(A prudent man ought not to show whatever little wealth he has, to others. For the very sight of such wealth is said to be alluring to the sages.)

Rule – 2

*“Dareshu kinchit swajaveshu kinchit gopyang vayasyeshu suteshu kinchit,
Yuktang na ba yuktamidang vichintya vadeddhipashchanma hatoutnurodhat”.*¹⁷⁰

(One ought to keep secret something from his wife, something from his relatives, something from his friends and something from his son. When asked by the elders, he should reply after having taken into consideration whether such disclosure of confidential matter is proper.)

The above mentioned texts of *Panchatantra* clearly prove the existence of Information Privacy in various aspects of human lives in the Hindu period in ancient India. Control of information is necessary in every society for the protection of Privacy which ultimately becomes fruitful for upholding the human dignity. Hence, the discussion of all the works on Privacy in the *Hindu* period reflects the existence of Privacy as a value of human relations in ancient India.

¹⁶⁹ R.Jha (ed.), *Panchatantra*, p.180; G.Mishra, *op.cit.*, p.77.

¹⁷⁰ *Id* at p.32.

2.5.2. The History of Privacy in the Muslim Period

The ancient period in India was actually the *Hindu period*, after the end of which the *Muslim period* was started. The *Muslim period* was called the *medieval period* in the Indian history, which was started in 1206 A.D. with the establishment of *Slave Dynasty* in India by *Kutabuddin Ibak*. It continued for long, including the *Mughal Dynasty* and ended at the beginning of *British regime* in India. The *Muslim period* or *the medieval period* was called the '*Period of Darkness*' in the Indian history, because much legal developments did not take place during that period. Moreover, with the advent of *Muslims* in India, the rich heritage of ancient Indian culture of the *Hindu period* was destroyed to a great extent. Due to that destruction, various evidences of ancient Indian society were lost. But, later on, *Muslims* had also created their literatures and work of arts, by way of which Indian society was again enriched.

The *Muslim* social structure and their culture were based on the idea of '*Islam*' and '*Prophet Mohammed*'. '*Islam*' means peace and in other words, it moves towards the submission to the will of *God or Allah*. One who follows *Islam*, is called a *Muslim*. *Prophet Mohammed* is the representative of *Allah*, who is also the founder of the *Muslim religion*. As such, *Muslims* are the followers of *Prophet Mohammed* and believe in *Islam*. *Quran* is the *holy book of Islam*, which is also considered as the first source of *Muslim law*. Though the advent of *Muslims* in India was started in 1206 A.D., but it was originated in *Mecca* and in the *Arab countries*, long before that. Hence, the *Islam principles of law* were very old and applicable among the *Muslims* in every country, including India. The rules and regulations of *Islam* were ordained in the *Quran*. The *Muslim Personal Law* was called *Shariat*. Apart from that, there were *other sources of Muslim Law*, like *Hadith*, *Ijma* and *Qiyas*. All these sources coupled together formulated the principles of *Muslim Law*.

Muslim principles of Law covered every aspect of human lives and *Prophet Mohammed* prescribed a code of conduct for the *Muslim people* which were found clearly from the verses of *Quran*. Along with the other rules and regulations, Privacy and Human Dignity occupied a prominent place in the *Muslim Personal Law*. The '*Purdah*' or veil system was very much prevalent in the Muslim society, which showed the existence of Privacy as a deep rooted custom in the Muslim

society. Various rules and regulations of Privacy were found among the Muslims, which are discussed below.

The norms of Privacy existed in the *Islamic principles of Law* followed in India during the *Medieval or Muslim period* are as follows:-

(1) There were express rules relating to Privacy of home in Islamic Law. As the home was the basis of family, thereby for the protection of Family Privacy, Privacy of Home was recognized in Islam.

In this sense, Islamic idea of Privacy of Home was similar with the Western view of Privacy of Family and Home, as expressed in the famous maxim “*a man’s home is his castle*”.¹⁷¹ A similar view was found in the verses of *Quran*, which stated as under:-

“O ye who believe, enter not houses other than your own without first announcing your presence and invoking peace upon the people therein. That is better for you, that you will be heedful... and if you find no one therein, still enter not until permission hath been given, and if it to said unto; go away, for it is purer for you, Allah knoweth what you do”.¹⁷²

Hence, it was found that, the verses of *Quran* explicitly guaranteed Privacy of Home like the Western view and in both the cases, the underlying meaning of the maxim or the verses was that, Right to Privacy of every individual would be protected in one’s home and unwarranted intrusion with the Privacy would be prevented thereby.

(2) The right of individuals for protection against unreasonable intrusions upon their Privacy was declared as a rule by *Prophet Mohammed*. The rule was as follows:-

“If a person looks at you, (referring here to a man’s home where he expects privacy) without your permission and you pelt with a stone and put out his eye, no guilt will be on you”.¹⁷³

(3) The morality of Islam was based on the idea of ‘*Haya*’ or ‘*Shyness*’, which was built to create strong moral deterrence against the evil inclinations of human beings. The feeling of shyness would prevent a man from committing obscene or indecent

¹⁷¹ I.P.Massey “*Constitutionalization of the Right to Privacy in India*”, in B.P.S.Sehgal (ed.), *Human Rights in India*, 1995, P.311; Kiran Deshta, *op.cit.*, p.98.

¹⁷² *Quran* xxiv:27,28, quoted in Medani Abdel Rahman Tageldin, “*Right to Privacy And Abortion:Jurisprudence*”, *Aligarh Law Journal*, vol.12, 1997, p.141

¹⁷³ *Sahih Muslim* (authenticated traditions of the Prophet reported by Muslims), 1930; Kiran Deshta, *op.cit.*, p.99.

acts, for which he or she would be answerable to God and conscience. In this respect, the Holy Prophet gave the following rule:-

*“When you do not have Haya,
You may do whatever you please”.*¹⁷⁴

(4) Another important rule of Privacy enjoined by Islam was to clothe one’s body and to conceal the shameful parts of the body. The sense of modesty as a part of human nature was also prescribed by this rule.¹⁷⁵

(5) A rule prescribed by *Quran* prohibited looking at other women and imposed a duty to cover shameful parts of the body. The rule was as follows:-

*“(O Prophet), tell the believing men to restrain their eyes (from looking at other women) and guard their shameful parts; this is a pure way for them; surely, Allah knows full well what they do. And (O Prophet), tell the believing women to restrain their eyes (from looking at the other men) and guard their shameful parts (24:30-31)”.*¹⁷⁶

Therefore, the clothing of one’s body and prohibition of looking at other men or women in unreasonable manner were prescribed as the rules of Privacy in Islam.

(6) There were other norms of Privacy prescribed by *Prophet Mohammed*, which were as follows:-

“(a) When one of you goes to his wife, he should mind his shameful parts. They should not strip their clothes off their bodies and become naked like donkeys (Ibn Majah)

(b) Accused is one who casts a look at the shameful parts of his brother (Ahkam-al-Quran by Jassas).

(c) No man should look at a naked man and no woman should look at a naked woman (Muslim).

*(d) Beware, never strip yourself of clothes, for with you is the one who never leaves you alone, except at the time when you attend the call of nature or have intercourse (Al-Tirmizi)”.*¹⁷⁷

(7) Muslims were very much Privacy conscious and hence they imposed restrictions forbidding male members from entering the house without alerting the female members, so that their Privacy would be protected.

¹⁷⁴ S.Abul A’la Mandudi, *Purdah and the Status of women in Islam*, in *Al Ash’ari* (tr. and ed.), 4th edn., 1979, p.162; G.Mishra, *op.cit.*, p.70.

¹⁷⁵ *Id at pp.1,162.*

¹⁷⁶ *Id at p.163.*

¹⁷⁷ *Id at p.172; G.Mishra, op.cit., p.72.*

(8) For the maintenance of Privacy, entering into other's house without permission was prohibited. The rule in this regard was as under:-

“O Believers, do not enter houses other than your own until you have taken permission; and when you enter a house, greet the people therein with salutation... (24:27)”.¹⁷⁸

(9) Peeping into the houses of other people was strictly prohibited as amounting to violation of Privacy. In this respect, *Prophet Mohammed* announced the following rule:-

“If a person peeps into somebody else's house without permission, the people of the house will be justified if they injure his eye (Muslim)”.¹⁷⁹

(10) The prohibition to meet a woman in a lonely place was also recommended for the protection of the Privacy of a woman. According to *Uqbah bin Amir*, the following rule was provided by *Prophet Mohammed* in this respect:-

“Beware that you do not call on women in privacy... (Al-Tirmizi, Al-Bukhari and Muslim)”.¹⁸⁰

(11) Privacy of a woman acquired a prominent place in Islam and in this respect , touching the body of a woman was prohibited . The following text prescribed by *Prophet Mohammed* evidences the rule:-

“The one who touches the hand of a woman without having a lawful relation with her, will have an ember placed on his palm on the day of judgment (Takmilah, Faith-al-Qadir)”.¹⁸¹

Exceptions of this rule were also found. As such, touching of a woman was permissible only in exceptional circumstances, like an ailing woman, a woman produced as a witness or a party in a court, a burning or drowning woman or a woman whose life or honour would be in danger in any manner etc.¹⁸²

(12) Alongwith the Right to Privacy, Right to live with human dignity, Right to Self-respect and Honour were also protected in Islam. In this respect, insulting each other, sarcasm, libel, defamation and back-biting were prohibited in Islam. The rule was found in *Quran* as follows:-

¹⁷⁸ *Id at p.175.*

¹⁷⁹ *Id at p.176.*

¹⁸⁰ *Id at p.177.*

¹⁸¹ *Ibid.*

¹⁸² *Id at p.178.*

“O ye who believe. Let not some men among you laugh at others, nor defame or be sarcastic to each other, nor speak ill of each other behind their backs (49:11-12)”.¹⁸³

(13) Privacy of correspondence was also recognized in Islam. In this respect, *Prophet Mohammed* prescribed in a *Hadith* as follows:-

“People would be prohibited from reading letters of others and warned that even if a man casts side long glances in order to see a letter of another person, his conduct becomes reprehensible”.¹⁸⁴

(14) Individual Privacy got a prominent place in Islam and as such, Privacy of the citizens was upheld. On the contrary, a ruler was prohibited to intervene in the private affairs of the citizens. The rule was prescribed by *Prophet Mohammed* as follows:-

“When a ruler begins to search for wrongs among his people he wrongs them”.¹⁸⁵

(15) Privacy of Information was protected in Islam. In this respect, the holy *Quran* enjoined the following rule:-

“... And spy not each other”.¹⁸⁶

Hence, spying was prevented in Islam, which as a general rule would always be prevented in every society for the protection of Privacy. The modern theorists also consider spying as an instrument for intrusion on Privacy and thereby recommend its prohibition. In this sense, this rule of Islam law could be considered as the fore-runner of the Modern rules of Privacy Law.

(16) Last but not the least, prevalence of ‘*Purdah*’ or veil system was an essential attribute of Privacy among the Muslims. Muslim women were always covered with ‘*purdah*’ or veil and the Privacy of a ‘*Purdahnasheen Lady*’ could never be violated.

A detailed study of the norms of Privacy in Islamic Law shows the existence of elaborate rules of Privacy in Muslim India. Muslims were very much concerned about their Privacy and as such, they did not speak everything in public. The custom of confidentiality of information was also found among them. Moreover, the Muslims were habituated with a distinction between Public life and Private life. As

¹⁸³ Tahir Mahmood, *Human Rights in Islam*, pp.10-11.

¹⁸⁴ Abul A’la Mandudi, *Human Rights in Islam*, p.27.

¹⁸⁵ Sheikh Showkat Hussain, “*Right to Privacy*”, *Journal of Islamic and Comparative Law Quarterly*, Vol.III(2), June 1983, p.107.

¹⁸⁶ *Ibid.*

such, they always kept personal matters private and could never bring into the public. This instance shows the acceptance of Privacy as a human value in Muslim society.

With the discussion of Muslim rules and regulations of Privacy in India, the history of Privacy in India would become more or less complete. In this respect, it is pertinent to mention that, Right to Privacy was originated in India during the ancient *Hindu period*. Therefore, the study of Hindu literatures would give us the idea of Privacy at the first instance in ancient India. The *Vedas, Upanishads, Grihya-Sutras, Ramayana, Mahabharata, Manusmriti and Kautilya's Arthashastra* were the authoritative works of ancient India which could produce ample evidences of existence of Privacy in ancient India. The next period of Indian history on Privacy was the *Muslim period or Medieval period*. Ample evidences of Privacy would also be found from the opinions of *Prophet Mohammed* and the injunctions of the holy *Quran*. Hence, it can be said that, Privacy was never an alien in India, rather it was embedded in the deep rooted custom of the rich cultural heritage of India.

2.6. Privacy : The Development in U.S.A. and U.K.

Right to Privacy was originated in the animal world and later on absorbed in the primitive human society from the animal society. Therefore, the process of development of Right to Privacy was marked as a dynamic process, which started with the beginning of the human civilization and had grown simultaneously with the growth of the human civilization. As the society was transformed from primitive to ancient society, Right to Privacy was also transformed in the positive direction to cope with the changing needs of the society. The process of social transformation continued and the ancient societies were gradually converted into the modern societies. Along with such transformation, Right to Privacy was also reached the modern period from the historical period, where the need of Privacy was understood much more seriously, because due to the scientific development, new tools for invasion of Privacy was invented and the human right to Privacy was severely threatened. Hence, the process of development of Right to Privacy can be categorized under the heads of origin of Privacy in the primitive society, transformation of it in ancient human society and development of this right in the

modern human society. The most important part is the development of Right to Privacy in the modern society, which is discussed hereunder.

The eminent theorists of Privacy have told that, the modern claim to Privacy has been based on “Science, the secularization of Government, and political democracy.”¹⁸⁷ While explaining this contention, it is noteworthy to mention that, there are both positive and negative side effects of scientific development, on the one side, has made Privacy possible by making ‘a man’s house as his castle’ by way of creating private rooms, private offices and privacy in various spheres of the life of modern man. But, on the other side, it has made privacy impossible by way of invention of various scientific tools for invasion of Privacy, like wiretapping, eavesdropping and other methods of surveillance of human activities. The electronic devices invented to overhear and record human voice, lie detector, CCTV and spy hidden cameras are the examples of scientific tools for invasion of Privacy. As such, the modern scientific developments have not always been a boon for Human Right to Privacy, rather sometimes has become a bane also. Though in the modern period, human lives have been freed from the Church and State control, but absolute Privacy still has not been possible due to the encroachment of scientific devices on human lives. In fact, Individual Privacy is much more threatened during these days than was threatened in the olden days, consequent to the evil effects of scientific developments. Hence, the protection of Privacy has become the urgent need of the hour in the modern period.

The threats on Right to Privacy and the consequent needs for its protection is not an isolated event. It is a common phenomenon in all existing modern societies, be it a western society or an eastern society, be it developed, developing or an underdeveloped society. As such, the necessity for development of Right to Privacy in the modern period is culminated into every society in the countries around the world. The two most important Common Law countries, where extensive considerations of Right to Privacy have been found, are U.S.A. and U.K. The development of Right to Privacy in these two countries is discussed below.

¹⁸⁷ S. K. Sharma, *Privacy Law – A Comparative Study*, Atlantic Publishers and Distributors, New Delhi, 1994, p.333.

2.6.1. The Development of Right to Privacy in U.S.A.

The traces of Right to Privacy have been found in U.S.A. since the very old days during the modern period in the history of human civilization. Though this right has been flourished in U.S.A. extensively in comparison to various other European or Asian countries, but legislative developments of this right has not been found to a large scale therein, rather it is based mainly on judicial developments. In fact, the Common Law has never recognised any Right to Privacy. As the American Legal System was based on the Common Law System, therefore, this right was neglected therein at the very beginning for any legislative enactment. Furthermore, the courts of U.S.A. have also not considered this right for protection due to this reason until the dawn of 20th century. At the beginning of the 20th century only, it has become an important issue in U.S.A., because since that time innumerable cases have come to the U.S. courts for consideration of Right to Privacy as a legal right and to determine its nature, extent as well as to suggest measures for its protection.

More specifically, the concern for Privacy has been understood in U.S.A., in the modern period, with the publication of the famous Article titled “*The Right to Privacy*” by *Samuel Warren and Louis Brandeis*, in the *Harvard Law Review*, in *December, 1890*.¹⁸⁸ It is called the origin of Privacy in the modern period, because it has specified the extreme urgency of Right to Privacy in the modern period and has highlighted a serious technique of invasion of Privacy in the modern period, called ‘Investigative Journalism.’ It has prescribed that, whatever may be the reason, but in no manner the ‘inviolate human personality’ or the ultimate personality of human beings coupled with the Right to live with human dignity, can never be violated, the protection of which means, the protection of Right to Individual Privacy.

The issues of Privacy raised by Warren and Brandeis have been well accepted in U.S.A. and gradually the judges have started to refer this article in cases relating to Privacy. In this way, a new era has been started in U.S.A. for the development of Right to Privacy. In this respect, it is pertinent to mention here that, though the Right to Privacy has not been expressly mentioned or the term ‘Privacy’ is not defined in the U.S. Constitution, but it is impliedly protected in the provisions of First Amendment, Fourth Amendment and in the provisions of the Bill of Rights.

¹⁸⁸ 4 Harvard Law Review, 1890, p.193.

Due to the non-mentioning of this right expressly in the U.S. Constitution, giving decisions for protection of this right by the U.S. Supreme Court was a problematic matter. Publication of Warren-Brandeis' article has become a solution of this problem and thereby, the judges have started referring this article in their judgments, since then.

The first reference of the Warren-Brandeis article has been found in the *Schuyler vs. Curtis, 15 N.Y. supp. 787 (1891)* case. In this case, the Supreme Court of New York has considered the issue of violation of Privacy, which was never raised in U.S.A. before this case. In this case, whether the private citizens would have a right to erect a statue of a locally prominent woman without the consent of her family and whether that would be a case of violation of Privacy, has been the matter of controversy. With reference to the Warren-Brandeis article and famous old English case of *Prince Albert vs. Strange, 1848*, it has been held by the court that, it would be a matter of violation of Privacy without the permission of the family of the woman.

The next important case in U.S.A. based in the light of the Warren-Brandeis' article, has been the *Roberson vs. Rochester Folding Box Co., 171 N.Y. 538 (1902)* case. It has been a New York Appellate case, where the violation of Right to Privacy has been the question of law. Chief Justice Parker has recognised Right to Privacy in this case by mentioning the assertion of this right for the first time in the Warren-Brandeis' article.

The next case has come three years later, which has been decided by the Georgia Court, titled *Pavesich vs. New England Life Insurance, 122 Ga. 190, 194 (1905)*. In this case, the question has been raised regarding the existence of Right to Privacy. In this case, Judge Cobb has tried to find out the source of the development of Right to Privacy and has decided that, this right has been derived from natural law. Accordingly, Natural Law has been determined as the source of Right to Privacy in this case.

In this way, the process of development of Right to Privacy in U.S.A. has been continued. The next important landmark case which has helped to speed up the process, has been the *Olmstead vs. United States (1928) 277 U.S. 438*. The judgment of this case has been enriched with the views of Justice Brandeis again, nearly 40

years after the publication of the Warren-Brandeis' article. In this case, the issue has been raised regarding the admissibility of the evidence obtained by eavesdropping, especially by way of Telephone tapping, against a person charged with crime. It has been held by Justice Brandeis that, such evidence would be inadmissible on the ground of violation of Privacy of the person concerned. In this judgment, Justice Brandeis has discussed about the demerits of strict government surveillance on citizens' life by means of advanced scientific technologies. Finally, he has held that, discovery of such information technology, which can keep every sphere of human life under surveillance is unexpected on the ground of violation of Right to Privacy of U.S. citizens and as a protection against strict government surveillance, he has prescribed Right to Privacy or Right to be let alone, which should be provided to all Americans. Justice Brandeis's view in *Olmstead* case has become the well accepted law in U.S.A. with the passage of time, which has created a new dimension in the process of development of Right to Privacy in U.S.A. Though various other cases before the *Olmstead* case have recognised Right to Privacy, but actually it is the first case which has firmly established Right to Privacy in U.S.A. In this sense, it is marked as an important landmark in the era of development of Privacy in U.S.A. It is also significant due to the re-acceptance of own view by Justice Brandeis 40 years later.

Next important development in U.S.A. has come in the *Osborn vs. United States (1966) 385 U.S. 323* case. In this case, Justice Douglas has expressed his views in line with Justice Brandeis in *Olmstead* case. As such, Justice Douglas has raised the fears and concerns regarding the violation of Right to Privacy in the era of extensive development of Information and Communication Technology, where no part of human lives would be free from government surveillance. In this age, rampant government surveillance would be possible by way of eavesdropping, bugging and wiretapping without any effective judicial or legislative control. Consequently, even the bedrooms of individuals might be under the observations of CCTV and any data would be available in a mouse-click, thereby a society would be created, where government intrusion would be possible into all the secret regions of individual life. If such a situation occurs, then that would definitely be a case of acute violation of Individual Privacy. Hence, the concept of Totalitarian State will

again emerge, which should never be expected in the modern times and therefore, the guarantee of Right to Privacy is the need of the hour. Thus, Justice Douglas has supported the existence of Individual Right to Privacy to act as a check on uncontrolled government surveillance in the modern U.S. life.

The process of development of Right to Privacy in U.S.A. gradually has been enriched with the four important enactments, like *the Omnibus Crime Control and Safe Streets Act, 1968, the Fair Credit Reporting Act, 1970, the Crime Control Act, 1973 and the Privacy Act, 1974*. All these legislations are the important instances of recognition of Privacy by law in U.S.A. Among all these, the most important piece of legislation is *the Privacy Act, 1974*, which has given formal protection to Privacy by express legislative provisions. These legislations have also been added by a debate on May 23, 1968 by Senator Edward V. Long of Missouri by a proposed amendment to a bill for recognizing Right to Privacy, campaigning against police surveillance on private lives by establishing activist groups, like Los Angeles Citizens' Commission of Police Repression, the Program on Government Surveillance and Citizens' Rights, the Coalition Against Government Spying of Philadelphia and the National Organizing Conference of the Campaign to stop Government Spying. In this respect, special government bodies have also been established for prevention of privacy violations by excessive police surveillance, e.g. the Advisory Committee on Automated Data Systems, established by the Department of Health, Education and Welfare. All these initiatives have ultimately been resulted into the amendment of the U.S. Constitution for express guarantee of Right to Privacy therein, started in 1979 and ended in 1987. Another important development has been the concern raised by the American Bar Association Journal since 1973 to 1976. The most important area of development has been the protection of the life of U.S. citizens' from unreasonable search and seizure. Hence, the development of Privacy in U.S.A. has always moved towards a positive direction for creation of a paradigm shift from no Privacy to Positive Right of Individual Privacy.

2.6.2. The Development of Right to Privacy in U.K.

The Common Law has never accepted 'Privacy' as a general right. As the English Legal System has always been based on the Common Law principles, therefore, non-recognition of Right to Privacy has always been found in U.K. In the

absence of express legislations, the rules of Common Law have been made generally on the basis of English Customs. Due to these reasons, English Courts also have given their decisions based on English Customary rules and regulations or the English Common Law. In that situation of total dependence on Common Law, the non-acceptance of Privacy Rights in the Common Law System has been the main reason for non-formulation of principles of 'Privacy' in the English Legal System. As such, the rules of Privacy are non-existent in the Legal System of U.K.

The above reasons portray the absence of Privacy in U.K. But, the traces of Privacy were found in England in the ancient period, where the English society was based on the recognition of Privacy in their social structure. Even they had accepted the Westinian principle of 'Reserve' for maintenance of Privacy in their everyday conducts. But, the history shows that, there was absence of Physical Privacy in England, rather the English people mainly relied on Psychological Privacy. There was absence of private rooms, private offices, private cabins for members of Parliament and so on. Instead, they were habituated with maintenance of Privacy in their conduct and body language. Usually, they used to suppress their emotions in front of everybody and by means of that attitude, they maintained their Privacy in the public life. Hence, there was absence of Physical Privacy and presence of Psychological Privacy in U.K. since the ancient period.

The modern period in U.K. is not an exception to the ancient period and the behaviour and attitude of English people have been continued in the modern period along with the attitude of Common Law towards Privacy. This situation has been a great obstacle in the way of development of Privacy in U.K. in the modern period. In fact, due to these reasons, since the very beginning of the modern period, there has been no concept of Right to Privacy in U.K. and usually remedy has been given on the ground of breach of confidence in cases of privacy violations. The idea of Psychological Privacy of the ancient period has not been turned into fruitful legislations in the early modern period and only the later modern period has witnessed a few developments in the area of Privacy by way of enacting a number of statutes.

The origin of Privacy has been found in U.K. in the modern period from the old English case of *Prince Albert vs. Strange, 1848*, which has been considered as

an elaborate edifice of Privacy in England, because since the decision of this case, everyone has started thinking on the aspect of violation of Privacy and has tried to develop a well-advanced law on Privacy in U.K. In that case, Right to Privacy of Queen Victoria and her husband Prince Albert has been violated by a photographer Strange by way of unauthorised publication of personal photographs of Queen Victoria and Prince Albert without their consent. When the case has been brought into the Court, decision has been given on the ground of breach of confidence, because there has been no law on Privacy in U.K. at that period. This case has been the landmark case in U.K. in the era of development of Privacy laws, which has turned the direction of law-makers towards the making of positive laws on Privacy.

The next important development in the field of Privacy in U.K. has been the *Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950*, which has not given protection to Privacy, but has protected everyone's 'right to respect for his private and family life'. Both are not the same thing and as such, it is an obstacle for development of Privacy law in U.K. Again, another impediment has been *Section 12 of the Human Rights Act, 1998*, which has accorded special protection to right to freedom of expression. In fact, there has been a long term controversy in U.K. among these two rights, which ultimately has become a major impediment for development of law on Privacy in U.K. This controversy has been continued for long and has been resolved to some extent only with the decision in *Douglas vs. Hello!, 2001* case, where it has been held by Sedley LJ that, "Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court". This decision has improved the situation to some extent. It has been identified as a remarkable development in the field of Privacy in U.K.

The above-mentioned instances show the evidence of slower process of development of Privacy in U.K. In fact, there has been a long gap between the judgment in *Prince Albert vs. Strange case, 1848* and the *Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950*. It shows that, the first enactment on Privacy has been made in 1950, which has taken a long time after the first judgment in 1848. Hence, legislative conversion of activism has never been prompt and active. In this respect, it is also pertinent to mention that,

Article 8 has been the only legal provision relating to Privacy in U.K. since 1950, though it does not directly deal with Right to Privacy. Again, the long time controversy between the Right to Privacy and freedom of expression has ceased only in 2001 by way of *Douglas vs. Hello!* case. It shows that, the positive development of Right to Privacy has been started in U.K. only in the recent period.

In the meantime, a few legislative developments have taken place in U.K. As for example, *the Private Members' Bills on Privacy, 1960, Lord Mancroft's Right to Privacy Bill, 1961 and the Mr. Walden's Bill, 1969*, have been introduced in the U.K. Parliament during this time. The series of *Private Members' Bills* have been introduced in the U.K. Parliament during the 1960's, which have discussed the privacy issues. *Lord Mancroft's Bill* has been concerned with privacy in the context of media. Other Bills have defined the Right to Privacy in very broad and general terms, a few of which have listed specific diverse areas of breaches of Privacy including industrial espionage, electronic surveillance and data banks.¹⁸⁹ Though various bills have been introduced in the U.K. Parliament, but none of them has become fruitful by way of converting into an enactment. In this sense, Lord Denning has stated that, as the Common Law of England has never supported the law of Privacy, thereby recognition of general Right to Privacy in U.K. during 1960-1970s would be a very doubtful issue.¹⁹⁰

The Lord Mancroft's Right to Privacy Bill, 1961 has tried to give protection to an individual from unauthorized publication in the mass media of the words relating to one's personal affairs or conduct causing distress or embarrassment to the individual. The other bills introduced in U.K. during 1960s have been dealt with various privacy matters including the Family Privacy. The most important bill has been the *Walden's Bill, 1969*, which has been supported by the Report and Proposals of the Committee of Justice, the U.K. section of the international Commission of Jurists. Consequent to this, the *Walden's Bill* has led the U.K. Government to appoint the *Younger Committee in 1970*, which has given a *Report on Privacy in 1972*.¹⁹¹ The constitution of the *Younger Committee to Report on Privacy* has been the remarkable event in the process of development of Privacy Rights in U.K. It has

¹⁸⁹ *Supra Note 187 at pp.11-12.*

¹⁹⁰ *Id at p.11.*

¹⁹¹ *Ibid.*

created a new dimension on Right to Privacy in U.K. The Committee has observed that, though Privacy is widely recognized as a legally enforceable right in U.S.A., but it is not recognised as an established legal principle and has not contributed largely towards the Respect for Privacy in daily lives, more specifically by the mass publicity media. It has also agreed on the issue of non-recognition of Privacy Rights by the English Common Law.

The Younger Committee has been constituted to consider the necessity of making a comprehensive legislation to give protection to the individual citizens as well as commercial and industrial interests against intrusions on Privacy by private individuals, organizations or companies, but not by the public authorities. The Committee has discussed about the growing menace of investigative journalism in U.K. and the problems associated with it, including the role of media in violating the individual Privacy. The Committee has also noted that, the growing pressures of modern industrial society are creating privacy violations in the home and daily life, which are supplemented by the urban housing structure and observation by the neighbours. Finally, the Committee has suggested that, enactment of a comprehensive legislation on Privacy in U.K. is the need of the hour.

The Younger Committee has also accepted the truth of absence of express legislations on Privacy and the presence of the equitable remedy for breach of confidence as the only effective remedy in U.K. This situation has taken a long time to change. Only in 1984, with the passing of *Data Protection Act*, one positive development has been made on the issue of Privacy. But, the Act has dealt with data privacy and not the individual privacy. However, the Act has been concerned with personal information automatically processed, without any distinction between the public and private sectors, but neither any information about legal persons, such as companies, nor information in manual files can be processed. National security has been in the category of exemption. Due to the various lacuna in the *Data Protection Act, 1984*, a new *Data Protection Act* has been passed in 1998 and the old Act has been replaced by the new one. The new Act has tried to improve the situation by covering a larger area.

These are the significant developments in U.K. on the issue of Privacy. Hence, the process of development of Privacy in U.K. is characterised by

transformation of the law of breach of confidence into the enactment of *Data Protection Act, 1998*, which is marked as a paradigm shift in the era of development of Privacy law in U.K. In the contemporary social scenario, data theft is no doubt an important issue, which is covered by the *Data Protection Act, 1998*, but U.K. is still awaiting a comprehensive legislation on Privacy like the *Privacy Act, 1974* of U.S.A.

2.7. Privacy : The Development in India

India is lagging far behind both U.S.A. and U.K. in respect of the process of development of Privacy herein. Absence of active judicial enforcement, express legislative enactments and lack of public discussion on the subject have led to growth and development of Right to Privacy in negative direction in India. But, surprisingly, India had a great historical background and a well-advanced law of Privacy since the ancient period. In India, the origin of Privacy was found in the ancient Hindu Jurisprudence, in the description of houses in Grihya-Sutras, Kautilya's Arthashastra and the epics of Ramayana and Mahabharata. In the medieval period, Privacy was found in the habit of observing 'purdah' among Muslim women to prevent public exposure of their faces. The Quranic injunctions had also prescribed for the rules of Privacy for men and women both. Hence, it was only in the modern period, that the development of this right has suffered somewhat degradation and underdevelopment.

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

The development of Privacy in India in the modern period, though has suffered from certain amount of degradation, but that does not mean that, there has been no Privacy laws in India. In fact, it has been considered as a customary right and an easement right during this period. Moreover, various legislations of British India have contained express legal provisions relating to Privacy. The Courts of British India have also given various judgments in favour of protection of Privacy on the ground of either a customary right or an easement right. Over and above, after independence, Indian Judiciary has taken active initiatives for development of Privacy as a constitutional right as well as recognition of it as a fundamental right. Therefore, the process of development of Privacy in India during the modern period, though slows, but has never become stagnant. However, the process of development of Privacy in modern India can be divided into the following two periods :-

- (i) Pre-independence Period, and
- (ii) Post-independence Period.

2.7.1. The Development of Privacy in the Pre-Independence Period

In the pre-independence period or in British India, the social structure has been modernized by way of urbanization and industrialization. Also the spreading of education has increased the awareness of Indians towards Privacy and technological advancements have created new threats to Privacy. All these instances coupled together have made the British government to take steps for protection of Privacy by way of legislative and judicial initiatives. Hence, the process of development of Privacy has been started in India.

In this respect, it is pertinent to mention that, the following legislations of 19th and 20th centuries have dealt with Right to Privacy in India :-

- (i) *Section 509 of the Indian Penal Code, 1860* provides for protection of Right to Privacy.
- (ii) *Sections 26, 164(3) and 165 of the Code of Criminal Procedure, 1898* deal with the protection of privacy interest.
- (iii) *Section 122 of the Indian Evidence Act, 1872* protects marital privacy, *Section 130* of the said Act protects privacy of a witness regarding the financial details, *Sections 126 and 129* protect the privacy of confidential communications between lawyer and client.

(iv) *The Banker's Book Evidence Act, 1891* protects a customer from dissemination of the transaction details, only exception of which is *Section 6*, where an inspection is allowed under the order of the court.

(v) *Section 18 of the Indian Easements Act, 1882* prohibits construction one one's land within the neighbourhood intruding the privacy of the female apartments of the house. This provision is made to protect the Privacy of women within the house, the origin of which can be traced back in the Grihya-Sutras of ancient Hindu period and Quranic injunctions of the medieval Muslim period.

(vi) *Section 137 of the Income Tax Act, 1961* protects the financial interests of an assessee.

(vii) *Section 15 of the Census Act, 1948* protects the personal details of the citizens in the hands of the Government from public disclosure.¹⁹²

All the above-mentioned legislative provisions of 19th and 20th centuries have given express protection to the Right to Privacy in India in respect of various subject-matters. But, these provisions generally have guaranteed right to privacy to some limited extent and as such, these are not absolute. However, these can be considered as important initiatives in the process of development of Privacy in India.

Apart from the above-mentioned provisions, there are certain laws in India which speak against the protection of Privacy and by these laws, Individual Privacy can be curtailed either in the public interest or for the protection of Right to Freedom of Information. As for example, *Section 26 of the Indian Post Act, 1898* empowers the Central and State Governments to intercept postal articles during public emergencies and for the protection of public safety or tranquility, but only by a written order and not otherwise. Also various provisions of the *Telegraph Act, 1885 and the Post Office Act, 1898* cause violation of Individual Privacy by way of telephone tapping and postal censorship. Hence, amendments are required to change said laws.¹⁹³

The following recommendations have also been made for the protection of Privacy in India :-

(i) The Law Commission of India has recommended that, a new section should be inserted in the *Indian Penal Code* to declare any unauthorized photography,

¹⁹² Kiran Deshta, *op.cit.*, pp.102-103.

¹⁹³ A. G. Noorani, "Parliament and Privacy," *Economic and Political Weekly*, Feb. 1984, p.239.

use of artificial listening or recording apparatus and publishing such information as punishable offences.¹⁹⁴

(ii) The Second Press Commission has recommended an amendment to the *Press Council Act, 1978* to uphold the Right to Privacy by introducing it as a function of the Press Council.¹⁹⁵

Hence, the pre-independence period in India is subjected to various legislative developments on Right to Privacy, which shows that, Indian law makers have always tried to uphold Privacy rights.

2.7.2. The Development of Privacy in the Post-Independence Period

The post-independence period in India has been marked as an era of significant development in the sphere of Right to Privacy. But, at the very beginning, the independent India has not started thinking about the Right to Privacy. Also, at the time of making the Indian Constitution in 1950, no initiatives have been taken for the protection of Privacy. In fact, the need for protection of this right has been emerged later on. After 1950, the traces of Privacy have been found in various Indian legislations, as for example, the provisions of *In Camera proceedings* in different matrimonial statutes, like the *Hindu Marriage Act, 1955* and the *Special Marriage Act, 1954*. These are the significant developments in the area of Privacy in India.

Though the Indian Constitution has not spoken expressly about the protection of Privacy in India, but few instances are found in the Constituent Assembly Debates, where discussion on Privacy have been made. As for example, in the Constituent Assembly, Mr. Karimuddin has proposed an addition to a clause to the draft Article 14,¹⁹⁶ which has been similar to the protection of Right to Privacy against search and seizure as expressed in the 4th Amendment of the U.S. Constitution. Dr. B. R. Ambedkar has also supported this view at the time of making of the Indian Constitution, but ultimately it has not become a fruitful effort due to the disagreement of the other Constituent Assembly members. In fact, the Constitution makers have not realized the necessity of incorporation of Right to

¹⁹⁴ Law Commission of India, 42nd Report on Indian Penal Code, 1971, pp.339-340.

¹⁹⁵ Report of the Second Press Commission (1982) as quoted in E. S. Venkataramiah, *Freedom of Press : Some Recent Trends*, 1987, p.117.

¹⁹⁶ Now Article 20.

Privacy as a fundamental right in the Indian Constitution. The legislative history of the Constitution shows that specifically.¹⁹⁷

At the time of the adoption of Indian Constitution in 1950, the Right to Privacy has not been declared as a fundamental right or other constitutional right, due to the influence of British legal system more than the American legal system. Moreover, the Indian legal system is based on the English Common Law, consequent to which, the Indian Judiciary has, at the very beginning, not recognized Right to Privacy. But, gradually Indian Judiciary has become liberal and with the expansion of *Article 21 of the Indian Constitution*, in the *Maneka Gandhi's Case in 1978*, Right to Life and Personal Liberty has got a new dimension. When the idea of 'Personal Liberty' has expanded so much to include within it various other rights, Right to Privacy has been included within it. In this way, a new era of judicial development of Right to Privacy has been started in the light of the *Article 21 of the Indian Constitution*. The first case for protection of Privacy in this era has been the *Kharak Singh vs. State of U.P., AIR 1963 S.C. 1295* case. Since then, Right to Privacy has been developed in India by way of case by case development and still it is developing to incorporate various new areas of Privacy.

Hence, the process of development of Right to Privacy in India has been enriched with the initiatives of the Indian Judiciary. But, simultaneously certain legislations have been developed which are detrimental to the privacy interests of the individual citizens, like *the Right to Information Act, 2005* and *the Information Technology Act, 2000*. In the modern period, these are the two controversial legislations which pose serious threat to Individual Right to Privacy. In this situation, the only ray of hope is the *Right to Privacy Bill, 2011* now known as *Privacy Bill, 2011* which can create significant developments in the field of Privacy in India.

2.8. Sum-Up

The origin of Right to Privacy can be traced back in U.K. to the famous English Case of *Prince Albert vs. Strange, 1848*, where privacy of royal couple Queen Victoria and Prince Albert, was violated by a photographer Strange in their private premises. In U.S.A., *Boyd vs. United States, 1886*, is an important case on

¹⁹⁷ Constituent Assembly Debates (1948-49), Vol. VII, p.794.

Right to Privacy. In this case, it was held that, the purpose of prohibition against unlawful searches and seizures under Fourth Amendment of the U.S. Constitution were to protect security and privacy of persons, houses, papers and effects.

India also had a great historical background and a well-advanced law of privacy since the ancient period. In India, the origin of Privacy was found in the ancient Hindu Jurisprudence, in the description of houses in Grihya-Sutras, Kautilya's Arthashastra and the epics of Ramayana and Mahabharata. In the medieval period, Privacy was found in the habit of observing 'purdah' among the Muslim women to prevent public exposure of their faces.

The development of Right to Privacy in India in the modern period has been marked by a very old case, *Nuth Mull vs. Zuka-Oollah Beg and Kureem Oollah Beg, 1855*. It has been the first Indian case decided by the Sadar Diwani Adalat of the North-Western Provinces, in 1855, where the question of Right to Privacy has arisen. This case shows the evidence that, the Right to Privacy has been broadly recognized in India at least half a century before the U.S.A., where the idea has come in 1890 by the publication of the Warren-Brandeis article. It has been held by the Court in this case that, construction of a house should not be made in such a way, so that, the others premises may be looked into from the roof of the new house and thereby their Right to Privacy is violated. Hence, Customary Right to Privacy has been protected in India since the very old period.

In the absence of express legislative enactments, the law of Privacy has been gradually developed by judicial pronouncements since the very old past in the countries of U.S.A., U.K. and India. In U.K. and U.S.A., it was based on the Law of Confidence, whereas, in India, it was considered as a Customary Right. However, in the International arena, Right to Privacy has become a matter of discussion since the adoption of Universal Declaration of Human Rights, 1948.

With the advancement of modern science and technology, the scope and ambit of Right to Privacy has been expanded to a considerable extent. Though the right has got many new dimensions in the modern age, but it is not a right of recent origin, rather it has a great historical background and has been originated in the very old past.

Thus, the origin, history and development of Privacy can be summed-up as follows :-

- 1) The term 'Privacy' is derived from the Latin word 'privatus' which means separated from the rest. Though it is a variable concept and varies with cultural or social context, but actually it means, the right to be left alone.
- 2) The need for Privacy is to create a balance between individual and social interests, which is equally applicable to past, present and future society. In this sense, the necessity of Privacy was found in the dawn of human civilization.
- 3) The idea of Privacy is as old as Biblical periods. Also the growth and expansion of Privacy varied according to the variation in different stages of human civilization. Hence, the description of origin and history of Right to Privacy should proceed from the ancient period to the modern period.
- 4) In fact, the idea of Privacy was originated in the animal society and gradually it has been incorporated into the human society.
- 5) The idea of Privacy, which was originated in the animal society, has been adopted in the primitive human society, where the traces of it were first found. According to different Anthropological studies, the idea of Privacy varied in respect of different primitive societies.
- 6) With the evolution of primitive society to ancient society and then gradually to modern society, the idea of Privacy has been developed to get its present shape.
- 7) The root of Privacy and its protection is embedded in the history of human civilization, which is characterized specially by transformation of primitive society into modern society.
- 8) The social transformation has increased both the physical and psychological opportunities for Privacy and also proved to be fruitful for conversion of these opportunities into choices of values in the context of socio-political reality.
- 9) Social transformation is the responsible factor for changing nature of Privacy as well as the changing character of Privacy violations from primitive societies to modern societies.
- 10) The comparison of 'Privacy' between primitive and modern societies, establishes that, whatever may be the nature of society, primitive or modern, the

need for Privacy or seclusion would always be there, for fulfillment of physical and psychological desires of man.

11) The history of Privacy in the Western society starts from the evolution of Western political and social institutions since the time of Greek and Roman civilizations.

12) The history of Privacy in modern democratic society is characterized by its political system, which plays the fundamental role for shaping its balance of Privacy.

13) The comparative analysis of Privacy in different Western societies and cultures show that, Privacy is not a static, rather a dynamic concept.

14) For creating an ideal modern society having the Right to Privacy, there should be a balance between the basic postulates of Individual Privacy, called Solitude, Intimacy, Anonymity and Reserve.

15) The origin of Privacy in ancient India was culminated into the term 'Avarana', in the idea of Meditation in Vedas and Upanishads and embedded in the idea of 'Dharma'.

16) The history of Privacy in India was divided into the Hindu and Muslim periods, both of which were enriched with the rules and regulations of Privacy.

17) Privacy was never an alien in India, rather it was embedded in the deep rooted custom of the rich cultural heritage of India.

18) The development of Right to Privacy in U.S.A. in the modern period has been based on the Warren-Brandeis article and the search and seizure cases under Fourth Amendment of the U.S. Constitution, the final result of which is the Privacy Act, 1974.

19) U.K. had no law of Privacy, instead there was the law of breach of confidence. With the help of various legal developments, the Younger Committee Report was submitted in 1972, the final outcome of which is the Data Protection Act, 1998.

20) Though India is lagging far behind U.K. and U.S.A. for protection of Privacy in the modern period, but it is also enriched with various legislative and judicial developments, which ultimately has given rise to the Right to Privacy Bill, 2011, now known as Privacy Bill, 2014.

CHAPTER 3

POSITION OF RIGHT TO PRIVACY IN INTERNATIONAL LEGAL ARENA

3.1. Prologue

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

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

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

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

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

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

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

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

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

3.2. Privacy : The International Character

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

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

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

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

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

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

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

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

³ *Ibid.*

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

- (i) Privacy as a Liberty, and
- (ii) Privacy as a Human Right.

3.2.1. The Significance of Privacy as a Liberty

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

3.2.1.1. Liberty vs. Privacy

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

- (i) Liberty and Privacy both are important for the existence of human beings in a civilized society.
- (ii) Liberty and Privacy both mean freedom of individual human beings.
- (iii) Liberty is necessary for the achievement of physical, psychological, emotional, intellectual and sensual developments of human beings. Privacy is also required for all these purposes.
- (iv) Meditation is required for the development of human mind, which is possible only in the state of affairs, called solitude or Privacy, which in other words, refers to physical or psychological freedom. In this sense also Privacy is similar to Liberty.
- (v) Though both Liberty and Privacy are essential for the existence of human beings in a civil society, but both of them are not absolute and reasonable restrictions can be imposed on both of them in the public interest.
- (vi) Both Liberty and Privacy cannot be curtailed by arbitrary or unreasonable government actions.
- (vii) Liberty is classified under various heads, of which Personal Liberty and Political Liberty are most important. Similarly, Privacy is also classified under various heads, of which Individual Privacy and Social Privacy are most important.
- (viii) Individual Privacy and Personal Liberty are more or less same thing and on the contrary, Social Privacy and Political Liberty are more or less same thing.
- (ix) Every civil society needs to create a balance between Individual and Social Privacy. Similarly, it is also necessary to create a balance between Personal and Political Liberty in a civil society.
- (x) The origin of Liberty and Privacy both are found in various ancient societies, one such society is the ancient Greek society.

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

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

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

3.2.2. The Significance of Privacy as a Human Right

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

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

3.2.2.1. Human Rights vs. Privacy

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

- (i) Human Rights and Privacy, both are obvious for the existence of human beings in a civilized society.
- (ii) Human Rights and Privacy, both are essential for the dignity and worth of human beings.
- (iii) Human Rights are the basic natural rights, without which the existence of human beings would be incomplete.
- (iv) Human Rights are classified into civil and political rights, economic, social and cultural rights and collective rights. Privacy is classified into Individual Privacy, Social Privacy, Family Privacy and Professional Privacy.
- (v) Individual Privacy and first two types of Human Rights are similar. On the contrary, Social Privacy and Collective Rights are similar.
- (vi) Privacy and Human Rights, both are the other names for liberty.

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

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

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

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

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

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

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

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

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

3.3. Privacy : The Legal Instruments

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

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

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

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

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

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

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

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

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

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

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

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

3.3.1. Privacy : The International Legal Instruments

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

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

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

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

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

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

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

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

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

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

3.3.2. Privacy : The Regional Legal Instruments

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

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

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

- (i) The Universal Declaration of Human Rights has enumerated the human rights with universal validity. It has not spoken anything about the regional protection of those rights.
- (ii) The human rights propounded by the Universal Declaration are merely having normative values, which are expected to promote and protect by the Member-States by voluntarily incorporating them either in the national Constitutions or by enacting national legislations in this respect. Those are having no binding effects on the Member-States otherwise.
- (iii) The human rights propounded by the Universal Declaration cannot be directly enforceable without incorporating them into national Constitutions of the Member-States or enacting national legislations for their enforcement.
- (iv) Since these rights are having no binding efficacy, no enforcement mechanism has been provided for their implementation by the Universal Declaration.⁶

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

⁶ V.K.Sircar, *Protection of Human Rights in India*, Asia Law House, Hyderabad, 2005, p.91.

⁷ *Id* at p.92.

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

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

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

- (i) The conflict between freedom of expression and the individual Right to Privacy.
- (ii) The right of the individual to authorise the use or prevent the use of their name or likeness for publicity purposes.

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

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

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

3.3.3. Privacy : The Municipal Laws of Different Countries

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

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

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

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

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

3.4. Privacy : The Various Components

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

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

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

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

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

- (i) *Interference with privacy, home or family;*
- (ii) *Interference with mental or physical integrity or moral and intellectual freedom;*
- (iii) *Attacks on honour or reputation;*
- (iv) *Placement in equivocal situations;*
- (v) *Unnecessary publication of painful facts of one's private life;*
- (vi) *Use of one's name, identity or likeness;*
- (vii) *Scrutiny, observation or pursuit;*

⁹ *Supra Note 5 at p.13.*

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

(viii) *Violation of correspondence;*

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

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

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

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

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

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

(iv) *Interference with correspondence;*

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

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

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

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

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

(x) *Public exposure of private matters;*

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

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

¹¹ *Ibid.*

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

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

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

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

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

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

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

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

3.5. Privacy : The Legal Protection of Various Components

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

3.5.1. Individual Privacy

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

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

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

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

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

3.5.1.1. The International Legal Arena

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

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

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

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

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

- (i) It has given protection to the –
 - (a) Individual Privacy;
 - (b) Family Privacy;
 - (c) Privacy of home or correspondence;
 - (d) Privacy of honour and reputation.
- (ii) It has prohibited arbitrary interference with the Privacy rights mentioned therein.
- (iii) It has enjoined legal protection to the Privacy rights mentioned therein.
- (iv) It has specifically given legal protection to those rights against any kind of arbitrary attack or interference.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ 13 GAOR Annexes, UN Doc. A/405 para. 46, 1958.

¹⁴ *Supra* Note 5 at p.20.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

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

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

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

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

3.5.1.2. The Regional Legal Scenario

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

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

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

Right to Privacy

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

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

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

Assessment

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

¹⁷ *Ibid.*

¹⁸ 33 GAOR Supp.40, UN Doc. A/33/40 para.348, 239, 1978.

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

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

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

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

- (i) It provides inviolability to all human beings.
- (ii) It provides to every human being –
 - (a) the right to respect for his life; and
 - (b) the right to integrity of his person.
- (iii) Any arbitrary deprivation of this right is prohibited.

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

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

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

3.5.1.2.3. An Overview of the Islamic Human Rights Instruments

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

- (i) *Universal Islamic Declaration of Human Rights, 1981.*
- (ii) *Cairo Declaration on Human Rights in Islam, 1990.*
- (iii) *Arab Charter on Human Rights, 2004.*

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

- (i) *The Universal Islamic Declaration of Human Rights, 1981 –*
 - (a) *Article XXII – Right to Privacy.*
- (ii) *The Cairo Declaration on Human Rights in Islam, 1990 –*
 - (a) *Article 18 – Right to Privacy.*
- (iii) *The Arab Charter on Human Rights, 2004 –*
 - (a) *Article 21 – Right to Privacy.*

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

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

3.5.1.2.4. Evaluation of the ASEAN Human Rights Declaration, 2012

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

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

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

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

3.5.1.3. The Municipal Legal Framework

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

3.5.1.3.1. A Study of the Common Law Countries

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

(i) *Decisions of the Courts.*

(ii) *Statute Law.*

(iii) *Custom.*

(iv) *Reason.*¹⁹

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

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

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

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

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

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

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

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

3.5.1.3.1.3. India : A Country based on British Common Law

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

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

3.5.1.3.1.4. Australia : A Patchwork of Divergent Legal Principles

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

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

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

²⁰ David Lindsey, "Freedom of Expression, Privacy and the Media in Australia", in Madeleine Colvin (ed.), *Developing Key Privacy Rights*, Hart Publishing, Oxford and Portland, Oregon, 2002, p.159.

²¹ *Id* at p.160.

²² (1937) 58 CLR 479.

²³ *Supra* Note 20 at p.167.

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

- (i) *The Tort of Trespass.*
- (ii) *The Tort of Defamation.*
- (iii) *An action for Breach of Confidence.*²⁴

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

- (i) The principle of statutory interpretation that legislation will be assumed not to infringe fundamental rights and freedoms applicable to Individual Privacy.
- (ii) *Australia* is a party to a number of international instruments that recognise privacy interests including *Article 17 of the International Covenant on Civil and Political Rights, 1966*, which provides for protection against arbitrary or unlawful interference with Individual Privacy.²⁵

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

3.5.1.3.1.5. Canada : A Combination of Different Legal Systems

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

²⁴ *Ibid.*

²⁵ *Id at pp.167-168.*

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

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

- (i) *The Warren-Brandeis Article in the Harvard Law Review in 1890.*
- (ii) *The Article 12 of the Universal Declaration of Human Rights, 1948.*
- (iii) *The Article 17 of the International Covenant on Civil and political Rights, 1966.*

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

- (i) *The Quebec Charter of Rights and Freedoms.*
- (ii) *The National Charter of Canada.*²⁷

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

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

²⁷ *Id* at pp.104-105.

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

Section – 7

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

Section – 8

“Everyone has the right to be secure against unreasonable search or seizure”.

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

²⁸ *Id at pp.106-107.*

²⁹ (1984) 2 SCR 145.

³⁰ *Supra Note 26 at p.107.*

3.5.1.3.1.6. South Africa : A Conglomeration of Different Laws

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

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

“Everyone has the right to privacy, which includes the right not to have:

- (a) Their person or home searched;*
- (b) Their property searched;*
- (c) Their possessions seized; or*
- (d) The privacy of their communications infringed.”*³³

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

³¹ S. D. Girvin, “*The Architects of the Mixed legal System*,” in R. Zimmermann & D. Visser (eds.), *Southern Cross: Civil and Common Law in South Africa*, Kenwyn, 1996, p.95; Christa Rantenbach, “*South African Common and Customary Law of Interstate Succession: A Question of Harmonization, Integration or Abolition*,” *Electronic Journal of Comparative Law*, Vol.12.1, May, 2008, pp.1-15 at p.2, www.ejcl.or/121/art_121-20.pdf, visited on 15.3.2015.

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

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

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

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

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

(ii) *Privacy of Home.*

(iii) *Privacy of Property.*

(iv) *Privacy of Possessions.*

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

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

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

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

³⁴ *Id at p.79.*

³⁵ *Ibid.*

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

3.5.1.3.2. A Depiction of the Civil Law Countries

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

- (i) *Legislation.*
- (ii) *Custom.*
- (iii) *Decided Cases.*
- (iv) *Legal Writing.*
- (v) *Super-eminent Principles.*³⁶

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

³⁶ *Supra Note 19 at pp.413-414.*

³⁷ *Id at p.420.*

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

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

3.5.1.3.2.1. France : The Chief Exponent of Civil Law System

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

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

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

³⁸ James Michael, *op.cit.*, p.15.

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

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

3.5.1.3.2.2. Germany : A Mixture of Statutory and Case Laws

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

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

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

³⁹ Catherine Dupré, “*The Protection of Private Life versus Freedom of Expression in French Law*,” in Madeline Colvin (ed.), *op.cit.*, p.45.

⁴⁰ James Michael, *op.cit.*, p.92.

⁴¹ Rosalind English, “*Protection of Privacy and Freedom of Speech in Germany*,” in Madeleine Colvin (ed.), *op.cit.*, p.77.

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

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

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

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

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

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

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

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

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

⁴² *Ibid.*

⁴³ *Id at p.78.*

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

Article – 1

“The dignity of the human being is inviolable.”

Article – 2(1)

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

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

Article – 2(2)

It provides the ‘inviolability of one’s person’.⁴⁵

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

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

⁴⁴ *Id at p.79.*

⁴⁵ James Michael, *op.cit.*, pp.92-93.

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

3.5.1.3.2.3. China : A Complex Pattern of Legal Structure

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

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

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

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

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

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

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

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

- (i) *The subject of the right to privacy can only be a natural person.*
- (ii) *The objects of the right are private activities, and personal information.*
- (iii) *The scope of protection of the right is limited by the public interest.*⁵⁰

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

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

⁴⁸ *Id* at pp.646-647.

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

⁵⁰ *Id* at pp.146-148.

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

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

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

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

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

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

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

3.5.1.3.3. A Portrayal of the Nordic Law Countries

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

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

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

⁵³ *Id* at p.20.

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

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

3.5.1.3.3.1. Sweden : Unidirectional Attitude towards Privacy Protection

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

⁵⁴ James Michael, *op.cit.*, p.14.

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

3.5.1.3.3.2. Denmark : A Sequel of Sweden on Privacy Protection

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

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

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

⁵⁵ *Id at p.56.*

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

3.5.1.3.3.3. Norway : Both Similarities and Dissimilarities with Sweden

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

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

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

⁵⁶ *Id* at pp.56-58.

⁵⁷ *Id* at p.15.

⁵⁸ *Id* at p.58.

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

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

3.5.2. Privacy of Family and Marriage

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

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

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

⁵⁹ *Id at p.59.*

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

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

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

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

(i) “*Primary socialisation of children*”.

(ii) “*Stabilisation of the adult personalities of the population*”.

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

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

*whereas it seemed to sociologists that if the family should dissolve, civilization itself would disappear”.*⁶⁰

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

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

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

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

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

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

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

- (i) It has given protection to the Family Privacy.
- (ii) It has prohibited arbitrary interference with the Privacy of Family.
- (iii) It has enjoined legal protection to that right.
- (iv) It has specifically given legal protection to that right against any kind of arbitrary attack or interference.

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

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

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

⁶¹ James Michael, *op.cit.*, p.20.

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

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

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

“(1) Men and women, of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

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

- (i) The freedom to take decision of marriage.
- (ii) The freedom to choose spouses according to one’s choice.
- (iii) The freedom to give consent to marriage and as such, no one can be forced to marry without consent.
- (iv) The freedom to found and create a family of one’s own choice.

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

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

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

- (i) Instead of 'arbitrary interference', the terms 'arbitrary or unlawful interference' are used in *Article 17*.
- (ii) Again, instead of 'attacks' the terms 'unlawful attacks' are used in *Article 17*.
- (iii) Hence, the term 'unlawful' is added to *Article 17*, which is not there in *Article 12*.
- (iv) In this sense, *Article 17* is a slight modification of *Article 12*.

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

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

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

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

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

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

“ 1. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

2. *The right of men and women of marriageable age to marry and to found a family shall be recognized.*

3. *No marriage shall be entered into without the free and full consent of the intending spouses.*

4. *State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”*

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

⁶³ James Michael, *op.cit.*, p.20.

⁶⁴ *Ibid.*

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

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

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

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

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

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

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

- (i) This right is actually not the Right to Privacy of Family and Marriage; rather it is the Right to Marriage and to found a Family.
- (ii) It can be kept under the umbrella of Right to Privacy of Family and Marriage in some implied manner only.
- (iii) The right declared under *Article 10(1)* is closely associated with various other rights proclaimed under the Covenant on Civil and Political Rights as well as under this Covenant, as for example –
 - (a) Freedoms of thought, conscience and religion;
 - (b) The Right to determine the moral and religious education of one's children;

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

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

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

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

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

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

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

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

⁶⁵ *Id* at p.19.

⁶⁶ *Supra* Note 12.

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

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

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

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

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

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

Article 8

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

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

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

- (i) It has recognised that, everyone has the right to respect for his –
 - (a) Private Life;
 - (b) Family Life;
 - (c) Home; and
 - (d) Correspondence.
- (ii) It has recognised and protected the Right to private life, family, home and correspondence of the individual human beings.
- (iii) Though it has not spoken directly about the Right to Privacy, but by way of protecting the private and family life of individuals, it has tried to protect the Right to Individual Privacy.
- (iv) It has prohibited any interference by the public authority on the exercise of this right.
- (v) Interference by the public authority is permitted only in the following cases –
 - (a) With an established legal procedure;
 - (b) In the interests of national security in a democratic society;
 - (c) For public safety;
 - (d) For the economic well-being of the country;
 - (e) For the prevention of disorder or crime;
 - (f) For the protection of health or morals;
 - (g) For the protection of the rights and freedoms of others.

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

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

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

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

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

⁶⁸ *Id* at p.249.

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

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

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

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

⁷⁰ *Id* at p.186.

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

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

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

⁷¹ *Id at pp.186-187.*

⁷² *Id at pp.187-188.*

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

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

Article 12

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

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

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

⁷³ *Id at p.191.*

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

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

Article 14

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

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

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

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

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

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

⁷⁴ *Id at pp.191-192.*

⁷⁵ *Id at p.192.*

⁷⁶ Vasak, *La Convention européenne*, p.51.

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

Article – V

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

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

Article – VI

“Every person has the right to establish a family, the basic element of society and to receive protection therefore”.

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

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

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

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

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

Right to Privacy

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

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

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

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

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

Article – 17

Rights of the Family

“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses ...”

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

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

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

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

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

Article 18

"1. The family shall be the natural unit and basis of society. It shall be protected by the State.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community . . ."

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

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

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

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

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

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

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

- (i) *Universal Islamic Declaration of Human Rights, 1981.*
- (ii) *Cairo Declaration on Human Rights in Islam, 1990.*
- (iii) *Arab Charter on Human Rights, 2004.*

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

- (i) *The Universal Islamic Declaration of Human Rights, 1981 –*
 - (a) *Article XIX – Right to found a Family and Related Matters.*
- (ii) *The Cairo Declaration on Human Rights in Islam, 1990 –*
 - (a) *Article 5 – Right to Marriage and Family.*
- (iii) *The Arab Charter on Human Rights, 2004 –*
 - (a) *Article 33 – Right to Marriage and Family.*

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

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

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

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

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

Article – 21

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

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

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

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

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

Article – 19

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

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

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

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

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

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

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

3.5.3. Privacy of Home

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁹ *Id at pp.180-181.*

⁸⁰ M. H. Smith, *The Boston Writes of Assistance Case*, 1978, reprinting James Otis, Address, p.344.

3.5.3.1. The International Legal Scenario of Privacy of Home

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

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

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

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

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

⁸¹ James Michael, *op.cit.*, p.20.

⁸² *Id* at p.19.

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

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

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

3.5.3.2. The Regional Legal Periphery of Privacy of Home

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

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

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

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

- (i) Sanctity of Home is upheld by *Article 8* of the European Convention and various other international and domestic laws.
- (ii) Any unauthorised entry into an individual's home would amount to violation of *Article 8* of the European Convention, if it has been made for the purpose of

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

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

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

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

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

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

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

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

includes the Right to Privacy of Home, because respect to home remains incomplete without the guarantee and protection of Privacy of home.

Moreover, any unauthorised interference with this right by anyone is prevented under *Article 8*, which includes even the Public Authorities. The Public Authorities can only interfere with this right in exceptional circumstances provided under *Article 8(2)* and during emergencies as provided under *Article 15* of the Convention. But, this right is exclusive in nature and not inclusive, because of which it has certain limitations. As such, the right to suitable or decent accommodation and the right to prevent demolition of illegal construction of a dwelling-house would not be included within the scope and ambit of this right. Hence, the right to respect for home means the sanctity and privacy of home, which should be enjoyed according to law.

As the *Article 8 of the European Convention* has actually protected the Right to Privacy of Home in disguise of the Right to respect for Home, therefore, this article is similar with the *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights*. In this sense, the scope and ambit of all these articles are more or less similar. Therefore, the initiatives taken by the European Convention are good initiatives for the protection of Privacy of Home in the European region.

3.5.3.2.2. An Interpretation of the American Declaration of the Rights and Duties of Man, 1948 regarding Privacy of Home

Article-IX of the American Declaration of the Rights and Duties of Man, 1948 contains provision relating to the Right to Privacy of Home, which is discussed below:-

Article – IX

Right to inviolability of the Home

“Every person has the right to the inviolability of his home”

This article of the *American Declaration* expressly deals with the ‘inviolability of one’s home’ within the American region. In fact, ‘inviolability of home’ means, no one can violate the *Right to Home* of any individual human being. A man is free to live with his home-life according to his wishes and no one can enter there without permission. Every unauthorised entry therein is prohibited. This

inviolable nature of home has actually upheld the sanctity of home, which also includes the secrecy and privacy of home. As inviolable nature of home denotes the freedom of home-life, therefore, it protects the Privacy of Home, because on the one side Privacy means Freedom and on the other side, Inviolability denotes Privacy. According to *Warren-Brandeis*, Privacy means something which is inviolable. Therefore, inviolability of home discussed here obviously means the Privacy of Home. Again, this idea of the *American Declaration* also brings forth the Common Law principle of “*Every man’s home is his castle*”. According to this principle, home is like a castle, where the security and liberty of an individual is well-guarded. This idea attaches inviolability to the concept of home. Again, protection of liberty of an individual in his home includes the protection of Privacy of his Home. Finally, when all these elements are taken together, the idea of Privacy of Home comes into being from the idea of inviolability of home as stated in the *Article-IX of the American Declaration*. Hence, the *American Declaration* has taken good initiatives for the protection of Privacy of Home in the American region.

In a deep-rooted study, it is found that, *Article-IX of this Declaration* is similar with the *Article 12 of the Universal Declaration*, *Article 17 of the International Covenant on Civil and Political Rights* and *Article 8 of the European Convention on Human Rights and Fundamental Freedoms*, because all of them are dealing with various aspects of *Right to Privacy of Home*. Therefore, the above-stated article of the *American Declaration* has dealt with the express provision for the protection of *Right to Privacy of Home* in the American region. For the purpose of protection and enforcement of the various human rights contained in the *American Declaration* including the Right to Privacy, later on, the *American Convention on Human Rights* has been adopted.

3.5.3.2.3. An Elucidation of Privacy of Home under the American Convention on Human Rights, 1969

Article 11 of the American Convention on Human Rights, 1969 has created provisions for the protection of *Right to Privacy of Home* along with other components of Right to Privacy, the textual version of which has already been discussed. In an analysis of this article, it is found that, it has prohibited arbitrary or abusive interference with everyone’s private life, family, home or correspondence.

In this sense, it has prohibited arbitrary or abusive interference with everyone's home-life along with other rights. Though the article has never used the term '*Right to Privacy*' anywhere, except the heading, but due to the use of the term in the heading, it can be assumed that, the article deals with various components of *Right to Privacy*. Therefore, all the rights described in the article are different aspects of *Right to Privacy*. As such, protection of home-life or *Right to Home* from any kind of interference here means, freedom to enjoy the *Right to Home* according to one's wishes. Freedom means Privacy and therefore, freedom to enjoy the *Right to Home* means the *Right to Privacy of Home*. Hence, this article deals with the *Right to Privacy of Home*. Moreover, it has specifically provided legal protection to the rights mentioned therein against any kind of interference or attacks. In this sense, it has given legal protection to the *Right to Privacy of Home* against any kind of interference or attacks. Hence, *Article 11 of the American Convention* has two sides. It has not only prohibited arbitrary or abusive interference with the *Right to Privacy of Home*, but has also provided legal protection to this right against such interference or attacks.

In a further analysis, it can be said that, *Article 11 of the American Convention* is similar with the *Article 12 of the Universal Declaration of Human Rights*, *Article 17 of the International Covenant on Civil and Political Rights* and *Article 8 of the European Convention on Human Rights and Fundamental Freedoms*. It is also similar with the *Article-IX of the American Declaration of the Rights and Duties of Man*. The reason behind it is, all these articles deal with various components of *Right to Privacy* including the *Right to Privacy of Home*. Hence, the American Convention has taken good initiatives for the protection of Privacy of Home in the American region.

3.5.3.2.4. Privacy of Home under the ASEAN Human Rights Declaration, 2012 : An Exposition

Article 21 of the ASEAN Human Rights Declaration, 2012 deals with general Right to Privacy as well as various components of this right including the Right to Privacy of Home, the textual version of which has already been discussed. In an analysis of this article, it is found that, this article gives protection to the Right to Privacy of Home from arbitrary interference along with other privacy rights. It also

provides legal protection to those rights against such interference or attacks. However, the analysis of *Article 21* has projected the similarities of this article with *Article 12 of the Universal Declaration of Human Rights*, *Article 17 of the International Covenant on Civil and Political Rights*, *Article 8 of the European Convention on Human Rights*, *Article-IX of the American Declaration on Rights and Duties of Man* and *Article 11 of the American Convention on Human Rights*. In this sense, these articles are not only similar, but also the reflection of one another. Hence, it can be said finally that, the *ASEAN Human Rights Declaration, 2012* has taken good initiatives for the protection of Right to Privacy of Home in the ASEAN region in the light of the *Universal Declaration of Human Rights* and other international as well as regional legal instruments.

3.5.3.3. The Municipal Laws on Privacy of Home : Whether Adequate or Not

Apart from the international and regional legal instruments, there have been various municipal laws of different countries protecting the Right to Privacy of Home. Those laws can be divided into the *Common Law Countries*, *Civil Law Countries* and *Nordic Law Countries*. But, specific laws are not found in all those countries, rather only in some Countries, those are discussed hereunder.

3.5.3.3.1. A Portrayal of the Common Law Countries regarding Privacy of Home

The specific laws on Privacy of Home are found in *Canada and South Africa*, which are discussed hereunder.

3.5.3.3.1.1. Judicial Exposition of Privacy of Home : The Canadian Experience

Canada is an important Common Law Country under the regime of Privacy Laws. The *Canadian Law of Privacy* is a mixture of Common Law principles of Law of Torts, Statutory Provisions of Privacy, Human Rights Codes and the *Canadian Charter of Rights and Freedoms, 1982*. The development of Privacy Laws in the *Pre-Charter* era in *Canada* is influenced by *the Warren-Brandeis Article in the Harvard Law Review in 1890*, *Article 12 of the Universal Declaration of Human Rights, 1948* and *Article 17 of the International Covenant on Civil and Political Rights, 1966*.

Though *Canadian Law* is very much influenced by the above-stated international instruments, but these instruments have little impact on the judicial

development of Right to Privacy in *Canada*. In fact, delayed judicial development has been noticed in *Canada* for recognizing Right to Privacy therein. Thereafter, the *Canadian Charter of Rights and Freedoms* has been enacted in 1982, which does not include the Privacy Rights directly, but by way of liberal interpretation, the Supreme Court of *Canada* has tried to incorporate those rights therein as one of the fundamental rights and freedoms. The *Canadian Supreme Court* has opined that in the case of *Hunter v. Southam*.⁸⁴ Since the decision of this case, Privacy has played a very important role for the interpretation of a number of provisions of the *Charter*,⁸⁵ most important among them are *Sections 7 and 8 of the Charter*, the textual version of which has already been discussed.

As there is no direct law on Right to Privacy in *Canada*, therefore, there is no question of existence of law on Right to Privacy of Home. But, the *Canadian Supreme Court* has applied the above-stated two sections in matters of privacy by way of liberal interpretation. These sections deal with the rights to life, liberty and security of persons as well as the right to be secured against unreasonable searches and seizures. Liberty and Security would remain incomplete without the guarantee of Privacy and as such Right to Privacy is protected hereby in implied manner. Again, security of persons and protection against unreasonable searches and seizures include the Right to Privacy of Home. In all these cases, what is violated is actually the Right to privacy of Home. Therefore, by way of indirect application, these provisions *Canadian Charter* are protecting the Right to Privacy of Home. Hence, this right is protected under the Public Law in *Canada* in implied manner.

Again, certain legal provisions are found in *Criminal Law in Canada* relating to the cases of search and seizure and Police surveillance, where unauthorised government intrusion is prohibited. These legal provisions have been made applicable to Right to Privacy of Home by way of judicial interpretation of the *Supreme Court of Canada* and the *Ontario Criminal Court*. These are not allowed by the Courts therein on the ground of violation of Right to privacy of Home. Though Canadian Legislature has not taken active steps for the protection of Right to privacy of Home, but Canadian Judiciary has played active role in this respect.

⁸⁴ (1984) 2 SCR 145.

⁸⁵ Marguerite Russell, *op.cit.*, p.107.

3.5.3.3.1.2. Privacy of Home : The South African Agenda

In *South Africa*, the Right to Privacy has been incorporated both in the *Common Law* and the *Constitution of the Republic of South Africa, 1996*. Chapter 2 of the *Constitution* contains the *Bill of Rights*, wherein *Section 14* provides for the protection of Right to Privacy of Person, Home, Property, Possession and Communication, the textual version of which has already been discussed.

In an analysis of the above-stated *Section 14*, it can be said that, though this section is mainly related to the matters of search and seizure as well as provides protection to individuals, their homes, properties and possessions from unlawful searches and seizures, but it has expressly mentioned the term “Right to Privacy”. As such, this section has specifically recognised the Right to Privacy of everyone. Therefore, it has not only provided protection against unlawful searches and seizures, but has also protected the Individual Privacy, Privacy of Home, Property, Possession and Communication. It has just only included the specific aspects of search and seizure within the broad ambit of Right to Privacy. As such, it has recognised the Right to Privacy of Home and has tried to protect it; protection from search and seizure is just one aspect of Right to Privacy of Home.

Apart from *Section 14*, no such express legal provisions are found in *South African Law* regarding Right to Privacy of Home. In fact, the whole Right to Privacy is neglected therein. Moreover, *Section 7(2)* of the *Constitution* provides that, the State should respect, protect, promote and fulfil the rights in the *Bill of Rights*. Therefore, this section is another initiative for the protection of Right to Privacy and its various components along with the protection of other rights in the *Bill of Rights*.

3.5.3.3.2. The Legal Framework of Civil Law Countries

The express legal provisions are found in *Germany and China* regarding the protection of Right to Privacy of Home, which are discussed hereunder.

3.5.3.3.2.1. The German Attitude towards Privacy of Home

The protection of Right to Privacy is a very important aspect in *Germany*. The Privacy Laws in *Germany* are based on the *U. S. Constitutional Model* as well as the *Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950*. The *German basic Law or the Constitutional Law* is the first source of Privacy Law in *Germany*, but there are *Civil and Criminal Laws*

on the subject also. The *German Basic Law* contains various provisions for the protection of Right to Privacy and its various components. In this respect, the following article is important to mention herein, which deals with the Right to Privacy of Home:-

Article 13

[Inviolability of the home]

“(1) The home is inviolable.

(2) Searches may be authorised only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.

(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay . . .

(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.”

This article provides the ‘*inviolability of home*’ and prohibits searches therein, except in accordance with law and to prevent imminent danger to public security and order. In this respect, it has prescribed certain conditions, only when the searches are permitted.⁸⁶ It has allowed surveillance of any home only according to judicial order and not otherwise. Most importantly, interference to home is permitted under this article only to combat the danger of an epidemic, or to protect young persons at risk. As such, this article truly portrays the inviolable nature of

⁸⁶ James Michael, *op.cit.*, pp.92-93.

German home, which can be interfered with only in limited circumstances as stated expressly in the said article.

Therefore, this article deals with the Right to Privacy of Home. According to the views of *Warren-Brandeis in U. S. Law*, Privacy means inviolability. As such, inviolability of home denotes Privacy of Home without any doubt. Again, prohibitions of unlawful searches are necessary for the protection of Privacy of Home, which has been done by this article. Again, this article permits searches of Home only to prevent imminent danger to public security and order as well as on the fulfilment of certain conditions prescribed therein. Hence, searches of Home are permitted only in exceptional circumstances, which obviously uphold the Right to Privacy of Home in *Germany*.

3.5.3.3.2.2. The Chinese Outlook regarding Privacy of Home

The *Chinese Constitution* and various *Chinese Legislations* have tried to protect the Right to Privacy and its various components including the Right to Privacy of Home. In this respect, the following article of the *Chinese Constitution* is noteworthy, which deals with the Right to Privacy of Home:-

Constitution of the People's Republic of China, 1982

Article – 39

“The home of citizens of the People's Republic of China is inviolable. Unlawful search of, or intrusion into, a citizen's home is prohibited.”

Therefore, this article provides inviolability of the home of the *Chinese* citizens and prohibits any unlawful search or intrusion thereof. Basically, it is a part of search and seizure law and provides protection to private homes against unlawful searches. But, incorporation of this article in the *Chinese Constitution as a Fundamental Right* gives different impetus to this right. ‘*Inviolability of Home*’ is recognised as a fundamental right vide this article of the *Chinese Constitution*. ‘*Privacy*’ and ‘*Inviolability*’ are nothing but the different names of one aspect and in this sense, ‘*Inviolability of Home*’ denotes ‘*Privacy of Home*’. As such, this article applies to Right to Privacy of Home in *China*. Hence, *Chinese Constitution* has tried to protect the Right to Privacy of Home. But, apart from this provision, no such laws are found in *China* in this respect. In this sense, this right is protected in *China* only to a limited extent.

3.5.3.3.3. The Viewpoint of Nordic Law Countries as regards Privacy of Home

Among the *Nordic Law* Countries, only *Denmark and Norway* have considered the importance of Privacy of Home. As such, the laws of these two countries are discussed hereunder.

3.5.3.3.3.1. Denmark and the Privacy of Home : A Legal Analysis

Denmark has taken initiatives for the protection of Privacy of Home. One such important *Danish Law* is the *Article 72 of the Danish Constitution*, which runs as follows:-

*“The dwelling shall be inviolable. House searching, seizure and examination of letters and other papers as well as any breach of the secrecy to be observed in postal, telegraph and telephone matters shall take place only under a judicial order unless particular exception is warranted by statute”.*⁸⁷

Therefore, *Article 72* provides that, the *Danish Constitution* has tried to protect the Privacy of Home, Privacy against unreasonable searches and seizures, Privacy of Correspondence, Privacy of Information and the like. Only exception provided under this article is that, invasion of those Privacy rights is possible under judicial order or according to express statutory provisions enacted in this respect. Further it can be said that, this article has made the dwelling place of a person inviolable. Dwelling place obviously includes Home and inviolability denotes Privacy and in this sense, this article deals with the Right to Privacy of Home along with the other components of this right. The initiatives taken under this article are good enough due to the reason that, it has permitted the violation of this right only in exceptional circumstances and not otherwise. The scope and ambit of this article is broad enough to protect the Privacy of Home.

3.5.3.3.3.2. Attempts taken by Norway to Safeguard Privacy of Home

The *Norwegian Constitution* has never enumerated a Right to Privacy, except under *Article 102*, which provides that, “*Search of private homes shall not be made except in criminal cases*”. This article is not concerned with the Privacy of Home or Individual Privacy; it gives protection to Private Homes against unreasonable searches, which is permitted only in criminal cases. In this sense, *Danish Constitution* provides far better protection than the *Norwegian Constitution*.

⁸⁷ *Id at p.56.*

However, the provision of *Article 102* cannot be totally rejected regarding the protection of Privacy. Basically, this article provides protection from unreasonable searches and seizures, except in criminal cases. In this sense, it is a search and seizure law with respect to the private homes. But, prohibition of search and seizure provides better protection to the Right to Privacy of Home. It also upholds the inviolability of Home. If unreasonable search and seizure is prohibited, freedom or Privacy of Home is automatically protected in better manner. Therefore, this article can be applied for the protection of Privacy of Home in implied manner. Hence, the initiatives taken by *Norway* are good enough for the protection of Privacy of Home.

3.5.4. Privacy of Correspondence and Communication

The process of Communication through Correspondence or exchange of letters dates back to letters sent through pigeons, which has gradually been replaced by informal and then formal postal system with the passage of time. But, the watching of mails and interception of messages are not the newly created ideas; rather those also have been started since the starting of Communication through Correspondence. In fact, Right to Communication and Correspondence is a basic human right as declared by various international and regional human rights instruments as well as by the domestic laws of different countries. This right brings with it the Right to Privacy of Communication and Correspondence. Communication through Correspondence is generally of two types – formal and informal. As a matter of fact, both these two types of correspondences require Privacy, because these are made for the purpose of Communication between the sender and receiver and these are not for Communication with any third person between the sender and receiver. As such, the third person is not supposed to know the information Communicated through the Correspondence. The same rule would be applicable to any modern means of Communication, like telephone, mobile phone, e-mail or sms or chatting. Hence, the Right to Communication or Correspondence includes the Right to Privacy of Communication or Correspondence.

Communication through Correspondence can be made among the intimate relations, family relations or in the acute professional relations, where the matter deserves circumstances of extreme professional confidence. Right to Privacy is also

subjected to Intimate Privacy, Family Privacy, Social Privacy and Professional Privacy. All these four types of Privacy rights are subjected to the Privacy of Communication or Correspondence, because exchange of letters can be made in all these cases. Not only that, but also the other modern means of Communications is made in all these cases. In most of the cases, information shared in these mediums is confidential information, which if communicated to any third person; the chances of loss of Privacy may arise. Again, three things are involved in case of exchange of letters – Sender, Receiver and the Subject of Correspondence. Hence, the chance of loss of Privacy is not related to the Sender or Receiver, but of the Subject-matter, where some information about a third person is communicated, which if known to someone else, every chance of breach of Privacy would automatically arise.

As already discussed, interpretation of messages or tapping of telephones are age-old practice, which have been increased in the present day society. These practices were more fully found during the era of totalitarian states. In the totalitarian states, the governments were induced by sovereign functions only and as such, a number of personal liberties of the citizens were curtailed in the name of governance of States. Right to Privacy was not recognised in those states and every action of the citizens was subjected to state control, even the personal lives of them were not relieved from prying eyes of the States. The situation has become worsen in the post Second World War era, when spying has reached its highest level. The situation has been continued during the cold war between U.S.A. and the erstwhile U.S.S.R. Even, now-a-days it is still continuing between the cold war of India and Pakistan. However, the situation has been changed with the abolition of totalitarian states and the rise of welfare states. In these States, governments generally perform various welfare functions and as such the personal liberties of the citizens have been given prominence. Along with other personal liberties, Right to Privacy has also been given importance and the states cannot curtail this right without due process of law or procedure established by law. But, there also this right has not been accorded absolute status and it can be restricted on the grounds of exceptions prescribed by the national constitutions, among which national security and interest of the State are the prime concern. As such, this right can be curtailed in the name of the national security, interest of the State or public interest.

The Privacy of Communication or Correspondence was not recognised in the totalitarian States and during the post Second World War era. Spying has reached its highest point during that period and every letter, message, code or number was subjected to scanning by the State in the interest of national security. War and war like situation was very common during the then period, by reason of which States had curtailed the personal liberties of the citizens including the liberty of personal correspondence for the protection of national security. But, in the present day welfare states, personal liberty of the citizens are guaranteed including the Privacy of Correspondence, except when the national security is threatened. As such, restriction on the freedom of personal Communication or Correspondence is imposed in most civilized nations today in the interest of national security and not otherwise. But, practically various modes of interception of letters, codes or breaking of emails and cracking of computer passwords are regularly found in the advanced and developing countries. In most of the cases, these are only private activities and are not made by the States. In this sense, spying, prying, besetting and eavesdropping and various other activities are common practice now-a-days, which have threatened the Privacy of Communication or Correspondence.

Moreover, a new practice has arisen in the present day society, which is called 'the Direct Mail Industry'.⁸⁸ The Direct Mail Industries use to purchase the Computerized personal information of the citizens of different countries from whatever source they can get the information and use to send mails to the persons they have found thus. In the present day technological world, all information about individuals is recorded in Computer databases as and when they avail of any service. As such, the Direct Mail Industries can easily purchase the information stored in the databases of the service providers. These organisations, called the Direct Mail Industries have made them heavily computerized and usually manipulate millions of pieces of personal information about individuals and families to produce selective lists for sale to advertisers who have a product or service to sell and organizations that have a cause or philosophy to promote.⁸⁹ As such, sending and receiving of unsolicited mails are common practices today covering which a nationwide

⁸⁸ Hyman Gross, *Privacy – Its Legal Protection*, Oceana Publications Inc., New York, Revised Edn., 1976, p.29.

⁸⁹ *Ibid.*

profitable industry has grown up. This new practice is a serious threat to personal privacy and people feel that, receipt of unsolicited mails amounts to violation of their Privacy of Correspondence. Again, the information stolen thereunder amounts to violation of the Information Privacy of the private individuals. This is not the only one, but also sending of fraud emails containing false promises and hacking of emails are also serious threats to Privacy of Correspondence, which are called the evil effects of advanced scientific technology.

Therefore, Privacy of Communication and Correspondence is very much threatened in the present day society. But, the most important fact is that, spying is the oldest industry of the world, consequent to which the concepts like ‘Spy’ and ‘Secret Agent’ are found since the very old period. Again, curiosity of man has always led him to read the letters of others without consent. As such, advancement of information and communication technology is nothing but the addition of more smart techniques to intercept letters of others or decode the messages of others in any medium. Due to these reasons, the threat to Privacy of Communication and Correspondence has increased in the present day world. However, Privacy of Communication and Correspondence is upheld by various legal instruments all over the world, which are discussed below.

3.5.4.1. An Overview of the International Legal Instruments dealing with Privacy of Communication and Correspondence

A number of international legal instruments have been found protecting the Privacy of Communication and Correspondence. These are stated hereunder:-

3.5.4.1.1. An Interpretation of the Universal Declaration of Human Rights, 1948 regarding Privacy of Communication and Correspondence

Article 12 of the Universal Declaration of Human Rights, 1948 has tried to protect the Privacy of Communication and Correspondence, the text of which has expressly dealt with the matter. In this sense, it has expressly tried to protect the Privacy of Correspondence along with other Privacy rights. But, it has never used the term ‘Privacy of Communication’, which does not mean that, it has not protected the other means of Communication, except Correspondence. In fact, it includes the protection of Privacy of all modes of Communication including Correspondence without mentioning them in express manner and protecting them in implied manner.

Also it has provided legal protection to this right from arbitrary interference or attacks.

This article is subjected to both positive and negative criticisms, because it has both advantages and disadvantages. It is criticized by many authors, because it has not specifically mentioned the dimensions of Privacy of Communications and Correspondences that it has tried to protect. But, it is supported by many authors due to the advantage that, under this article, the physical zone of protection includes the home and correspondence with others, which may go very far from the physical home.⁹⁰ Though this article can be criticized for coupling the rights to Privacy of Home and Correspondence together, but it is advantageous, because it has left the scope open for liberal interpretation of these rights. In this sense, it can go far beyond the physical home or correspondence and can cover within its ambit, different modes of Communication also.

3.5.4.1.2. A Representation of the International Covenant on Civil and Political Rights, 1966 as regards Privacy of Communication and Correspondence

Article 17 of the International Covenant on Civil and Political Rights, 1966 has tried to protect the Privacy of Communication and Correspondence along with other privacy rights, because it has expressly mentioned about the protection of Privacy of Correspondence therein. In fact, this article is drawn in same line with *Article 12 of the Universal Declaration* and as such, same kind of protection is accorded herein. Hence, Privacy of Correspondence is expressly protected herein, but Privacy of Communication is protected in implied manner. Only difference lies between the two articles is that, *Article 17* has provided protection to the Privacy Rights mentioned therein from arbitrary or unlawful interference, but *Article 12* has provided protection to those rights from arbitrary interference only. In this sense, *Article 17* has provided far better protection than *Article 12*, because the scope and ambit of *Article 17* is larger than *Article 12*. Hence, Privacy of Communication and Correspondence get better protection under *Article 17*. Though *Article 17* is based on *Article 12*, but it has expanded its scope and ambit to cover the areas uncovered under *Article 12*. *Article 17* is also subjected to both positive and negative criticisms

⁹⁰ James Michael, *op.cit.*, p.19.

like *Article 12*, but it is also supported by various authors due to its advantages. Hence, it is a good attempt for protection of Privacy of Correspondence and Communication in the international legal arena.

3.5.4.2. An Analysis of the Regional Legal Scenario regarding Privacy of Communication and Correspondence

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Privacy of Communication and Correspondence. Those are stated hereunder:-

3.5.4.2.1. A Review of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 has created provisions for the protection of various components of Right to Privacy along with the Right to Privacy of Communication and Correspondence. This article has expressly protected Privacy of Correspondence and impliedly protected Privacy of Communication from any interference by a public authority, except in exceptional circumstances provided under *Clause (2) of Article 8*. But, the limitation of this article is that, it has provided protection from the interference by any private authority or individual. In this sense, the scope and ambit of this article is lesser than *Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights*, because those articles have provided protection to this right from any kind of interference, be it by public or private entity.

This article has recognised that, everyone has the right to respect for his correspondence along with other rights. Though it has not spoken directly about the Right to Privacy, but by way of protecting various rights allied to Right to Privacy, it has tried to protect Right to Privacy and its various components. In this sense, by way of protecting the Right to respect for correspondence, it has protected the Right to Privacy of Correspondence. Therefore, the analysis of *Article 8* shows that, it deals with the Right to respect for Correspondence, which provides the security and protection to the Correspondence of an individual and obviously it includes the Right to Privacy of Correspondence, because respect for Correspondence remains incomplete without the Privacy of Correspondence.

Jurists have expressed different opinions regarding the scope and ambit of *Article 8* on the point of Respect or Privacy of Correspondence. In fact, they are not unanimous on the issue that, whether the article covers respect for Correspondence only or includes other means of Communication also. But, most of them have expressed that, the article applies to other means of Communication also, apart from Correspondence. In this respect, the idea of Correspondence is necessary to explain. Generally, the term 'Correspondence' includes every Communication between persons by exchange of letters. Again, the term 'Letter' should also be explained hereunder. Accordingly, letter means any written communication, but it includes closed letters, post cards as well as anything else despatched or transmitted through a private individual or the post office.⁹¹ As such, *Article 8* is applicable to all these kinds of letters and the protection it provides to Correspondence is applicable to both public and private means of transmission of Correspondence. Not only that, this article has tried to provide safeguards against violation of the Right to respect for Correspondence by providing following protections:-

- (i) Protection against examination of Correspondence.
- (ii) Protection against prevention of Correspondence from reaching its destination.
- (iii) Protection against making the contents of Correspondence or its existence known to a third person.⁹²

In this respect, the article has tried to provide every protection to the Right to respect for Correspondence. Moreover, this article has provided protection to other means of Communication also, apart from Correspondence. The reason behind that is, Correspondence is a medium of Communication and the idea of Communication remains incomplete without Correspondence. Again, in the modern age, the system of Correspondence is supplemented by other means of Communication and those new means are used to communicate between two or more persons instead of Correspondence. Therefore, protection of the means of Correspondence is automatically applicable to the other means of Communication with the passage of time. In this sense, expansion of *Article 8* is required to cover other means of Communication, which has already been done and it includes the Communication by means of telephone, telegraph, electrical, wireless, pneumatic or other mediums. As

⁹¹ A. H. Robertson, *op.cit.*, p.62.

⁹² *Id* at p.63.

such, the interception, suppression or disclosure of a message transmitted by these means of Communication amounts to violation of *Article 8 of the Convention*. Any intentional telephone-tapping by a public authority without the consent of the parties to Conversation will also amount to violation of Right to respect for Correspondence under this article.⁹³ Telephone-tapping is an acute case of violation of Privacy of Communication and in this sense, the Right to respect for Correspondence includes the Right to Privacy of Correspondence and other means of Communication without any discrepancy.

However, the protection of Right to respect for Correspondence under *Article 8* is not absolute and reasonable restrictions can be imposed by a public authority on this right on the following grounds:-

- (i) Derogations in time of war or other public emergency threatening the life of the nation – Article 15.
- (ii) Restrictions on the political activity of aliens – Article 16.
- (iii) Forfeiture of the right to rely on the Convention – Article 17.
- (iv) Reservations – Article 64.⁹⁴

Therefore, in an ultimate analysis, it is found that, though *Article 8 of the European Convention* expressly deals with the protection of Right to respect for Correspondence, but this protection is applicable to other means of Communication also, in the implied manner, because Correspondence is supplemented by those means of Communication with the passage of time. In fact, Correspondence or exchange of letters between persons is made through the electronic medium by email, mobile sms or whatsapp messages in the contemporary society, which are nothing but the modern forms of Correspondence or exchange of letters. In this sense, the traditional mode of Correspondence is replaced by these modern modes. As such, the protection of Right to respect for Correspondence would be applicable automatically to these modern forms of Correspondence and other means of Communication. This is the reason by way of which it can be said that, though *Article 8* expressly protects Correspondence, but is applicable to other means of Communication in implied manner. Now this reason does not only apply to *Article 8*, but also equally applicable to other international, regional and national legal

⁹³ *Id at pp.65-66.*

⁹⁴ *Id at p.66.*

instruments and due to this reason, each and every legal instrument protecting the Right to Correspondence automatically protects the Right to Communication in the modern period in implied manner. Hence, it is always true that, Right to Correspondence covers the Right to Communication in implied manner.

Moreover, the Right to respect for Correspondence includes the Right to Privacy of Correspondence, because in most of the cases, Correspondence contains private information between the persons or deals with information of professional confidence, where maintenance of Privacy is must. Therefore, if the Correspondence is to be respected, then the Privacy of Correspondence should be maintained first. This is true in case of other means of Communication also, because Communication over telephone or electronic media is also subjected to the Right to Privacy. In this sense, Right to respect for Correspondence and Communication remains incomplete without the guarantee of Right to Privacy of Correspondence and Communication. Hence, Right to respect for Correspondence should always include the Right to Privacy of Correspondence. This is true not only in case of *Article 8 of the European Convention*, but also in case of any other legal instrument containing this right. As the other international, regional and national legal instruments have specifically spoken about the Privacy of Correspondence, therefore, this problem of interpretation does not arise in those cases. However, it should always be remembered that, Right to respect for Correspondence remains incomplete without the guarantee of Right to Privacy of Correspondence. Hence, both of them can be called two sides of the same coin or mirror reflection of each other.

Last but not the least, *Article 8 of the European Convention* has actually protected the Right to Privacy of Correspondence and Communication in disguise of the Right to respect for Correspondence, therefore, this article is similar with the *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights*. In this sense, the scope and ambit of all these three articles are similar with a slight difference that, *Article 8* has provided protection from interference by public authority and is silent about the interference by private entity, whereas, both *Articles 12 and 17* have provided protection from any interference, both by public and private. In this sense, other two

articles, except *Article 8*, are having larger scope and ambit than *Article 8*. Apart from this difference, all the three articles share similarities with one another.

3.5.4.2.2. An Assessment of the American Declaration of the Rights and Duties of Man, 1948 on the point of Privacy of Communication and Correspondence

The American Declaration of the Rights and Duties of Man, 1948 contains an article relating to the Right to Privacy of Correspondence and Communication, which is discussed below:-

Article – X

Right to inviolability and transmission of Correspondence

“Every person has the right to the inviolability and transmission of his Correspondence”.

This article of the *American Declaration* expressly deals with the ‘inviolability and transmission of one’s Correspondence’ within the American region. In fact, ‘inviolability of Correspondence’ means, no one can violate the Right to Correspondence of an individual human being. A man is free to communicate with others by means of Correspondence and other means of Communication, like telephone, telegraph as well as the newly invented modes of Correspondence, like email, mobile sms and whatsapp messages. Any interference with this right is unauthorised interference and as such, prohibited. This inviolable nature of Correspondence has actually upheld the secrecy and privacy of Correspondence. As inviolable nature of Correspondence denotes the freedom of Correspondence, therefore, it protects the Privacy of Correspondence, because on the one side Privacy means Freedom and on the other side, Inviolability denotes Privacy. Therefore, inviolability of Correspondence discussed here obviously means the Privacy of Correspondence. Again, Privacy of Correspondence means Privacy of every means of Communication, which has already been discussed. In this sense, inviolability of Correspondence includes inviolability of Communication, which ultimately means, both Privacy of Correspondence and Communication. Moreover, this article also speaks about the Right to transmission of Correspondence. It means every person should enjoy freedom to transmit one’s Correspondence without any interference as and when wishes in the American region. Such transmission of

Correspondence should not be prevented by anyone. Therefore, by way of guaranteeing inviolability and transmission of Correspondence, this article has tried to protect freedom or Privacy of Correspondence. Privacy of Correspondence remains incomplete without the inviolability and free transmission of Correspondence. Hence, this article deals with the Privacy of Correspondence in the American region.

Finally, it can be said that, *Article X of this Declaration* is similar with *Article 12 of the Universal Declaration, Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention*, because all of them have dealt with the Right to Privacy of Correspondence and Communication along with other privacy rights.

3.5.4.2.3. An Examination of Privacy of Communication and Correspondence in the light of the American Convention on Human Rights, 1969 and the ASEAN Human Rights Declaration, 2012

Article 11 of the American Convention on Human Rights, 1969 and Article 21 of the ASEAN Human Rights Declaration, 2012 have dealt with Right to Privacy. Specifically, these two articles prevent any arbitrary or abusive interference on the Right to Privacy of Correspondence as well as these articles provide legal protection to this right against such interference as a matter of right. As such, these articles have tried to protect the Right to Privacy of Correspondence in an all-round manner. Though these articles have not used the term ‘Privacy of Correspondence’, but by providing freedom from arbitrary interference to Right to Correspondence, those have recognised the Right to Privacy of Correspondence, because Privacy means Freedom. As already stated, Right to Privacy of Correspondence includes the Right to Privacy of other means of Communication. Therefore, these articles also provide protection to Right to Privacy of Communication. In this sense, these articles are similar with *Article 12 of the Universal Declaration, Article 17 of the International Covenant on Civil and Political Rights and Article X of the American Declaration*. Those have a slight difference with *Article 8 of the European Convention* like the other articles, because *Article 8* provides protection against the interference by public authority only and these *Articles 11 and 21* provide protection against any interference. Hence, *Article 11 of the American Convention and Article 21 of the*

ASEAN Declaration are good initiatives for the protection of Right to Privacy of Correspondence and Communication in their respective regions.

3.5.4.3. The Standpoint of Municipal Laws regarding Privacy of Communication and Correspondence

The standpoint of Municipal Laws of different Countries as regards the protection of Right to Privacy of Correspondence and Communication has been discussed hereunder.

3.5.4.3.1. An Exposition of the Common Law Countries

The most important Common Law Country, which deals with the Right to Privacy of Correspondence and Communication, is *Australia*.

3.5.4.3.1.1. The Australian Viewpoint of Privacy of Communication and Correspondence

The legal protection of Privacy against intrusion in *Australia* has been divided into *Territorial Privacy and Electronic Privacy*. *Electronic Privacy* is protected by legislation regulating the unlawful interception of telecommunications by way of enacting the federal *Telecommunications (Interception) Act, 1979 (cth)*, which also prohibits unlawful dealing with intercepted information. It is also protected by making legislation regulating the use of listening and surveillance devices and in this respect, each *Australian* jurisdiction has enacted "*Listening Devices*" Legislation.⁹⁵ This Electronic Privacy protection legislation in *Australia* is an initiative for the protection of Privacy of Communication in *Australia*. Telecommunication is part and parcel of Correspondence and Communication. Hence, protection of Privacy of telecommunication amounts to protection of Privacy of Correspondence and Communication and in this respect, the action taken by the Common Law Country *Australia* is a good action.

3.5.4.3.1.2. Inadequacy of Canadian Laws for Protection of Privacy of Communication and Correspondence

The next important Common Law Country in this respect is *Canada*. Certain amount of protection is found in *Canadian Criminal Law* with respect to the Privacy of Correspondence and Communication. *Part VI of the Criminal Code titled*

⁹⁵ David Lindsay, *op.cit.*, pp.168, 171-172.

“*Invasion of Privacy*” deals with the interception of Communications.⁹⁶ Hence, this is the only legislation in *Canada* providing protection to the Right to Privacy of Communication. Therefore, the *Canadian Laws* are inadequate for prevention of violation of Privacy of Correspondence and Communication thereof.

**3.5.4.3.1.3. Protection of Privacy of Communication and Correspondence :
The South African Strategy**

In *South Africa*, the Right to Privacy has been dealt with both by the *Common Law* and the *Constitution of the Republic of South Africa, 1996*. Chapter 2 of the *Constitution* deals with the *Bill of Rights*, wherein *Section 14(d)* provides for the protection of Right to Privacy of Communication, which runs as follows:-

“Everyone has the right to privacy, which includes the right not to have: . . . (d) The Privacy of their Communications infringed”.⁹⁷

In fact, *Section 14 of the Bill of Rights* expressly deals with various components of the Right to Privacy including the Right to Privacy of Communications. Specifically, *Section 14 (d)* covers a broad area of protection of Privacy as the Privacy of Communications, which is based on the Common law principle of *actio iniuriarum (action for invasion of Privacy)* taken from the old *South African Law*.⁹⁸ This legal provision is important, because it provides protection against the infringement of the Privacy of Communications of every person in *South Africa*. As such, the protection of Privacy of Communication in *South Africa* largely depends upon the above-stated Common Law principles and the *Constitution*. In this respect, incorporation of *Section 14* is a great initiative, because it empowers the Government to take steps for the protection of the so far neglected areas of the Right to Privacy. Moreover, *Section 7 (2) of the Constitution* gives further impetus to this process, which provides that, the state should respect, protect, promote and fulfil the rights in the *Bill of Rights*. Therefore, this section creates the provision by way of which protection of Right to Privacy is upheld in *South Africa*.⁹⁹ Hence, this section would also become helpful for the protection of Right to Privacy of Communication therein.

⁹⁶ Marguerite Russel, *op.cit.*, pp.105-106.

⁹⁷ C. M. van der Bank, *op.cit.*, p.78.

⁹⁸ *Id at p.79*.

⁹⁹ *Ibid*.

In this sense, it can be said that, *South African Constitution* has expressly tried to protect the Right to Privacy of Communication, but is silent about the Right to Privacy of Correspondence. But, by way of larger interpretation and analysis, it is already found that, Correspondence is a part of Communication and as such, Right to Privacy of Communication includes the Right to Privacy of Correspondence. Hence, the law protecting Privacy of Communication in *South Africa* would obviously include the Right to Privacy of Correspondence. In order to give effect to this right, the *Electronic Communications and Transactions Act, 2002* has been enacted in *South Africa*. More or less, this is the situation in this Country as regards the protection of Right to Privacy of Correspondence and Communication.

3.5.4.3.2. The Approach of Civil Law Countries towards Protection of Privacy of Communication and Correspondence

The most important Civil Law Countries as regards the protection of Privacy of Correspondence and Communication are *Germany* and *China*.

3.5.4.3.2.1. Privacy of Communication and Correspondence : The German Exposition

The German Constitutional Law is called the *Basic Law*, which deals with various components of Right to Privacy in its different articles. It has also dealt with the Privacy of Correspondence and Communication. In this respect, the following articles of the *Basic Law* are important, which are stated hereunder:-

Article 10

[Privacy of correspondence, posts and telecommunications]

“(1) The privacy of correspondence, posts and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.”

Article 18

[Forfeiture of basic rights]

“Whoever abuses . . . the privacy of correspondence, posts and telecommunications (Article 10) . . . in order to combat

the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.”

These two articles of the *German Basic Law* are noteworthy. *Article 10* provides for the inviolable nature of privacy of correspondence, posts and telecommunications, restrictions on which may be ordered only pursuant to a law. Therefore, this article has tried to protect the Privacy of Correspondence and Communication in an express manner. The last part of this article is more significant, because it says that, if legal restrictions are imposed on those rights without informing the person on whom the restrictions are imposed, in the interest of national security or for free democratic basic order, then the court orders should be reviewed by the agencies appointed by the legislature. In this sense, this article has practically made these rights immune from any interference in *Germany*, which projects towards a strong law for protection of Privacy of Communication and Correspondence in *Germany*. Only exception in this respect is *Article 18*, which provides that, the right to privacy of correspondence, posts and telecommunications is forfeited in order to combat the free democratic basic order, if it is abused by any individual. However, the Federal Constitutional Court reserves the right to determine this forfeiture and its extent as per *Article 18 of the German Basic Law*. In this sense, the power to forfeiture this right is also not absolute and is subjected to the conditions prescribed under *Article 18*.

Therefore, the above-stated articles of the *German Basic Law* have tried to protect the Privacy of Correspondence and Communication in *Germany* in full-proof manner. The most important part of these articles is that, these have expressly tried to protect both the Privacy of Correspondence and Communication by using the terms ‘correspondence, posts and telecommunications’, whereas, most of the international, regional or other national legal instruments have expressly protected either Privacy of Correspondence or the Privacy of Communication. In this sense, the scope and ambit of *German Basic Law* is far more significant and comprehensive than the other legal instruments and it has far reaching consequences as regards the protection of this right. Moreover, this law is all pervasive, because it has allowed only legal restrictions on this right and has provided the forfeiture of this right only when the right is abused. Accordingly, such forfeiture is permitted

only for the maintenance of free democratic basic order of the society and not otherwise. In this sense, these rights can be curtailed only by imposing reasonable restrictions on them. Hence, the attempts taken by the *German Basic Law* for the protection of Privacy of Correspondence and Communication are highly appreciated.

3.5.4.3.2.2. An Account of Chinese Laws for Protection of Privacy of Communication and Correspondence

China is another important Civil Law Country which deals with various components of Right to Privacy and provides legal protection thereof. But, *China* has mainly dealt with Personal Privacy and Privacy Torts. Not more legal provisions are found therein as regards the protection of Privacy of Correspondence and Communication. However, the *Chinese Constitution* has tried to protect this right to some extent. In this respect, the following provision of the *Constitution of the People's Republic of China, 1982* is pertinent to mention, which is stated hereunder:-

Article – 40

“Freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organisation or individual may, on any ground, infringe upon citizens' freedom and privacy of correspondence, except in cases where, to meet the needs of State security or of criminal investigation, public security or procuratorial organs are permitted to censor correspondence in accordance with the procedures prescribed by law”.

Therefore, *Article 40 of the Chinese Constitution* has expressly tried to protect the freedom and privacy of the Correspondence of the Chinese Citizens. It has provided legal protection to this right and has expressly prevented its infringement by any organization or individual on any ground, except the exceptions provided in that article. In this sense, violation of this right is not allowed in *China* by any private organization or individual and it can only be curtailed by the public authority or State in the public interest, for protection of national security, for the purpose of Criminal investigation or any other matter mentioned therein. Again, it can only be curtailed by procedure prescribed by law or express legal procedure. As such, this article has tried to protect the Privacy of Correspondence in *China* against

any interference and it has provided protection to this right in an all-round manner. However, it has not provided express protection to the Privacy of Communication, which can be included within the Privacy of Correspondence by larger interpretation. Hence, *Chinese Constitution* has taken good initiative for the protection of Right to Privacy of Correspondence and Communication in *China*.

3.5.4.3.3. A Portrayal of the Nordic Law Countries regarding Privacy of Communication and Correspondence

Denmark is the only *Nordic Law* country, which has certain laws for the protection of Privacy of Correspondence and other means of Communication.

3.5.4.3.3.1. The Standpoint of Denmark

Article 72 of the Danish Constitution is the only provision for protection of Privacy of Communication and Correspondence in *Denmark*, the text of which has already been discussed. Therefore, *Article 72* provides that the *Danish Constitution* has tried to protect various aspects of Right to Privacy, including *Privacy of Correspondence and Privacy of other means of Communication, like telegraph and telephone*. In this sense, this article has tried to protect the Privacy of Correspondence and Communication in express manner in *Denmark*. Moreover, this article is having a broad ambit, because it says that, invasion of the Privacy rights stated therein, is possible only in exceptional cases by any judicial order or as per the express statutory provisions enacted in that effect. Hence, this article has tried to provide protection to Privacy of Correspondence and Communication in an all-round manner.

3.5.5. Privacy of Honour and Reputation vis-a-vis Defamation

Reputation of a person is utmost important, because the loss of reputation creates the violation of Privacy of a person along with the violation of human dignity. Privacy means Freedom and when the reputation of a person is lost, he is not free to live his life according to his wishes and as such, Privacy of the person is lost. Moreover, defamation causes both physical and mental harm to a person and the mental loss or loss to feelings amounts to violation of Privacy of that person. Every human being needs freedom or privacy in a civilized society and as such, a person becomes incomplete without privacy. Honour or Reputation includes within it certain private facts relating to an individual, which an individual may not want to

share with others or may cause loss of Privacy, if discussed in public. Every individual has both private and public lives. Public life is for maintaining relations with the outside world, but private life is personal life, which includes various private and secret facts, which can be shared only with family or intimate relatives. In this sense, if the private facts of an individual are brought in public, then those may create embarrassment in the public life of that person by damaging the picture of that person before general public. This situation is more fully applicable for a celebrity or public figure. As such, the disclosure of private facts in front of public amounts to violation of Privacy of an individual, which causes loss of one's reputation also. Therefore, the question of Privacy of Honour or Reputation comes into picture, the maintenance of which is utmost important for the sake of maintaining social relations by an individual.

Every individual is entitled to enjoy his or her right to reputation and if right to reputation is destroyed, the right to live with human dignity is also destroyed. Reputation is an essential attribute of human character and in this sense; it is directly related to human dignity. The wrong which takes away human reputation is called Defamation. Defamation does not only cause harm to human reputation but it also affects the human dignity, because reputation is part and parcel of human dignity. In this sense, if Privacy is violated, human dignity is also violated, because another meaning of Right to Privacy is protection of inviolate personality of human beings, which is directly related to human dignity. Therefore, ultimate consequence of Defamation not only affects human dignity but also violates the Right to Individual Privacy. In this sense, there is a close connection between Defamation and Privacy.¹⁰⁰ More specifically, it can be said that, Defamation is closely connected to Privacy of Reputation.

Privacy of Reputation is not only a human right but also it is considered as a tort, because the wrong of Defamation is a tort, which takes away the right to reputation of individual human beings or causes harm to their reputation. Therefore, compensation can be claimed under law of torts for the violation of right to reputation by way of Defamation. In this sense, an analysis of Privacy as a tort is also required.

¹⁰⁰ Sangeeta Chatterjee, "Privacy and Defamation: A Legal Analysis in the Indian Context", JCC Law Review, Vol. V (1), 2014, pp.99-117 at p.100.

3.5.5.1. Analysis of Privacy as a Tort

Privacy was considered as a tort in the Western World and most of the Western jurists have defined privacy as a tort. Still it is considered as a tort today and parallel action can be taken for violation of Right to Privacy under the Law of Torts along with the Constitutional or Human Rights Laws.¹⁰¹

Privacy was considered as a Tort for the first time by *William L. Prosser in 1960*. He has defined Privacy as a tort after analyzing a number of judicial pronouncements and has finally contended that, Privacy is not one tort, but a combination of four torts.¹⁰² Prosser's idea of Privacy is called the '*Privacy Torts*'. He has enumerated the following four *Privacy Torts*:-

- (i) Intrusion upon the Plaintiff's seclusion or solitude or into his private affairs.
- (ii) Public disclosure of embarrassing private facts about the plaintiff.
- (iii) Publicity which places the plaintiff in a false light in the public eye.
- (iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁰³

3.5.5.2. Defamation : The Concept

Defamation is a tort causing injury to a person. In fact, it is a civil wrong causing harm to a person's reputation. Every individual human being has a right to reputation and defamation directly attacks a person's reputation by publication of false and defamatory statement about that person in front of everybody. Defamation can be in any form, temporary or permanent, verbal or written but it should have the capacity of causing harm to the reputation of an individual.¹⁰⁴

Defamation has the following essential elements:-

- (i) There must be a statement.
- (ii) The statement must be false and defamatory.
- (iii) The statement must refer to the plaintiff.
- (iv) There must be publication of the statement.

Defamation is divided into two types – *Libel and Slander*. *Libel* is the publication of false and defamatory statement in some permanent form, like writing, printing, picture, effigy or statue, whereas, *Slander* is the publication of false and

¹⁰¹ *Id at p.103.*

¹⁰² *Ibid.*

¹⁰³ William Prosser, "*Privacy*", California Law Review, Vol.48, 1960, p.389.

¹⁰⁴ *Supra Note 100 at p.105.*

defamatory statement in some temporary form, like spoken by words or gestures. Though Defamation is considered as a tort, but it has the following defences:-

- (i) Justification or Truth.
- (ii) Fair and Bonafide Comment.
- (iii) Privilege – (a) Absolute privilege; and
(b) Qualified Privilege.

Absolute Privilege is applicable in the following cases:-

- (i) Parliamentary proceedings.
- (ii) Judicial proceedings.
- (iii) State Communications.

Qualified Privilege is applicable in the following cases:-

- (i) Statements should be made in discharge of a duty or protection of an interest.
- (ii) The statement should be made without any malice.

Therefore, action can be taken under the law of torts for Defamation, but the wrong-doer can escape the liability, if the case fits under any of the above-mentioned defences. In those cases, the person is not liable for Defamation.

3.5.5.3. Comparison between Privacy and Defamation

Privacy and Defamation are two separate legal aspects, but they are related with each other by a common term, called ‘Reputation’. Right to Reputation is an important human right, the violation of which amounts to the wrong of defamation. Again, violation of right to reputation brings with it, the violation of Right to Privacy also. In fact, any loss of reputation of a human being creates defamation as well as the invasion of Privacy. Though the law of defamation protects the reputation of an individual and the law of privacy protects the feelings of an individual, but a common element, called ‘reputation’ exists between them, because due to the loss of reputation by way of defamation, certain amount of mental loss is also caused to an individual and that is the invasion of Privacy.¹⁰⁵

There is another important aspect of the relation between Defamation and Privacy. To constitute Defamation, there should be the publication of a false statement. As such, if the statement is true, there should be no defamation, but there may be the invasion of privacy due to the causing of injury to one’s feelings.

¹⁰⁵ *Id at p.108.*

Therefore, violation of privacy may be caused without creating any harm to reputation of an individual by stating true facts about the person. In such situations, no action for defamation would lie, because the information that is discussed is merely embarrassing, not false.¹⁰⁶ In those cases, only the action for invasion of Privacy would lie.¹⁰⁷

Therefore, a number of differences are found between Privacy and Defamation, which are stated below:-

- (i) *The law of Defamation does not attract any loss or damage arising from publication of true facts, whereas, the law of Privacy attracts such loss or damage.*
- (ii) *The law of Defamation mainly covers physical sufferings of an individual, whereas, the law of Privacy covers both physical and mental sufferings.*
- (iii) *The law of Defamation has been originated in England, whereas, the law of Privacy has been originated in various countries at the same time.*
- (iv) *Truth is a defence in an action for Defamation, while it is not a defence in an action for invasion of Privacy.*
- (v) *Defamation hurts an individual's public reputation or status, whereas violation of Privacy causes injury to one's private life.*
- (vi) *Defamation is a recognized tort, whereas, Privacy is not a recognized tort and is still in developing stage regarding its tortious liability.*
- (vii) *In most of the countries, protection against Defamation is available both against the State and private individuals, but protection against invasion of privacy is available only against the State and not by private individuals.*¹⁰⁸

The comparison between Defamation and Privacy also projects towards the necessity of considering Privacy as a tort. In gist, it can be said that, the cause of action in privacy cases is not injury to one's public reputation or status as in defamation cases, but injury to emotional and mental sufferings.¹⁰⁹ As such, the mental distress causing from the fear of being exposed in front of the public, should be protected by adequate law of Privacy considering it as a tort.¹¹⁰

¹⁰⁶ P. M. Bakshi, "Defamation and Privacy", in *Law of Defamation: Some Aspects*, N. M. Tripathi Pvt. Ltd., Bombay, 1986, p.21.

¹⁰⁷ *Supra Note 100 at p.108.*

¹⁰⁸ *Id at pp.108-109.*

¹⁰⁹ Wade, "Defamation and the Right to Privacy", *Vanderbuilt Law Review*, Vol.15, Oct.1962, p.1093.

¹¹⁰ *Supra Note 100 at p.109.*

In the present day society, Right to Privacy of Reputation of the human beings is very much threatened by the over-encroachment of media into human lives. In fact, media has reached at every door-step in today's world for the purpose of gathering information in order to publish news over print or electronic media. As such, private lives of the celebrities and public personalities are very much endangered. Every time media tries to publish embarrassing private facts about them in public, which causes violation of their Right to Privacy of Reputation as well as amounts to Defamation. Sometimes these attacks by media end into many tragic stories, like the death of Lady Diana. As such, Right to Life and Human Dignity of the celebrities are very much threatened along with their Right to Privacy of Reputation due to the over-encroachment of media into human lives. Moreover, media tries to publish private facts about the ordinary citizens also causing violation of their Right to Privacy of Reputation. Hence, it is high time to enact extensive legislation in this field. However, Privacy of Honour and Reputation is upheld by various legal instruments all over the world, which are discussed below.

3.5.5.4. An Appropriation of the International Legal Instruments regarding Privacy of Honour and Reputation

A number of international legal instruments have been found protecting the Privacy of Honour and Reputation. Those are stated hereunder:-

3.5.5.4.1. The Universal Declaration of Human Rights, 1948 : A Liberal Attitude towards Protection of Privacy of Honour and Reputation

Article 12 of the Universal Declaration of Human Rights, 1948 has tried to protect the Privacy of Honour and Reputation, the textual version of which has already been discussed. It has prevented any attacks on the Privacy of Honour and Reputation and has provided legal protection to this right against such attacks as a matter of right. Though this article has expressly provided protection to the Honour and Reputation of an individual against any attack, but surely this article has provided protection to Privacy of Honour and Reputation of an individual. The reason is that, attack on Honour and Reputation means, any attack on Honour and Reputation, which includes the Privacy of Honour and Reputation.

This article is subjected to both positive and negative criticisms, because it has both advantages and disadvantages. It is criticized by many authors, because it

has not specifically mentioned the dimensions of Privacy of Honour and Reputation that it has tried to protect. Again, the reasons for inclusion of the terms ‘honour and reputation’ are not clear to many authors. But, some have suggested a distinction between the two terms – honour and reputation to give a clear idea. Accordingly, it has been prescribed that, personal integrity of human beings is based on both the subjective and objective elements, wherein ‘honour’ is the subjective element and ‘reputation’ is the objective element.¹¹¹ Therefore, authors have tried to provide positive criticism to this article.

Moreover, this article can be criticized for coupling the rights to Privacy of Honour and Reputation together, but it is advantageous, because it has left the scope open for liberal interpretation of these rights. In this respect, the attempt taken by the Universal Declaration is a good attempt.

3.5.5.4.2. Whether the International Covenant on Civil and Political Rights, 1966 has upheld the Privacy of Honour and Reputation or not

Article 17 of the International Covenant on Civil and Political Rights, 1966 has tried to protect the Privacy of Honour and Reputation along with other privacy rights, because it has expressly mentioned about the protection of Privacy of Honour and Reputation therein. In fact, this article is drawn in same line with *Article 12 of the Universal Declaration* and as such, same kind of protection is accorded therein. Only difference lies between the two articles is that, *Article 17* has provided protection to the Privacy of Honour and Reputation against unlawful attacks only, but *Article 12* has provided protection to this right against any attacks. In this sense, *Article 17* has further elaborated *Article 12* by specifically mentioning the nature of ‘attacks’ as ‘unlawful attacks’. This article has also provided legal protection to this right against such attacks as a matter of right. In this sense, *Article 17 of the International Covenant on Civil and Political Rights* is a slight modification of *Article 12 of the Universal Declaration of Human Rights*. Hence, it is a good attempt for protection of Privacy of Honour and Reputation in the international legal arena.

¹¹¹ James Michael, *op.cit.*, p.21.

3.5.5.5. The Role of Regional Legal Instruments for Protection of Privacy of Honour and Reputation

Apart from the international legal instruments, there have been a number of regional legal instruments protecting the Privacy of Honour and Reputation. Those are stated hereunder:-

3.5.5.5.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 : Incomplete Protection

Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950 deals with Right to Respect for private life and various components of Right to Privacy, like the Privacy of Family life, Home and Correspondence, but it does not deal with the protection of Right to Privacy of Honour and Reputation. In fact, it has never mentioned expressly about the Right to Privacy of Honour and Reputation in *Article 8*, but that does not mean that, this article has accorded no protection to this right. This article has provided protection to this right in implied manner and it is applicable only to the protection of Honour and Reputation in Private life. In this sense, a slight difference is found between *Article 8 of the European Convention and Article 17 of the International Covenant on Civil and Political Rights*, because *Article 17* deals with the protection of Honour and Reputation in public life. Therefore, *Article 8* only secures Privacy of Honour and Reputation in private life, but *Article 17* secures Privacy of Honour and in public life also. In this sense, the scope and ambit of *Article 17* is larger than the scope and ambit of *Article 8*. As *Article 17* is based on *Article 12 of the Universal Declaration of Human Rights*, hence, same difference is found between *Article 8 and Article 12*.

However, it does not mean that, *European Convention* is totally silent about the protection of Privacy of Honour and Reputation. Though it has not mentioned anything about this right in *Article 8*, but it has tried to protect this right under *Article 10(2)*. *Article 10* deals with Freedom of Expression. Under *Article 10(1)* the Right to Freedom of Expression of everyone is protected. But, *Article 10(2)* imposes certain reasonable restrictions on the unfettered use of this right. The restrictions imposed thereunder must be prescribed by law. It is also stated under this article

that, the restrictions can be imposed for the protection of the rights or reputation of others and for the protection of the confidential information.

In this respect, the text of **Article 10(2)** runs as follows:-

“ . . . restrictions . . . prescribed by law and are necessary in a democratic society. . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence . . . ”

Therefore, *Article 10(2)* is also a good attempt for protecting the Right to Privacy of Honour and Reputation. It has prescribed legal restrictions on the Right to Freedom of Expression in the interests of the protection of rights or reputation of others as well as for the protection of confidential information, which is part and parcel of Right to Privacy of Honour and Reputation. In this sense, *Article 10(2)* is also a supplement to *Article 8*, because it has completed the incomplete works of *Article 8*. Moreover, *Article 10(2)* has also helped to bridge the gap between *Article 12 of the Universal Declaration or Article 17 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention*. The term ‘reputation’ used in the above-stated *Articles 12 and 17* has not been used in the *Article 8* and thus, a gap is created between them, which are filled up by *Article 10(2)* by using the word ‘reputation’. Apart from that, protection of confidential information means the protection of Right to Privacy and more specifically Right to Privacy of Honour and Reputation, because Privacy and Confidentiality of Information are synonymous. Moreover, maintenance of confidentiality of information about oneself is required for the protection of Honour and Reputation of that person, either in private life or in public life, which is called the Privacy of Honour and Reputation. In this sense also, *Article 10(2)* is a supplementary provision to *Article 8*, because the direct use of Privacy is found therein, which is used indirectly in *Article 8*. Hence, the incorporation of *Article 10(2)* is a good initiative under the Convention.

Hence, it can be said that, *Article 10(2)* has accorded protection to the Privacy of Honour and Reputation in line with *Article 12 of the Universal Declaration and Article 17 of the International Covenant on Civil and Political Rights*, which is left by *Article 8 of the European Convention*. Due to this reason, it can be said that, *European Convention* has provided protection to various

components of Privacy under its different articles, which denotes the completeness of the *European Convention*.

3.5.5.5.2. The American Declaration of the Rights and Duties of Man, 1948 : A Positive Contribution for Protection of Privacy of Honour and Reputation

Article V of the American Declaration of the Rights and Duties of Man, 1948 deals with the protection of Right to Privacy of Honour and Reputation, which runs as follows:-

Article V

Right to Protection of honour, personal reputation and private and family life

“Every person has the right to the protection of the law against abusive attacks upon his honour, his reputation and his private and family life”.

This article deals with the legal protection of honour, reputation, private and family life of a person against any abusive attack as a matter of right. Therefore, this article deals with Privacy of Honour and Reputation along with other Privacy rights, because protection of Honour and Reputation against any abusive attack means the protection of that right in an all-round manner, which includes the protection of Privacy also. Any attack on Honour and Reputation always curtails the Privacy of that right and as such, those attacks cannot be separated from violation of Privacy. Hence, this article is applicable to Privacy of Honour and Reputation without expressly using the term ‘Privacy’. In this sense, it is applicable to protection of various components of Privacy in implied manner.

However, this article is similar with *Article 12 of the Universal Declaration of Human Rights* and *Article 17 of the International Covenant on Civil and Political Rights* as regards the protection of Privacy of Honour and Reputation, with the only exception that, it has never used the term ‘Privacy’ expressly as have been used in the other two articles. It is also not similar with *Article 8 of the European Convention*, because *Article 8* has not used the terms ‘Honour and Reputation’ in express manner. In this sense, it is similar with *Article 10(2) of the European Convention*, which has provided express protection to Privacy of Honour and Reputation. Hence, it is a good attempt for the protection of this right in the American region.

One more difference is found in this article with the other articles that, it has used the term 'abusive', whereas, the others have used the term 'unlawful'. More or less, these two terms are similar with a difference that, 'abusive' means misuse of law which means, partial violation of law, but 'unlawful' means total violation of law. In this sense, the scope and ambit of this article is narrower than the other articles stated above. In spite of this criticism, this article is advantageous as regards the protection of Privacy of Honour and Reputation. The positive side of this article is that, it has taken initiative for protection of Honour and Reputation of individual persons.

3.5.5.5.3. The American Convention on Human Rights, 1969 : Specific Protection to Privacy of Honour and Reputation

Article 11 of the American Convention on Human Rights, 1969 expressly deals with Right to Privacy as a Civil and Political Right. It has provided protection to various components of Right to Privacy including the Privacy of Honour and Reputation. Specifically, it has accorded respect to everyone's honour and has recognized everyone's dignity. Moreover, it has provided protection to the honour and reputation of every person against unlawful attacks. Such legal protection is provided to everyone as a matter of right under this article. Therefore, this article is drawn in same line with *Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights*. Only exception lies between the three articles is that, above stated *Article 11* has used the term 'Right to Privacy' only in the heading and not in any other place, but the other two articles have used this term within the articles expressly. In this sense, *Article 11* has provided protection to the Right to Privacy in implied manner, whereas, the other two articles have provided express protection to this right.

But, it can be said without doubt that, this article provides protection to the Privacy of Honour and Reputation, because unlawful attacks on Honour and Reputation always amount to violation of Privacy of Honour and Reputation. In this sense, whenever this article provides legal protection against unlawful attacks on Honour and Reputation, it obviously provides legal protection to the Privacy of Honour and Reputation.

However, this *Article 11* can be criticized on the following grounds:-

- 1) This article has never used the term ‘Right to Privacy’, except the heading.
- 2) It has given protection to ‘honour’, ‘reputation’ and ‘dignity’ separately, though all these terms are synonymous and can come under one umbrella.

Therefore, the criticisms of the article have made it narrower in its scope and ambit. But, in the ultimate effect, this article has become broader in its scope and ambit, because it has tried to protect various components of Right to Privacy thereunder. It is just specific about various terms relating to the Privacy of Honour and Reputation, wherein it has used the similar terms separately. By using the words in this manner, it has tried to provide special protection to each and every aspect of the Privacy of Honour and Reputation without any ambiguity or doubt. In this sense, the scope and ambit of this article have become broader as regards the protection of Privacy of Honour and Reputation. Hence, *Article 11 of the American Convention* has been proved to be advantageous with respect to the protection of Privacy of Honour and Reputation. This is the usefulness of the separate use of similar terms relating to Honour and Reputation. This separation should be taken as positive side of the article and not as negative side.

Finally, if this *Article 11* is compared with *Article 8 of the European Convention*, then dissimilarities are found between them, because *Article 8* has not used the terms ‘honour and reputation’. In this sense, this *Article 11* is similar with *Article 10(2) of the European Convention*, which has tried to protect the Privacy of Honour and Reputation like this article. *Article 11* also differs from *Article V of the American Declaration* as regards the nature of attacks on Privacy of Honour and Reputation, because *Article V* has used the terms ‘abusive attacks’ and *Article 11* has used the terms ‘unlawful attacks’. In this sense, the scope and ambit of *Article 11* is broader than *Article V*. Hence, it is a good initiative for protection of this right in the American region.

3.5.5.5.4. A Perusal of the Islamic Human Rights Instruments regarding Privacy of Honour and Reputation

The *Islamic Human Rights Instruments* dealing with various components of Right to Privacy are mentioned below:-

- (i) *Universal Islamic Declaration of Human Rights, 1981.*
- (ii) *Cairo Declaration on Human Rights in Islam, 1990.*

(iii) Arab Charter on Human Rights, 2004.

As such, the provisions containing the Right to Privacy of Honour and Reputation in the three *Islamic Declarations* are listed below:-

(i) The Universal Islamic Declaration of Human Rights, 1981 –

(a) Article VIII – Right to Protection of Honour and Reputation.

(b) Article XXII – Right to Privacy.

(ii) The Cairo Declaration on Human Rights in Islam, 1990 –

(a) Article 4 – Right to good name and honour.

(b) Article 8 – Right to Privacy.

(iii) The Arab Charter on Human Rights, 2004 –

(a) Article 21 – Right to Privacy.

3.5.5.5. An Examination of the ASEAN Human Rights Declaration, 2012 regarding Protection of Privacy of Honour and Reputation

Article 21 of the ASEAN Human Rights Declaration, 2012 has dealt with the protection of various components of Right to Privacy including the Privacy of Honour and Reputation. It declares every person's right to be free from attacks upon that person's honour and reputation. Not only that, but it also provides legal protection to every person against such attacks as a matter of right. In this sense, this article has tried to provide all-round protection to the Right to Privacy of Honour and Reputation. More or less, this article is drawn in same line with *Article 12 of the Universal Declaration of Human Rights* and *Article 17 of the International Covenant on Civil and Political Rights*. But, there is a slight difference between these three articles on the point that, both *Article 21* and *Article 12* have used the term 'attacks' on honour and reputation without specifying the nature of 'attacks'. On the contrary, *Article 17* has specifically mentioned the nature of attacks by using the terms 'unlawful attacks'. As such, *Article 17, Article 12 and this Article 21* are not different from each other by nature, but are different from the point of view of specific protection or more elaboration. However, there is no doubt that, every article provides protection to the Privacy of Honour and Reputation of individual persons.

Moreover, *Article 21* is also not similar with *Article 8 of the European Convention*, because it does not deal with the protection of Privacy of Honour and

Reputation; rather it is similar with *Article 10(2) of the European Convention*, which deals with the protection of this right. *Article 21* also differs from *Article V of the American Declaration* regarding the nature of attacks on Privacy of Honour and Reputation, because *Article V* has used the terms ‘abusive attacks’ as well as also differs from *Article 11 of the American Convention* as regards the nature of attacks on Privacy of Honour and Reputation, because *Article 11* has used the terms ‘unlawful attacks’. Hence, the initiatives taken by the *Article 21 of the ASEAN Declaration* for the protection of Privacy of Honour and Reputation are not as praiseworthy as the other international and regional legal instruments, due to the reason that, others have provided far better or specific protection to this right.

3.5.5.6. An Appropriation of the Municipal Legal Framework regarding Privacy of Honour and Reputation

As regards the protection of Right to Privacy of Honour and Reputation, the Municipal Laws of different countries are discussed hereunder.

3.5.5.6.1. The Viewpoint of Common Law Countries

The most important *Common Law Country* regarding the protection of Privacy of Honour and Reputation is *Australia*. It has provided protection to this right under the law of torts.

3.5.5.6.1.1. The Australian Outlook of Privacy Torts

Australia has the codified laws on Privacy as well as the Common Law action of torts for the protection of Right to Privacy. It has tried to protect various components of Privacy in various manners. But, as regards the protection of Privacy of Honour and Reputation, it has taken the help of Law of Torts. As such, in case of violation of Individual Privacy not involving any element of data protection, action cannot be taken under the *Australian Statutory Provisions*, instead action has to be taken only under the other forms of law not specifically designed to protect Privacy, which are as follows:-

- (i) *The tort of Trespass.*
- (ii) *The tort of Defamation.*
- (iii) *An action for Breach of Confidence.*¹¹²

¹¹² David Lindsay, *op.cit.*, p.167.

Another type of Privacy protection available in *Australia* is the prevention of *Disclosure of Private Facts*. In this respect, mainly two types of actions can be taken to protect private facts, which are the *action for breach of confidence* and the *action for the tort of defamation*. In certain limited circumstances, action can also be taken under the *tort of malicious falsehood*. Under the *Action for Breach of Confidence*, a duty to keep the material confidential may be imposed by contract or may arise from an equitable obligation. In order to maintain an *Action for Breach of Confidence*, the following elements should be satisfied:-

- (i) *The information must have the necessary quality of confidence;*
- (ii) *The information must have been imparted in circumstances importing an obligation of confidence; and*
- (iii) *There must be an unauthorised use of the information by the person to whom it has been imparted, to the detriment of the confidence.*¹¹³

Therefore, these *Australian Laws* can be taken into account for the protection of Right to Privacy of Honour and Reputation in *Australia*, because these are concerned with the disclosure of private facts about an individual, which are also directly related to the tort of defamation. Tort of defamation causes harm to the reputation of an individual, which has both physical and mental effects. The mental loss occurs due to defamation amounts to violation of Privacy of Honour and Reputation. In case of tort of breach of confidence, the same wrong occurs, which causes violation of Privacy of Honour and Reputation. Also the *Australian Law* prescribes the types of confidential information, disclosure of which amounts to breach of confidence. Privacy and Confidentiality of information are two sides of the same coin. In this sense, disclosure of confidential information about someone causes violation of Right to Privacy of Honour and Reputation of that person. Therefore, *Australian Law* prescribes protection of Privacy of Honour and Reputation under the Law of Torts. In this sense, the *Australian Law* is similar to *William Prosser's Privacy Torts* and *Australia* has tried to protect this right under the law of torts, which is another side of protection of this right simultaneous to the protection under the Human Rights Law. Hence, *Australia* has taken good initiatives for the protection of Privacy of Honour and Reputation.

¹¹³ *Coco v. A. N. Clark (Engineers) Ltd.* (1969) RPC 41, 47 per Megarry J.

3.5.5.6.1.2. The Canadian Notions of Fault and Harm

The *Canadian* Courts have suffered from dilemma in determining a particular wrong as a Common Law tort of Privacy or a tort of nuisance. The *Canadian* Laws for determining the claims for invasion of Privacy can be divided under the following heads:-

(i) *The Quebec Charter of Rights and Freedoms* – It has been the first statute in *Canada* for recognizing Privacy as a legal interest.

(ii) *The National Charter of Canada*.¹¹⁴

The statutory recognition of Privacy, mostly the Privacy of Honour and Reputation, in *Canada* in the *Pre-Charter* era can be divided into the following heads:-

(i) *The Quebec Law based on the French Law having two notions of fault and harm.*

(ii) *Privacy under Criminal Law – Part VIII of the Criminal Code deals with offences against the person and reputation.*¹¹⁵

Therefore, the *Canadian* Courts have played a little role for protection of Right to Privacy of Honour and Reputation in *Canada*. But, the *Canadian* legislature has taken few initiatives for the protection of this right. In this sense, the *Quebec Law* and the above-stated other legislations are noteworthy, which are based on the notions of fault and harm either under the *Law of Torts* or under the *Criminal Law*. Moreover, the *Canadian Criminal Code* has recognised the violation of one's reputation as a punishable offence. These are the *Canadian* legislative attempts in the *Pre-Charter* era.

In the *Post-Charter* era, the *Canadian Charter of Rights and Freedoms, 1982* has not taken much initiative for the protection of Right to Privacy of Honour and Reputation. In fact, it has no direct provision in this respect. The *Canadian Supreme Court* and the *Ontario Civil and Criminal Courts* have evolved various Privacy rights by way of judicial interpretation, among which the recognition of *Invasion of Privacy as a tort in its own right in the cases of personal harassment* is important.¹¹⁶ This provision is related to protection of Privacy of Honour and Reputation in *Canada*.

¹¹⁴ Marguerite Russell, *op.cit.*, pp.104-105.

¹¹⁵ *Id* at pp.105-106.

¹¹⁶ *Id* at pp.108-109.

3.5.5.6.1.3. The South African Negligence towards Privacy of Honour and Reputation

In *South Africa*, Section 14 of the *Bill of Rights of the Constitution of the Republic of South Africa, 1996* has provided protection to various components of Right to Privacy, but unfortunately it has not incorporated the Right to Privacy of Honour and Reputation within it. In this sense, *South African Constitution* is silent about the protection of this right or has neglected this right.

The Law of Privacy in *South Africa* is based only on three pillars, *Common Law or Civil Law principles (based chiefly on Law of delict or tort), Bill of Rights and Legislations*.¹¹⁷ The principles of delict or tort have been derived from the *Roman Law*, which protects the Right to Privacy with the help of Civil Law protection of dignity. In this sense, the *Roman Law* principles of *actio iniuriarum (action for invasion of Privacy)*¹¹⁸ is far better than the *Common Law* principle of *torts*, because the violation of Privacy is considered as the loss of dignity in the *Roman Law*, which is absent in *Common Law*. Therefore, regarding the protection of Privacy of Honour and Reputation in *South Africa*, the *Common Law and Civil Law* principles of Law of Torts have given better protection to this right. The *Civil Law or Roman Law* principle has considered the violation of Privacy as the loss of dignity, which is directly related to the honour or reputation of an individual. In this sense, this provision can be applicable for the protection of Privacy of Honour and Reputation in *South Africa*. Apart from that, the traditional *Common Law* principles of *Privacy tort and Breach of Confidence* are also existed in *South Africa*. These traditional laws are noteworthy for the protection of Privacy of Honour and Reputation in *South Africa*.

3.5.5.6.2. The Standpoint of Civil Law Countries

The most important *Civil Law Countries* regarding the protection of Privacy of Honour and Reputation are *France, Germany and China*. The positions of those countries in this respect are discussed hereunder.

3.5.5.6.2.1. The French Doctrine of Delictual Liability

France is mainly concerned with the protection of private life and not the protection of Right to Privacy. But, while trying to protect the private life, it has

¹¹⁷ Jonathan Burchell, *op.cit.*, p.2.

¹¹⁸ C. M. van der Bank, *op.cit.*, p.79.

taken initiatives for the protection of various components of Right to Privacy. Among them, Right to Privacy of Honour and Reputation is one important component.

The doctrine of private life has been developed in the *French Law* along with the development of photography. At the very beginning, in the absence of a special legal provision on private life, judges have relied on the principle of *delictual liability* under *Article 1382 of the Code Civil*. This right has been developed to protect certain aspects of the human personality, like honour and reputation, private life and the '*right to one's own image*' (*le droit à l'image*). This right is considered as the first approach of the *French Courts* to protect the private life in the *Pre-Act, 1970* era. The *right to one's own image* has been used to prevent breach of privacy, particularly by the tabloid press. It has also been used to protect professional life.¹¹⁹ Therefore, these initiatives of the *French Law* have recognised the problem of violation of Individual Privacy due to the unauthorised taking of photographs by the tabloid press. This wrong has been considered under the *delictual liability*, which is similar to the *Common Law action of Torts*. This is also similar to *Defamation*, which takes away one's reputation by disclosing private photographs of a person in public. In this sense, this law is helpful for protecting the Right to Privacy of Honour and Reputation of a person. Moreover, the *French Law* has tried to protect the honour and reputation of human beings by protecting the '*right to one's own image*'. This right has been used to protect the secrecy of professional life as well as to prevent the disclosure of embarrassing private facts about public figures in public, which may cause harm to their reputation. Hence, this is a good initiative of the *French Law* for protection of Privacy of Honour and Reputation.

Next period of the protection of private life in the *French Law* is the period of constitutional development, which is marked by the *Conseil Constitutionnel of 1995*, which has acknowledged the incorporation of this right under **Article 66**, stating as follows:-

*"Everybody has a right to the respect of her private life and to the dignity of her person".*¹²⁰

¹¹⁹ Catherine Dupré, *op.cit.*, pp.50-51.

¹²⁰ *Id* at pp.54-55.

Therefore, the *French Constitution, 1995* has created express provisions for the protection of private life and while doing so, it has upheld the dignity of individual persons, which is part and parcel of Right to honour and reputation. In this sense, this provision can be taken into account for the protection of Privacy of Honour and Reputation. Moreover, there are also other essential attributes relating to the private life in the *French Law*, which are helpful for the protection of Privacy of Honour and Reputation. Those are listed below:-

- (i) *Disclosure based on Consent.*
- (ii) *The Private Life of Politicians.*
- (iii) *Protection of Private Life of the Dead.*¹²¹

The above-stated provisions are directly related to the Privacy of Honour and Reputation of a person, because disclosure of unauthorised information in all these cases amount to the violations of this right. Hence, *France* has taken noteworthy initiatives for the protection of this right.

3.5.5.6.2.2. All-round Protection of Privacy of Honour and Reputation in Germany

The *German Law* is *Constitution-based* and in this respect, three types of law are found in *Germany*, the *Basic Law or the Constitutional Law*, the *Civil Code and the Criminal Law Code*.¹²² Apart from that, there are also certain *Federal and State Laws*, which have contributed towards the development of Privacy rights in *Germany*. Those are discussed below:-

- (i) *The Constitutional Court* has interpreted the rights contained in the *Basic Law* as inviolability of human dignity (*Article 1*) and free development of the personality (*Article 2*) to recognise and protect the Right to Privacy.¹²³

These *German Laws* have contributed towards the development of human dignity and personality. As such, these can be made applicable for the protection of Privacy of Honour and Reputation in *Germany*. However, the *German Law of Privacy* was age-old and at the very beginning, remedy was provided for invasion of Privacy under the tort of breach of confidence like the English Common Law. One important landmark judgement in this respect was *Bismark Case (RG 28 December*

¹²¹ *Id at pp.55-56, 57, 61, 63.*

¹²² Rosalind English, *op.cit.*, p.77.

¹²³ *Id at p.78.*

1899), where the remedy was provided on the ground of unjust enrichment, this case was similar with the old English case *Prince Albert v. Strange (1849)*, *1 Mac & G25*. Therefore, similarities with the *Common Law* have again been found.¹²⁴ Therefore, the old *German Law of Privacy* was based on the tort of breach of confidence, which has become helpful for the development of the law for protection of Privacy of Honour and Reputation.

(ii) Moreover, the *Basic Law of 1949* has created provisions for protection of Right to Privacy based on the right to dignity and development of personality. In this respect, the *Basic Law* contains various provisions for the protection of Right to Privacy, which are stated below:-

Article – 1

“The dignity of the human being is inviolable”.

Article – 2(1)

*“Everyone has the right to the free development of his personality, insofar as he does not injure the rights of others or violate the constitutional order or the moral law”.*¹²⁵

As already stated, these legal provisions are important for protection of Privacy of Honour and Reputation in *Germany*, because these have contributed towards the development of dignity and personality of human beings.

(iii) In this respect, it is pertinent to mention that, the rights incorporated in the *Basic Law* are considered as fundamental rights, which can be used to provide remedy in private disputes also and in this sense, can be applicable to cases of invasion of Privacy. Again, for further development and for specific protection of Privacy under national legislations, the Privacy provisions of *Basic Law* under *Articles 1 and 2* have been incorporated in the main tort provisions of the *Civil Code*. The important provisions in this respect are as follows:-

Article 823

“I. A person who intentionally or negligently injures the life, body, health, freedom, property or other right of another unlawfully is obliged to compensate the other for the harm arising from this.

¹²⁴ *Ibid.*

¹²⁵ *Id at p.79.*

II. The same obligation applies to a person who offends against a statutory provision which has in view the protection of another”.

Article 826

*“A person who intentionally inflicts harm on another in a manner which offends against good morals is obliged to make compensation to the other for the harm”.*¹²⁶

An analysis of the above-stated articles shows that, the first part of *Article 823* prohibits invasion of Privacy in an all-round manner, whereas, the second part of *Article 823* prohibits invasion of Privacy by way of breach of any statutory obligation. In this sense, the application of the second part is specific and limited, whereas, the application of first part is general, but covers a broad range of activities. However, the article as a whole is a good instrument for privacy protection, because it provides compensation in both the cases. The incorporation of *Article 826* actually provides additional protection to Privacy along with *Article 823*, by way of imposing obligation to pay compensation in case of intentional infliction of harm to good morals. As such, it is a provision for protection of Privacy from moral offences. In this sense, these articles can be applicable for the protection of Privacy of Honour and Reputation, because these articles have tried to protect various aspects of Right to Privacy, which include Honour and Reputation also. Moreover, those have tried to protect from moral offences, which include mental harm also. In this sense, those can be made applicable for the protection of Privacy of Honour and Reputation.

(iv) Apart from these articles, a few other important provisions for Privacy protection available in *German Law* are as follows:-

(a) *Sections 22 and 23 of the Law of Artistic Creations, 1907*, which prohibit the unauthorised publication of personal photographs.

(b) *The State Laws of the Federal Republic of Germany* prohibits the misrepresented publication by the Press by way of granting injunction.

(c) Invasion of Privacy in the public sphere amounts to a defamation, for which criminal liability is imposed under *Article 187a of the German Criminal Code*.¹²⁷

These laws are mostly related to prevention of unauthorised publication of personal photographs as well as the prevention of defamation, all of which are

¹²⁶ *Ibid.*

¹²⁷ *Id at pp.80-82.*

related to honour and reputation of individual persons. As such, these laws are good initiatives for the protection of Privacy of Honour and Reputation in *Germany*. Hence, it can be said finally that, *German Laws* have taken good initiatives for the protection of Privacy of Honour and Reputation, but mostly under the Law of Torts and Criminal Law. The *German Constitutional Law* only incorporates indirect provisions in this respect.

3.5.5.6.2.3. The Chinese Idea of Personal Privacy and Privacy Torts

China is another important *Civil Law Country* which deals with various components of Right to Privacy and provides legal protection thereof. It has mainly dealt with Personal Privacy and Privacy Torts. In this sense, a number of provisions are found therein regarding the protection of Privacy of Honour and Reputation. The *Chinese Constitution* and various *Chinese Legislations* have taken good initiatives in this respect. The following Constitutional and legislative provisions are pertinent to mention in this respect:-

(i) *Article 38 of the Constitution of the People's Republic of China, 1982* provides for the protection of personal dignity of *Chinese Citizens*, which runs as follows:-

Article 38

“The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited”.

(ii) *Article 101 of the General Principles of Civil Law, 1986* provides that, “Citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited”.

(iii) *Articles 145 and 149 of the General Principles of Criminal Law, 1979* consider invasion of Privacy as defamation and provide punishment thereof.¹²⁸

Though the *Chinese Constitution* does not recognise Right to Privacy of Honour and Reputation directly, but it has tried to protect this right under the guise of personal dignity under *Article 38 of the Constitution*. This article protects the personal dignity of every *Chinese Citizen* from any insult, libel or defamation, which are the wrongs relating to reputation and in this sense, this article can be made applicable for the protection of Privacy of Honour and Reputation. Again, the

¹²⁸ Guobin Zhu, *op.cit.*, pp.210-211.

general Principles of Civil Law and General Principles of Criminal Law have tried to protect the right to personality and right to reputation of the individual citizens, remedy for the violation of which are compensation under the *Civil Law* and are punishable under the *Criminal Law* as constituting the crime of *defamation*. All these aspects are part and parcel of the Right to Honour and Reputation of individual persons. As such, these laws can be made applicable for the protection of Privacy of Honour and Reputation in *China*. Therefore, the major laws of the country have incorporated various legal provisions for the protection of this right.

3.5.5.6.3. An Overview of the Nordic Law Countries regarding Privacy of Honour and Reputation

No such important initiative is found in the *Nordic Law Countries* regarding the protection of Privacy of Honour and Reputation. But, certain aspects of the legislative initiatives of *Sweden* and *Denmark* are noteworthy, which are stated hereunder.

3.5.5.6.3.1. Inadequacy of the Swedish Laws

Sweden has enumerated its laws of data protection by elaborating one of the rights of the *Nordic Conference*, called the right to protection from ‘being placed in a false light’. In this respect, *Sweden* has adopted various other laws relating to data protection, like *the Freedom of Press Act, the Secrecy Act, the Credit Information Act, 1974 and the Debt Recovery Act*. The *Swedish* approach of privacy laws is not based on a general right to Privacy, which is usually infringed by an ‘appropriation of likeness’, rather it covers the law of copyright, trademarks, unfair competition and libel.¹²⁹ Therefore, except one aspect of legal protection from libel, *Swedish Law* does not provide any protection to the Right to Privacy of Honour and Reputation.

3.5.5.6.3.2. Denmark : Indifferent Attitude towards Privacy of Honour and Reputation

Denmark is also concerned with the Data Protection Laws like *Sweden*, but certain articles of the *Danish Constitution* have tried to protect various aspects of Right to Privacy. But, unfortunately, it is silent about the protection of Right to Privacy of Honour and Reputation. However, *Denmark* is highly influenced by the *German* legal thought and has supported the necessity of a general ‘personality

¹²⁹ James Michael, *op.cit.*, pp.54-56.

right'. In this sense, *Danish theory* is similar to the *William Prosser's tort of 'appropriation of likeness'* as existed in *U. S. A.* and the *Danish Courts* have given judgements on the basis of this principle. But, inspite of these provisions *Danish Law* has not gone far to protect Individual Privacy and has remained concerned with Data Privacy only like *Sweden*¹³⁰. In the absence of further development of the above-stated principle in *Denmark*, the Right to Privacy of Honour and Reputation has always been neglected therein and any further development of this right has never been possible.

3.6. Sum Up

Right to Privacy is not a narrower local or regional human right, rather its scope and extent have been broadened so much that, it covers a wide range of globally accepted human rights within its periphery. In fact, Right to Privacy is considered as a global phenomenon in the modern age. It has international recognition and is effective in all parts of the world.

International recognition of Right to Privacy has been started just after the end of Second World War and the establishment of United Nations in the year 1945. It has got a remarkable development under the auspices of the United Nations. Presently, it is an internationally acclaimed human right. As such, it is incorporated as an important human right in numerous International Instruments. In this respect, it has a great international legal perspective.

In the international human rights law, 'Privacy' is clearly and unambiguously established as one of the basic human rights in 1948 with the proclamation of the Universal Declaration of Human Rights. The importance of Privacy as a human right and its need for legal protection has been given in the various other international instruments, like the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. In the regional level, there are also various human rights Conventions, which deal with the protection of Right to Privacy. Important conventions among them are the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the American Convention on Human

¹³⁰ *Id at pp.56-58.*

Rights, 1969, the African Charter on Human Rights and People's Rights, 1981 and the Asia-Pacific Privacy Charter, 2003.

Apart from the International and Regional legal instruments, Municipal Laws of various Countries are well-advanced on Right to Privacy. The Municipal Laws of different Countries can be divided into the Privacy Laws of Common Law Countries, Civil Law Countries and the Nordic Law Countries. A few other countries are also remaining, the Privacy Laws of which are important in this respect. Moreover, Privacy Laws are found all over the world in an all-round manner. In the modern period, the significance of Right to Privacy has been understood by all legal systems in the world and as such, the laws of Privacy enacted by them have become fruitful to portray the International Legal Arena of Right to Privacy.

Thus, the International Legal Arena of Right to Privacy can be summed-up as follows:-

- 1) The existence of Privacy in different parts of the world is not an isolated event but the outcome of a continuous process of development of Privacy all over the world.
- 2) The study of Privacy from the social and cultural contexts helps to draw the contention that, Privacy is not a narrower local or regional right; rather it is a universal right having great significance in the context of mankind in general.
- 3) In the present day society, Individual Privacy is recognized as a basic human right in all the developed and developing countries.
- 4) In this sense, the internationalization of Privacy is required by prescribing certain norms of Privacy, which should be universally acclaimed and international in character.
- 5) This process of internationalization of the Privacy Rights has already been started under the auspices of the United Nations all over the world.
- 6) Right to Privacy has assumed its universal character in 1948, since the proclamation of the Article 12 of the Universal Declaration of Human Rights.
- 7) It has been supported by various other International and Regional legal instruments, which have tried to give this right a concrete shape in the context of the world at large.

8) The internationalization of Right to Privacy has received a special significance by a number of Municipal legal instruments of worldwide recognition, like the Nordic Conference of Jurists, 1967 and the Younger Committee Report, 1972.

9) Moreover, the international character of Right to Privacy is characterized by the ideas of Liberty and Human Rights, which are essential for giving it a concrete shape.

10) These ideas have been recognized as the Privacy denoting factors in the international periphery with overwhelming consensus.

11) In fact, in order to give effect to that recognition, this right has been incorporated as an important human right in various international, national and regional human rights instruments as well as separate legal instruments has been created governing Right to Privacy as a whole.

12) More specifically, the legal instruments for the protection of Right to Privacy can be categorized as the International Legal Instruments mostly made under the auspices of the United Nations, the Regional Legal Instruments and the Municipal Laws of different countries.

13) The Municipal Laws of different countries can again be divided into the Laws of Common Law Countries, Civil Law Countries and Nordic Law Countries.

14) The Privacy Laws of major Common Law Countries include the Laws of U.S.A., U.K., India, Australia, Canada and South Africa whereas; the major Civil Law Countries in this respect are France, Germany and China. On the contrary, the major Nordic Law Countries having Privacy Laws are Sweden, Denmark and Norway.

15) The International Legal Instruments on Right to Privacy have tried to give protection to this right in an all-round manner, which have been made under the auspices of the United Nations and by way of adopting these instruments; United Nations has played a very important role for the protection of Right to Privacy in the international field.

16) The regionalization of Right to Privacy is also necessary along with the universalisation of this right and for this purpose, various Regional Legal Instruments have been made, which have become fruitful for the implementation of this right in the regional level.

17) As regards the Municipal Laws of different countries, the Privacy Laws of the Common Law Countries have been found to be well-developed.

18) Though the Common Law Countries are enriched with Privacy Laws, but the Civil Law Countries are not lagging behind them and in fact, Civil Law Countries have, even more advanced Privacy laws under both the constitutional provisions and national legislations.

19) The Nordic Law Countries are important for discussion, because of the Nordic Conference of Jurists, 1967, but practically, the Nordic Law Countries are not much concerned with Personal Privacy, rather they are mainly concerned with the Data Privacy and have enacted the Data Protection Laws.

20) Though the legal instruments for protection of Right to Privacy are important, but the division of this right into various components is noteworthy for a matter of discussion.

21) Apart from Individual Privacy, there are various other components of Right to Privacy also, like Privacy of Family and Marriage, Privacy of Home, Privacy of Correspondence and Communication and Privacy of Honour and Reputation.

22) The above-mentioned list is not exhaustive, rather inclusive in nature and as such, a number of other components may be found.

23) But, the international and regional legal instruments have confined themselves into these components only and as such, component-wise discussion of those instruments is confined into these components only.

24) Municipal Laws, in this respect have highlighted other components also, but these components are most noteworthy and most of the municipal laws have dealt with these elements.

25) However, protection of Right to Privacy in all round manner means the protection of all these components of Privacy worldwide, but, all the components are not adequately protected in every legal sphere.

26) Most importantly, municipal laws of each and every country have not dealt with all the components equally; rather each and every country has dealt with one or two components only.

In this respect, the most important point is that, incorporation of Privacy provisions in the Municipal Laws of different countries have become fruitful for the

enforcement of Right to Privacy and its various components throughout the world, because most of the international and regional legal instruments are not directly enforceable and can be enforced in indirect manner only by way of incorporating the provisions thereof, either in the national constitutions of different countries or by way of enacting national legislations for the implementation and enforcement of those rights. The inadequacy of municipal laws for protection of various components of Right to Privacy is the biggest problem in this respect and as such, enactment of comprehensive municipal legislations in this field is the need of the hour. Last but not the least, municipal laws are nothing but the extension of international and regional legal instruments, because most of the international and regional legal instruments are mere declaratory in nature, but the municipal laws are enforceable in nature.

CHAPTER 4

RIGHT TO PRIVACY: NATIONAL LEGAL FRAMEWORK OF U.S.A., U.K. AND INDIA

4.1. Prologue

Privacy is acclimatized with Freedom, because both of them are inseparable. In this sense, Privacy is a component of Freedom, without the protection of which, guarantee of Freedom remains incomplete. But, the Freedom or Privacy should not be absolute and in this respect, the question of dichotomy between Privacy and Public Interest comes into picture. Privacy is the representative of individual right, but Public Interest is the representative of public right, the protector and guarantor of which is the State. From this point of view, the question of State also comes into picture. Therefore, the conflict between State and individual is raised as a continuous and self-generating process. Interests of the State are served by the need to know about us as much as possible.¹ On the contrary, individual interests are served by maintaining by their Right to Privacy as much as possible. As such, a conflict of interests comes into being among them, wherein the first one seeks to gather information about the second one and the second one seeks to suppress information about himself or herself from the first one. Hence, the conflict of interests continues. This conflict of interests is an ongoing and never ending process, which is equally applicable to all ages of time.

It is to be remembered that, there are many times when we should provide personal information to the State for the purpose of individual as well as common good, but that should be done only for a limited and definite purpose. Providing every information means, curtailment of Privacy, this is undesirable. As such, when the definite purpose is over, access to personal information should be stopped. Therefore, it is necessary to fix a border line, where gathering and providing information should be ended. In order to do that, it is also necessary to reconcile the right of the individual to be let alone with the state's right to know about the

¹ Donald Madgwick and Tony Smythe, *The Invasion of Privacy*, Pitman Publishing, London, 1st Edn., 1974, p.1.

individual.² Therefore, protection of both, individual Right to Privacy and State's Right to Information is the urgent need of the hour.

Freedom or Privacy is must for the existence of individuals in a civilized democratic society, but simultaneously it is also to be remembered that, freedom should not be absolute. Total freedom is unexpected, because it is incompatible with responsibility to one's fellow men in a humane and efficiently functioning society.³ It can be morefully explained like that, in a situation of total freedom, everyone would lead the secluded life from one another, wherein no one would interfere in the life of another. It does not only mean enjoyment of private life, but also the non-fulfilment of duties towards others. It is undesirable in an ideal society, because men are social beings and can only be existed in a civilized social life dependent on one another. In an ideal society, total seclusion means helplessness and failure to lead a good life without the assistance of others. In an ideal society, everyone performs his or her functions, the combined effect of which means the social functions. In that situation, if anyone stops functioning in that manner owing to the enjoyment of Freedom or Privacy, then the whole societal balance would be destroyed. This situation, ultimately would lead towards the utter destruction of the society as well as the human beings. Due to this reason, total freedom is a utopian concept, the achievement of which is practically impossible.

If we could take a detached view and imagine an ideal society, it would be quite unlike anything we know today. Certainly there would be mutually agreed limitations on the arbitrary acts of individuals and in that sense; it would not be wholly free. For example, it would presumably not condone the unrestricted distribution of those addictive drugs which are universally recognized as dangerous, nor indeed any activity in which the freedom of one man depends on the victimization of another. The freedom to cause hurt to another individual, whether in body or mind, is a corrupting freedom which cannot well be defended by any society whose goal is the welfare of the people.⁴ Therefore, every free society is subjected to certain limitations and cannot be called free in the practical sense of the term. Freeness should be subjected to certain limitations and restrictions, because freedom

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

means, freedom of every person and freedom of one does not mean the infringement or victimization of freedom of others. In this sense, though we speak of a 'Free Society', 'Free Country' or a 'Free World', but those are actually impossible.

We do not live in an ideal society, but we live in what is in some respects a tolerably civilized and humane one. At times we all need to withdraw ourselves from the gaze of others and this in essence is what Privacy is all about. In fact, this is called the Freedom or Privacy. We cannot share everything with others and at the end of the day, we need to confine us within ourselves and for that, we need seclusion. That is the situation, called Privacy. The American Judge *Cooley (Torts, 2nd edition, 1888)* defined it as simply '*the right to let alone*'. This definition was amplified in a *California suit (Kerby v. Hal Roach Studios, 1942)* as '*the right to live one's life in seclusion, without being subjected to unwarranted or undesired publicity. In short, it is the right to be let alone*'. Such definitions are useful, but limited. Seclusion and solitude are states rightly demanded by the individual when he wishes to preserve what is essentially private, but they constitute only what we may call the negative aspect of Privacy.⁵

Therefore, what do we mean by Privacy and when do we need that, no unanimity is found among us on the point. Though the notable judges and jurists have highlighted the areas of 'Solitude' and 'Seclusion', while defining Privacy, everyone does not support this idea. According to some persons, these are all negative aspects of Privacy, because absolute solitude or seclusion is impossible and if, at all possible, would create negative impacts on human lives or have futile effects thereon. As for example, in a village, where a small child was found dead after lying alone for several days, due to non-interference by anyone, it undoubtedly has shaken the concept of Privacy by solitude or seclusion. The question, therefore, has been raised that, whether the neighbours has any moral duty to protect individuals in such circumstances or not. The question has also been raised that, whether any interference into private life in those cases would cause violation of Privacy or not.⁶ The reasonable answer is affirmative in favour of interference by bothers in most of the cases. Every prudent man would obviously support this view, because what would be the necessity of that Privacy which would lead to death of a

⁵ *Id at p.2.*

⁶ *Ibid.*

human being. Privacy is required for the enjoyment of the life of a human being and not the enjoyment of death. Due to these reasons, absolute solitude or seclusion is called the negative aspect of Privacy, which may lead to the above-stated disastrous effects.

Then what would be called the positive aspects of Privacy. To answer this question, a discussion of certain aspects of Privacy is important. The right of an individual to be 'let alone' must always be governed by the condition that his or her seclusion commits no harm to others.⁷ If a person is busy in planning a major terrorist activity in his seclusion, then maintenance of that Privacy would not be granted, because that would be futile to the mankind as a whole. On the contrary, if the neighbours would maintain their Privacy by not interfering into the seclusion of a distressed person or would feel that, interference into others seclusion, for whatever reason might amount to violation of their Privacy, that would also be imperfect thought regarding Privacy. It would also be futile for the human beings. As such, whether a neighbour has a duty to prevent someone from committing suicide in the seclusion of his own home is a matter on which there will be some disagreement. While the principle that, all life is sacred is a good one, there is a respectable argument that everyone has the right to dispose of his own destiny in his own way. There is the counterveiling argument, however, that we need to be protected from our weaknesses. Besides, the would-be suicide might well, if frustrated in his design, looking into his problems by others, is a more hopeful light. If we are all to be allowed to dispose of our own lives without restraint, the case for the free availability of narcotic drugs would to many people be irresistible.⁸ This situation is again, be dangerous for the existence of mankind. Therefore, enjoyment of Privacy, in these cases, would not be allowed.

Man, as a social being, has certain rights and obligations in the society. Every man also has certain duties towards the mankind in general. As such, one cannot escape from his or her duties in the name of maintenance of Privacy. If Privacy becomes dangerous for the whole mankind, enjoyment of that Privacy is not permissible. If solitude or seclusion brings the above-stated dangerous results, then that also, is not permissible. Then what is permissible about the Privacy. The answer

⁷ *Ibid.*

⁸ *Id at pp.2-3.*

is affirmative in favour of the well-being of the mankind in general. It means that, when Privacy brings good to all human beings in general and does not become deadly or futile for anyone, then it is permissible. In this sense, certain aspects of Privacy come into being and the scope of Privacy becomes limited. Privacy means, keeping secret only the matters of private life, outside interference is prevented wherein. Here, it is to be remembered that, the aspects of private life should be determined by oneself and there is no hard and fast rule in this respect. As such, the aspects of private life may vary from case to case. Due to this reason, there is no fixed definition of private life also, only certain aspects of personal life, like marriage, family, child-birth and rearing, adoption, sonship, parentage, guardianship etc. are included within the term 'Private Life'. Civilized people generally prefer to maintain Privacy in these cases and do not expect outside interference therein. Also, the common people want to avoid any unwanted publicity of their private lives. Hence, these can be called the positive aspects of Privacy, where people do not live in absolute solitude or seclusion, but maintain Privacy within their intimate relations and simultaneously perform their social obligations. In these cases, they just avoid unnecessary publicity in front of the public eye and nothing else. Therefore, this is called the true spirit of Privacy or positive viewpoint towards Privacy.

Though the definition of private life is not full-proof and varies from case to case, but is vital for determining the positive aspects of Privacy. Suicide is a crime under the penal code of any country and as such, permitting a person to commit suicide in the atmosphere of solitude or seclusion is derogatory to the basic principles of human civilization. As such, this kind of Privacy is called Negative Privacy. Neighbours should not interfere into one's private life in these cases, because any Privacy leading to one's death is unexpected. Therefore, Privacy should be constructed in positive sense of the term. When Privacy is followed by maintaining intimate and social relations, having reserveness among others and preventing unwanted publicity, then Privacy becomes Positive Privacy. In this respect, positive aspects of Privacy are welcomed in a civilized society, where stress is given only on the prevention of unwanted publicity of one's private life. Unwanted publicity brings unnecessary humiliation, harassment, defamation, appropriation of one's likeness and places oneself in the false eye. Therefore, true spirit of the Privacy

should be to protect oneself from those harassments. Here lies the Positive aspect of Privacy.

After discussing about the positive and negative aspects of Privacy, it is found that, Positive Privacy is accepted and Negative Privacy is rejected. This is the situation in most of the civilized countries. More or less, all the countries have enacted Privacy Protection Laws keeping in view of those points. Though all the countries throughout the world do not have Privacy Protection Laws, but most of the western countries have enacted laws in this respect. A few eastern countries have also enacted these laws. A detail discussion of Privacy Protection Laws in the international legal field, regional legal field and in the Common Law Countries, Civil Law Countries and Nordic Law Countries has been presented in the previous Chapter. Therefore, this Chapter will focus on the discussion of Privacy Protection Laws in U.S.A., U.K. and India.

4.2. An Analysis of Privacy Protection Laws in U.S.A.

Right to Privacy, although neither guaranteed in the *United States* as a constitutional right, had been judicially examined. In the *U.S.A.* the *first ten amendments to the federal Constitution* form the *Bill of Rights*. These amendments have been proposed by the Congress on *September 25, 1789*, within two years from the adoption of the Constitution of *U.S.A.* on *September 17, 1787*. These amendments are addressed to the federal government and were not extended to the various States till the adoption of the *Fourth Amendment in 1868*. Among the *first ten amendments, Amendments III, IV, V and IX* are material to Privacy. *Amendment III prohibits its quartering of soldiers in any house without the consent of the owner in peace times or without the authority of law during war. The Fourth Amendment protects the individual and his dwelling from unreasonable searches and seizures. The Fifth Amendment incorporates the rules against double jeopardy and self-incrimination. It also ordains that, no person shall be deprived of life, liberty or property, without due process of law. Ninth Amendment simply states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".⁹* In fact, *Ninth Amendment constitutes a*

⁹ K. C. Joshi, "Right to Privacy: An Extension of Personal Liberty", *Kurukshetra Law Journal*, Vol. 4 (131), 1978, pp.131-142 at pp.133-134.

*fundamental declaration of natural rights designed to protect the individual.*¹⁰ Justice Goldberg supports this view in his opinion in *Griswold v. Connecticut* case.¹¹ However, the application of *Bill of Rights* and the protection of liberty guaranteed in the *Fifth Amendment* have been extended to the States by the *Fourteenth Amendment*.¹²

The questions of Privacy as a protected constitutional right have been raised in the U.S.A. generally under the *Fourth and the Fifth Amendments*. In some cases, the other rights, more specifically, of the *First Amendment*, have been tested against the Right to Privacy. In *Olmstead v. U.S.*¹³ the validity of evidence obtained by wire-tapping was in issue. But, Justice Brandeis, in his opinion, held the Right of Privacy as “*the most comprehensive of rights and the right most valued by civilized men*”. Similarly, in *Wolf v. Colorado*¹⁴ the Supreme Court described the immunity from unreasonable search and seizure in terms of the Right of Privacy. *Map v. Ohio*¹⁵ is again a case under the *Fourth Amendment*. In this case, Miss Dollree Mapp was convicted for possessing obscene material in violation of State statute. She challenged her conviction based on evidence introduced in disregard to the *Fourth Amendment*. The Court by majority reversed the conviction. In the course of its decision, the Court referred to the Right of Privacy as any other right reserved to the people.¹⁶

Since the *Fourth Amendment's* Right of Privacy has been declared enforceable against the States through the *Due Process Clause of the Fourteenth Amendment*, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.¹⁷ The *fourth Amendment*, it has been held that, cannot be translated into a general constitutional “Right to Privacy”.¹⁸ Therefore, the above-stated U.S. constitutional provisions and Supreme Court cases show that, Right to Privacy is a recognised right therein. Though the Constitution

¹⁰ Bennett B. Patterson, *The Forgotten Ninth Amendment*, 1955, p.19, quoted in Trisolini and Shapiro, *American Constitutional Law*, 1970, pp.337-338.

¹¹ 381 U. S. 14, L.Ed. 2d 510 (1965).

¹² *Supra Note 9 at p.134.*

¹³ 277 U.S. 438 (1926).

¹⁴ 338 U.S. 25 (1949).

¹⁵ 367 U.S. 643 (1961).

¹⁶ *Ibid.*

¹⁷ *Id at pp.654-655.*

¹⁸ *Katz v. United States*, 19 L.Ed. 576, 581 (1967).

does not contain any express provision relating to Privacy, but the Supreme Court has tried to protect this right by judicial interpretation of various provisions of the *Bill of Rights*. In fact, the court has also tried to apply those judgements on the constitutional provisions, so that, those can be indirectly made applicable for the protection of Right to Privacy in that country. The views of a number of eminent American Jurists, in this respect, are noteworthy.

4.2.1. Privacy : The American Concept

Privacy, the right “*to be let alone*” has been the American Concept, at the very beginning. In fact, the growth of Privacy has been simultaneous with the growth of America – the new nation in a new continent of North America. Due to this reason, with the progress and development of the new American nation, called U.S.A., the growth of Privacy protection laws have been occurred concurrently. The first colonies on the North American Continent were founded and settled at least in part, because of a lack of Privacy in 17th Century England. Religious parishioners were not allowed the Privacy of conscience to worship as they pleased, so they emigrated to the New World in search of the ecclesiastical solitude and repose they could not find in Great Britain.¹⁹ The age-old English society was subjected to absolute Church control induced by traditional orthodox infrastructure, wherein no scope of modernity was found in religious matters. With the passage of time, religious parishioners wanted freedom or Privacy of their conscience, which they did not get anywhere. As such, they wanted solitude and repose in ecclesiastical matters. Solitude and repose are two essential elements of Privacy. In this sense, a new concept of Privacy was born in America and that was, ‘*Privacy of Conscience*’, which was also responsible for the birth of the new nation, called U.S.A.

Therefore, the creation of a new nation, named U.S.A. has been made, owing to the enjoyment of Privacy of Conscience, which is vital in the history of growth of Privacy in U.S.A., though that freedom has not been possible therein absolutely, but that is not important. Absolute freedom or Privacy is not possible in any subject or anywhere and as such, has not been enjoyed in U.S.A. also. But, the idea of Privacy has been flourished therein freely and gradually it has become the birth place of modern Privacy protection laws. Many new jurists have come up to define ‘Privacy’

¹⁹ Don R. Pember, *Privacy and the Press : The Law, the Mass Media, and the First Amendment*, University of Washington Press, Seattle and London, 2nd Printing, 1972, p.4.

in new ways and manners based on their point of view, which ultimately have become fruitful to develop a concrete idea of Privacy in U.S.A. Among them, *Thomas Cooley, Samuel D. Warren, Louis D. Brandeis and Edward J. Shils* are prominent.

The right “*to be let alone,*” was first declared by *Thomas M. Cooley* in his book.²⁰ He discussed the idea under the heading “*Personal Immunity*”, and suggested that the “*right to one’s person may be said to be a right of complete immunity: to be let alone*”.²¹ As such, this idea denotes the Right to Privacy, which has been illustrated by *Cooley* by saying that, every person should have a Right to privacy, without which one’s personal immunity is incomplete. Complete personal immunity means the guarantee of the right to be let alone. This is called the Right to Privacy which is associated with one’s right to personality. Complete right to personality includes both privacy and disclosure. If one is not allowed to live alone as and when he or she wishes, then what is the meaning of his or her Right to Personality? Complete right to personality means the Privacy and Disclosure of personal information according to one’s wishes. Here lies the importance of Right to Privacy and due to this reason; Right to Privacy has become part and parcel of Right to Personality. *Cooley* has been the prime exponent of this proposition.

In spite of the strong exposition of Right to Privacy by *Cooley*, the right has not been flourished extensively in the new born U.S.A. Even the Englishmen, who have come to U.S.A. in search of their ecclesiastical repose and solitude or in other words, the Privacy of Conscience, have not been successful in their attempt to enjoy Privacy. Mostly, the 16th, 17th and 18th century social environment of North America has been responsible for this. The inmates of the then America were habituated in sharing information with each other and in this sense, they mostly believed in disclosure, instead of Privacy. At that period, the social structure of America was mainly village-based and as such, the village-life was induced by similar practices like Indian villages. Usually villagers are habituated in free mixing with each other and taking part in each other’s daily activities. The then American society was not an exception to it. Due to this reason, practice of Privacy was absent therein.

²⁰ Thomas M. Cooley, *A Treatise on the Law of Torts*, Callaghan, Chicago, 2nd Edn., 1888, p.29.

²¹ *Supra Note 19 at p.4.*

At this juncture, *Cooley* has come with his concept of Right to Privacy or the right “*right to be let alone*”. But, due to the above-mentioned social infrastructure in America, *Cooley’s* idea of Privacy has been unacceptable therein. In this respect, it is to be remembered that, *Cooley* has come with his idea in 1888, a long time after the making of the new nation, U.S.A. By this time, Privacy has got certain significance therein with the transformation of village society into urban society and with the advent of press as well as journalism. But, at the very beginning at 16th and 17th century, Privacy was more or less, unthinkable in U.S.A. In this sense, *Cooley* was the propounder of modern concept of Privacy therein. Just two years after 1888, in 1890, two young lawyers have come in U.S.A. with a strong exposition of Right to Privacy or the right “*to be let alone*”. They have been *Samuel D. Warren and Louis D. Brandeis*, who have published their famous article titled “*The Right to Privacy*” in the *Harvard Law Review* in 1890. Though they have supported and elaborated *Cooley’s* idea of Privacy, but they have extended it faraway to cover the violation of Privacy of every unpublished work. In fact, their protest has been against the unreasonable encroachment of press and yellow journalism upon human lives. At that period, no legal protection has been available in U.S.A. against these encroachments. Only nearest law has been the English Copyright law, which could give protection to published works against any breach of the copyright. But, what about the unpublished works? Are their Privacy less important than the published ones? No answer has been available in the then laws about these questions. Therefore, *Warren and Brandeis* have come to find the answers and to provide protection to unpublished works. According to them, unpublished works are equally important like the published ones and their Privacy needs to be protected. In fact, those have more important Right to Privacy. While dwelling upon this concept, they have developed their own concept of Privacy, which they have called the Right to “*inviolable personality*”. In their words, every human being should have freedom of their personality, which no one can violate for any reason and that is called the right to “*inviolable personality*”, which in other words, known as Right to Privacy.

Therefore, since 1888 Right to Privacy has got some recognition in U.S.A. with the hands of *Cooley*, which has further been developed by *Warren and Brandeis*. In this respect, another important person has been *Edward Shils*, who has

further developed this right to reach a certain level. *Shils*'s thesis enlightened us in 1966, a long time after 1890, but it has confirmed the existence of Right to Privacy in the American society. During this period, America has seen total transformation of rural life into urban life and has clearly understood the difference between the two. According to *Shils*, some kind of physical privacy is available in rural lives owing to the distance living of the village dwellers, but mental privacy is absent therein owing to the close contact among themselves in their daily activities. On the contrary, city dwellers are sharing one apartment, having close neighbourhood, but are practically indifferent about one another. Though they are sharing physical space owing to which they are not enjoying physical privacy, but mentally they have no attachment and are not concerned about one another. In this sense, they are enjoying mental privacy. Also they are enjoying one kind of physical privacy in their closed door apartments, wherein every outsider is considered as an infringer of Privacy. *Shils* is the exponent of this new kind of Privacy in 20th century U.S.A., which is specific in the urban American society.

The transformation of American society from rural to urban has witnessed the growth of a new right, the Right to Privacy. Chief exponents of this right have been *Cooley*, *Warren-Brandeis* and *Edward Shils*. More or less, all these exponents have been unanimous regarding the concept of privacy as a right "to be let alone". But, it is to be remembered in this respect that, at the time of its formation, 16th and 17th century America has not been in a position to accept the existence of a new right, called the Right to Privacy. The then American society has been rural society subjected to open social structure, wherein social recognition of Right to Privacy is impossible. But, when the American society has been transformed into urban society with the passage of time, closed social structure has been formed, wherein everyone has felt the necessity of privacy and the Right to Privacy has come into being in due course of time. Formation of Press and Yellow journalism has propelled this initiative faster. Hence, the declaration of a new right, the Right to Privacy by the American Jurists and Lawyers at that point of time has been very significant for the growth of that new right therein.

4.2.2. The Value of Privacy in America

The value of Privacy in America cannot be disregarded in the changing social structure. The rural American society has been subjected to Physical Privacy, but the urban society has become subjected to Mental Privacy. In this respect, it can be said that, while the new city life has lacked the physical privacy which living in rural areas has afforded, it has provided another kind of privacy. According to the Sociologists, city life has freed men and women from the thinking of morality and immorality.²² In view of *Edward Shils*, it can be expressed as “*the oppressive moral opinion of village and rural society*”.²³ The village dwellers are usually habituated with traditional orthodox feelings and superstitious beliefs, wherein the questions of morality and immorality generally come into picture. The then American society has not been an exception to it. Owing to the feelings of morality and immorality, village dwellers have usually passed oppressive moral opinions to the persons seeking Privacy and showing indifferent attitude towards others. But, when the rural society has been changed into urban society, the city dwellers have become modern leaving behind the traditional orthodox concepts and superstitious beliefs. Moving above the feeling of morality and immorality, they have started showing indifferent attitude towards the fellow city dwellers by seeking their Right to Privacy. This, in view of *Shils*, means the freedom of men and women in city life from the “*oppressive moral opinion of village and rural society*”.

According to *Shils*, living in an urban area has increased the indifference of most residents to the behaviour of their friends and neighbours. The urban environment has become more exciting because more things have been available to do and see. Different activities, more specifically, politics, art, music, theatre, ambitions and careers have drawn the attention of the city dwellers “*out of the narrow primordial sphere and turned it outward, toward public things*”.²⁴ Due to these reasons, city dwellers have become indifferent towards one another. They have found many more activities to do instead of peeping into the windows of others’ houses to look into their insidal matters. Though man is curious by nature and man’s curiosity about the neighbourhood activities is universal, which can never be

²² *Id at p.8.*

²³ Edward Shils, “*Privacy : Its Constitution and Its Vicissitudes*”, *Law and Contemporary Problems*, Vol.31, No.2, 1966, p.288.

²⁴ *Id at p.289.*

changed with the changing time, place and society, but engagements in other activities have decreased the amount of curiosity of man towards others. This has been the main reason in 20th century American society for seeking Privacy of the individual persons. In fact, Privacy is most important for physical, moral and intellectual development of human beings. As such, development in politics, arts, music, theatre, ambitions and career has required Privacy in the American society, which has become main reason for the growth of Right to Privacy therein.

There were also other persons in American society speaking in same line with *Edward Shils*. As for example, author and critic *Granville Hicks* has expressed his views in 1959 regarding the new born Right to Privacy in the American city life, after living for several years in a small town in New England. His views are expressed hereunder:-

*“Our situation was the exact opposite of the situation of a family living in a New York city apartment. The city dweller is surrounded by multitudes of people, none of whom, as a rule, knows or cares to know anything about him. Of the kind of physical privacy that I enjoy he has none, but there is no doubt that he lives a more private life than I do”.*²⁵

Therefore, *Hick’s* idea of Privacy has also projected the same viewpoint like *Shils*. American city dwellers, at the then period, have become indifferent towards one another inspite of living in the close neighbourhood owing to their need of Privacy. This typical feeling in an environment of absence of Physical Privacy has given birth to another right, which is called the ‘Right to respect for Private Life’. Though Privacy and Private Life, both are not the same things, but there are similarities between the two. In fact, Privacy is required to protect one’s private life. In a city life, people have become habituated with the enjoyment of their own private lives, wherein they have not expected the interference of others. As such, the necessity of Right to respect for Private Life has been increased. Modern urban societies are mainly closed societies, wherein people do not expect interference of others into their private lives. Due to this reason, necessity of Privacy has been increased in the urban lives. America is the birth place of the modern urban society and as such, Right to Privacy in the city-life has been started therein.

²⁵ Granville Hicks, “*The Invasion of Privacy : The Limits of Privacy*”, American Scholar, Spring 1959, p.185.

On the contrary, village societies are mainly open societies, wherein people are habituated with free mixing with each other in their daily lives. The villagers generally prefer to share their personal information with others and do not feel the necessity of privacy in their lives. In every case, either good or bad, participation of all villagers are found and as such, they do not have any 'so called Private Life' like the city-dwellers. They never expect solitude, secularism or any closed-door activities like the city-dwellers. This has been the situation in the 20th century village life of the American society. Even after the establishment of the modern cities in America, villagers have been still existant. Therefore, 19th and 20th century America and more specifically, U.S.A. has stood upon the conjuncture of village and city-lives or in other words, at the conjuncture of 'Privacy and no Privacy'. In this circumstance, on the one side, village-lives have wanted 'no Privacy', but city-lives have wanted 'Privacy' on the other side. Due to this reason, *Hicks* has made his analysis of the need of Privacy in the 20th Century American society by making a comparison between the New England town life and New York City life. This comparison has clearly portrayed the picture of the then American society, which has facilitated to understand the value and growth of Right to Privacy therein.

But, *Hicks's* analysis alone is not enough to understand the value of Privacy at the then American society. In this respect, consideration of *Shils's* analysis is again noteworthy, because *Shils* has not only distinguished between rural and urban society, but has also distinguished between the urge of Privacy in different strata of urban American society. In fact, his study would help to provide an idea of need of Privacy in different classes of American society, which study also projects the idea that, Privacy at the then American society has been dependent upon the social stratification. In this respect, the analysis of *Shils* shows the multiform pattern of growth of Privacy in the American society. However, the growth of Privacy has actually been occurred in the urban society, wherein people have started enjoying their Right to Privacy. When this right has been enjoyed, people have understood the value of Privacy at the then period. When the value of Privacy has been understood, urge from every section of the society has come to recognise it as a general right, but the then American social structure has not been adequate to consider it as a full-proof right. As such, it has grown therein gradually as a basic legal right. But, the

20th century urban American society has contributed much for the growth of Privacy as a legal right in modern America or U.S.A.

As regards the value of Privacy in America, it is to be remembered that, American city-dwellers have first understood the importance of Privacy for the development of their physical, mental, intellectual and moral quality. It has been necessary to respect their private lives, to maintain the Privacy of their private lives and to maintain the respectability of an individual person in the society, depending upon one's social status. Privacy is a right, which protects one's personality from placing in a false light and to prevent one from defamation. As soon as a person acquires a social status, right to reputation is attached with his personality. Privacy is an essential right to protect one's reputation from being defamed. In a complex social urban structure and in a close society, the wrong of defamation is a very common problem, especially for the celebrities and politicians. This problem has become more serious after discovery of the tabloid press. Recognition of a legal Right to Privacy is the only remedy to prevent this problem. 20th century U.S.A. has been the first place to have undergone with all these problems and has been suffering from the urge of a legal Right to Privacy. *Warren-Brandeis* has understood the problem for the first time and has claimed the creation of a new right, called the Right to privacy. In a free and open village society, Right to Privacy may not be a prima facie important right, but in a modern urban close society, people need the protection of this right for their very existence. 20th century American society has witnessed this need for Privacy and has become an important catalyst for the growth of this right. Here lies the value of Privacy in the then American society.

4.2.3. Privacy : Its Development in Modern America

Modern American urban society has facilitated the need for Privacy, which in turn, has been suggested to be recognised by the 19th and 20th century American jurists, like *Warren, Brandeis, Shils and Hicks*. The name of *Cooley* is also noteworthy in this respect, who being the predecessor of these jurists, has coined the use of the term 'Privacy' for the first time. But, even after the recommendation of this right by these prominent persons, the growth of this right in America has not been a smooth one. If consideration is made from the ancient period, then it should be mentioned that, Anglo-American law was slow to develop a legal interest in the

personality of the individual. Before medieval times, the Romans recognised the importance of the sanctity of the individual's identity and afforded a legal remedy for mental suffering resulting from humiliating treatment or insult. While property rights received early recognition in the Common law, it was not until the 14th century that personal rights began to develop. The first recoveries for civil assault as an attempt at bodily harm were recorded in 1348.²⁶ Slowly, other personal rights emerged. The first known judgement for defamation was recorded in 1356. Recoveries for nuisances, noises, odours, dust and smoke soon followed. In 1745 the first known recovery for alienation of affection was granted in an English Court.²⁷

But, throughout this period of the extension of personal rights, courts in both Great Britain and the United States more often than not sought the violation of some property right as the basis for any recovery. Their tendency was understandable. The violation of a property right was much easier to demonstrate than the violation of personal right. Also, it was simpler to determine value in the payment of damages when property rights were involved.²⁸ It was difficult for the judiciary to fix a financial value on the mental suffering experienced by the parents of a seduced daughter. Such judicial hesitancy can be seen a line of cases, beginning in the early 18th century, involving ancient lights or windows, which is perhaps the earliest assertion of a legal right of Privacy. These cases, none of which were cited by *Warren and Brandeis*, graphically demonstrate how British Courts would uphold property rights over personal rights, even if an invasion of Privacy had occurred.²⁹

While the law of literary property was growing in Great Britain, it was also developing in the U.S.A. One of the earliest cases occurred in 1811 in Louisiana Territory and surprisingly *Warren and Brandeis* either missed or ignored it.³⁰ The defendant obtained a copy of a letter the plaintiff had written to a third party. He threatened to publish it, but was stopped by an injunction obtained by the plaintiff. The defendant then advertised that he had posted a copy of the letter on the wall of his printing shop for public inspection. The plaintiff went back to court and attempted to get the defendant's copies of the letter and to have the printer found in

²⁶ Nizer, "The Right of Privacy", Michigan Law Review, Vol.39, 1941, p.527.

²⁷ *Winsmore v. Greenbank*, Willes 577 (1745).

²⁸ *Supra* Note 19 at p.42.

²⁹ *Id* at p.43.

³⁰ *Denis v. Leclere*, 1 Mart.(O.S.) 297 (La.1811).

contempt of court for disobeying the injunction. At this stage of the action, Judge *Francis-Xavier Martin* ruled that a letter was an object of property and could not be published, without the writer's consent.³¹ This decision was a landmark decision in the field of development of Right to Privacy in U.S.A. Not only that, it was the forerunner of a long series of similar rulings in American courts, most of which were pronounced in New York State Chancery Courts. In 1839, in *Brandreth v. Lance*,³² *New York Chancellor Reuben H. Walworth* refused to issue injunction to stop the publication of a book entitled the *Life, Exploits, Comical Adventures and Amorous Intrigues of Benjamin Brandling M.D.U.P.L. U.S., a distinguished Pill Vendor [sic], written by Himself; Interspersed with Racy Descriptions of Scenes of Life in London and New York*. Therefore, this case has again shown the viewpoint of the then American Judges and Jurists for the protection of Right to Literary Property and not the Right to Privacy contained therein. In fact, nobody has felt about the violation of Right to Privacy and the mental sufferings owing to it, consequent to the said publication in that particular case.

Therefore, a series of cases have come into being in U.S.A. upholding the Right to Literary Property as against the Right to Privacy. But, gradually a certain amount of deviation has been found in the contention of the Judges, which would have become fruitful for the growth of Right to Privacy, finally. It is necessary to discuss the process to understand the contention of the Judges. In *Wetmore v. Scovell*,³³ *Vice-Chancellor William T. McCoun* modified the literary property rule and said that, a letter must possess the attributes of a literary composition before its publication could be stopped under its publication could be stopped under copyright law.³⁴ As such, certain amount of deviation has clearly been shown in this decision from the previous contentions as it has felt the existence of mental feelings behind any literary work, but has not recognised that feelings owing to the existence of the then legal parameters. Due to this reason, inspite of the acceptance of outrage of mental feelings, the Judge clearly contended that, remedy could only be available only on the ground of violation of Right to Literary Property and not on any ground of mental sufferings or outrage of mental feelings. Though this decision has not been

³¹ *Id* at p.315.

³² 8 Paige 23 (1839).

³³ 3 Edw. Ch. 543 (1842).

³⁴ *Supra* Note 19 at p.49.

able to protect Right to Privacy, but it can be considered as a step further in positive direction for the growth of Privacy in the then American society.

The above-stated decision has become famous as the *Wetmore decision*. *Chancellor Walworth* supported and reinforced this decision in the case of *Hoyt v. Mackenzie*³⁵ in 1848. This decision has clearly shown the acceptance of moral obligation to protect the mental feelings in any publication by *Walworth*. In fact, practically he has accepted and recognised the existence of such a right to protect mental feelings. But, simultaneously he has also accepted his inability to provide protection to this right owing to the existing legal parameters or the absence of adequate legal infrastructure. He has not supported the publication of private letters for wounding the feelings of individuals and has called such activity as a perverted public taste. According to him, it has been an unjustifiable wrong and a normal person could never commit such a wrongful activity. But, he has expressed his helplessness to protect the mental feelings in this regard, because the court has lacked jurisdiction to protect that right owing to the existing legal infrastructure, wherein remedies could be provided only for the violation of Right to Property and not for Right to Privacy.

The rule propounded by these cases has commonly been known as *Wetmore-Hoyt Rule*. This rule has remained the law for seven years before it was overruled in *Woolsey v. Judd* case, which was the leading U.S. case on the subject. In that case, *Justice John Duer* of the *New York Superior Court* ruled that the *Wetmore and Hoyt* decisions were a departure from the law to the extent that the plaintiff was required to demonstrate that the property in question possessed the requisites of literary composition.³⁶ In this respect, the views expressed by *Duer* can be summarised as follows:-

*“The writers of letters, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same . . .”*³⁷

Therefore, *Duer* has supported the exclusive right of writers of letters to publish the same. In support of his views, *Duer* further added that the receiver may only justify his publication of a letter when he can show that the publication was

³⁵ 3 Barb. Ch.320 (1848).

³⁶ *Supra Note 19 at pp.49-50.*

³⁷ 4 Duer 379 (1855).

necessary to the vindication of his own rights or conduct against unjust imputations. In his definitive opinion *Duer* made comments worthy of extensive quotation.³⁸ He made the following observation regarding the unauthorized publication of letters:-

*“ . . . one of the most odious breaches of private confidence, or social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice, opinions and sentiments, which seems essential to the well-being of society, and may involve whole families in great distress from the public display of facts and circumstances which were reposed in the bosom of others, in the fullest and most affecting confidence that they should remain forever inviolable secrets ”.*³⁹

The views of *Duer* expressed above, projects the idea that, unauthorized publication of letters is nothing but a breach of private confidence. In fact, *Duer* himself was against the unauthorized publication of letters and as such, expressed such views. Accordingly, it would amount to breach of confidence of the writer and would hurt his or her honorable feelings. Letters are the mediums of free exchange of ideas and expressions, which if published in unauthorized manner, the writer's feelings and sentiments would be seriously jeopardised. At the same time, nobody would trust this medium and the free interchange of advice, opinions and sentiments with others in a social system would be hampered. Free interchange of ideas is necessary for the social well-being. In a democratic civil society, free expression in any form or medium is a basic liberty, which if curtailed; the very basis of a civil society would be destroyed. On the other hand, everyone should enjoy the confidentiality of his or her expression and if the person, with whom certain information is shared, would publish such information in unauthorized manner, then it would surely be a case of breach of confidence. Therefore, every receiver of letter should have a moral and social duty to maintain the confidence of the writer of the letter. Every civil society is based on mutual co-operation and a kind of fiduciary relationship with one another, which if destroyed in this manner, and then what would be the fate of human civilization? Therefore, these types of wrongful activities should not be supported and everyone should have a social duty to maintain confidence with others.

³⁸ *Supra* Note 19 at p.50.

³⁹ *Supra* Note 37.

Society is also a family, which can be called an extension of the ordinary family. In that family, everyone has certain rights as well as duties. If any number of that family commits any breach of trust or confidence, the other members would surely be suffered. The necessity of maintaining confidence within the society gives birth to another kind of Privacy, called the Social Privacy. Social Privacy is nothing but the keeping of secrecy and confidentiality within different social relations. The feeling or sentiment shared with others should be kept as inviolable secrets. If that is done, then only the social balance would be maintained. If everyone uses others sentiments for his or her own benefit then distrust would propagate among the social relationships. Upholding Social Privacy is necessary to prevent such situation. Human beings are social animals and can live and flourish in a social atmosphere. They cannot live alone. Therefore, any activity, which jeopardises the social structure, would be disregarded. *Duer* has understood it very well and due to this reason, has expressed the above views. He has supported the existence of Right to Privacy in a social environment. He has also supported the necessity of recompose of violation of mental feelings and sufferings. But simultaneously, he has also expressed his inability to protect this right owing to the inadequate legal infrastructure. He has accepted the idea of giving compensation only in case of violation of Right to Property. From this point of view, *Duer* is similar with his predecessors, but from the other perspectives, he is far better than the others. Hence, the urge of privacy has been understood in U.S.A.

This has been the legal position in 1855 in U.S.A. It has continued till 1890, when *Warren-Brandeis* have come with their famous article, titled “*The Right to Privacy*”. The above study projects the idea that, not only *Warren-Brandeis*, but several other judges and jurists have understood the urge of a right, called ‘Privacy’ in U.S.A. But, their assertion was implicit, wherein *Warren-Brandeis* made explicit assertion. In fact, American judges have understood the necessity of this right for the protection of individual interests in the then social infrastructure, but due to inadequate legal infrastructure they have become unable to portray this right clearly or to provide legal protection thereof. The judicial process since 1830-1890 clearly provides this idea. Again, at this course of development of Privacy, concept of this right was somewhat haphazard, owing to which judges have become unable to name

this right clearly or to define this right in concrete manner. At this juncture, *Warren-Brandeis* have come with their bold steps to create a new right in explicit manner and to create provisions for the protection thereof.

But, it is to be remembered that, *Warren-Brandeis* have not taken into consideration the above-mentioned leading American cases on recognition of Right to Literary Property and providing some confirmation to the Right of mental feelings and sufferings. Instead they have considered the famous English case *Prince Albert v. Strange, 1848*. The reason behind this may be that, in that case, the subject-matter has been the acute case of breach of Privacy or Personal Confidence, wherein judgement has been given on the ground of 'Breach of Confidence'. It has been specifically stated therein that, the case has attracted the violation of Privacy, but owing to the absence of law in that respect, remedy has been given on the ground of breach of confidence. This case has been considered as the origin of Right to Privacy in England as well as in U.K. Most probably, owing to this reason *Warren-Brandeis* have referred this case in their article and considered it as the basis for existence of Privacy in the Common Law System before 1890. As such, they have disregarded the then American cases, wherein concrete formation of Right to Privacy has not been found and which have been based on the recognition of Right to Literary Property only.

The idea of Literary Property is a half-hearted concept, wherein everything, like the words, thoughts and expressions have also been considered as the property of the owner or the sender of the letter. Even it has been told that, creation of mind would be the property of the creator. Therefore, a tendency has been found at the then period, to bring everything under one umbrella and that is a property. The situation has been that, no law has there been found protecting the privacy of literary or other works and as such, it has been necessary to bring the matter under the Law of Property, in any manner, to provide remedy for violation of the right thereof. This is a very vague concept, which is unacceptable in the modern legal system. If nothing is found, then how can it be possible to bring the matter under the existing law, wherein no remote possibility is found to do the same. But, the then American judges have done the same. At this juncture, *Warren-Brandeis* have come with their new legal principle. Their point of view should be discussed in this regard.

In fact, *Warren-Brandeis* have tried to bridge the gap between the Law of Literary Property and the Law of Privacy. In this respect, their point of view is pertinent to mention, which is stated hereunder:-

*“The principle which protects personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality”.*⁴⁰

Therefore, *Warren-Brandeis* have contended, that, by way of unauthorized publication, what is violated, is not the Right of one’s Private Property, but the Right of one’s Inviolable Personality. Right to Private Property has its physical existence, it is tangible and it provides protection to an individual against theft or physical appropriation of property. But, applying this right to provide remedy against unauthorized publication of one’s literary works, is a misconception, because in that case, what is violated is one’s emotions and mental feelings which are intangible. Therefore, a new right is required to be developed to protect such violation of intangible aspects. Based on this point of view and the urge of developing a new right to cover the violation of intangible rights of human beings, *Warren-Brandeis* have developed the Right of Inviolable Personality or in other words, the Right to Privacy. By providing this new right, they have tried to bridge the gap between the Right to Literary Property and the Right to Privacy. In this respect, their Contribution has made a paradigm shift in the American legal system, wherein transformation of Right to Literary Property into the Right to Privacy has become possible.

But, a detail study of the 18th and 19th century American case laws on Literary Property provides the idea that, judicial remedy at the then period to prevent the unauthorized publication of letters, manuscripts, photographs or any other ‘so-called production of the mind’ has been possible only under the property law. Though a number of judges have mentioned about the necessity of Right to Privacy, but those have been made only as obiter dicta. As such, privacy issues have been considered as good judicial philosophy at the then period and not as good law. At such situation, *Warren-Brandeis* have propounded their idea of new Right to Privacy, which has been the totally opposite idea of the then view of Right to

⁴⁰ Samuel D. Warren and Louis D. Brandeis, “*The Right to Privacy*”, Harvard Law Review, Vol. IV (5), 1890, pp.193-220 at p.205.

Literary Property. As such, projection of such viewpoint has been absolutely unexpected at that period of time. Hence, it has taken a long time for acceptance of the idea of Right to Privacy in America. In this sense, the idea of *Warren-Brandeis* seems very contemporary, because they have become able to create a future projection for providing remedy towards the violation of mental feelings and sentiments.

Warren-Brandies have also specifically mentioned the basis of their new Right to Privacy and that is, 'mental suffering'. They have clearly specified that, this right is necessary to provide redressal to the mental suffering. However, few instances have been found in U.S.A. before 1890 for awarding damages for mental sufferings, but that has been done mostly in cases of seduction, wherein mental suffering is a vital element. Apart from seduction, one or two cases of bodily trespass in 1880 have attracted the idea of Privacy and have awarded damages for mental suffering, but those have only been exceptional cases. General rules have remained the same, wherein judges have questioned regarding the measurement of mental sufferings and conversion of it into monetary compensation. Even they have also questioned about the remoteness of damage owing to mental sufferings. Keeping in view of all these, nobody has been willing to consider Privacy as a tort or a ground for considering mental sufferings. At this juncture, the contention of *Warren-Brandeis* has been unacceptable by all and has been severely criticized by the then judges and jurists.

Though the law of Privacy has been rejected by most of the American judges and jurists, but two important judicial decisions are worth mentioning in this respect, which have awarded compensation for violation of Individual privacy in the pre-*Warren-Brandeis* era. Those are *Demay v. Roberts* and *Manola v. Stevens* case. In *Demy v. Roberts*,⁴¹ a doctor has taken an untrained assistant for delivery of the child of an expecting mother at her home without informing about the capacity of the assistant. The lady and her parents have thought that, the assistant has been a trained assistant and have not objected at his presence during delivery. But, after coming to know of the true facts about the assistant, she has sued for the violation of her Privacy during child-birth. Chief Justice Isaac Marston of the Michigan Supreme

⁴¹ 46 Mich. 160 (1881).

Court has granted compensation in that case on the ground of violation of Privacy by saying that, the occasion of child birth being a sacred one, an expecting mother should have a legal right to Privacy in this respect, which no one can violate. Specifically, compensation has been awarded in that case on the ground of breach of Privacy and not trespass or any other tort. In this sense, this decision in 1881 is a remarkable decision before *Warren-Brandeis* on the aspect of Privacy.

Same thing has happened in the case of *Manola v. Stevens*, which has been an unreported decision. In that case, an opera star has been asked by the manager of the theatre to pose for photographs for the advertisement of the production in her costume, especially in tights. When she has refused to do so, the manager has hired a photographer and has taken her flash pictures in the costume, when she has been performing in the opera. All these have been done without her consent. As such, after coming to know of the photographs, she sued for an injunction to prevent the alleged manager from using the photographs. New York Supreme Court Judge George L. Ingraham has issued a permanent injunction in that case in favour of the actress on the ground of breach of Privacy.⁴² It is to be remembered that, in that case, decision has been given specifically on the ground of breach of Privacy and not on the ground of breach of contract or otherwise. Moreover, this decision is given in the year 1890, when the famous *Warren-Brandeis* view has come into being. Due to this reason, this decision has received further impetus later on.

Therefore, the importance of these two decisions in the growth of Privacy Law in America cannot be disregarded. In fact, these have been the initial privacy decisions before *Warren-Brandeis* and those have been referred later on as the initial privacy decisions. The importance of these decisions lies within themselves. In *Demay*, courts have seen an obvious intrusion on the private life of an expectant mother. In *Manola*, legal scholars note the first case in which an individual has stopped the display or publication of her photograph without resorting to the breach of contract argument.⁴³ In this sense, these two decisions have highlighted two important aspects of Right to Privacy. Due to this reason, the significance of these two decisions in the development of Right to Privacy in America has been recognised by everyone. Just after the pronouncement of these decisions, the

⁴² The New York Times, 15 June, 1890, p.2; 18 June, 1890, p.3; 21 June, 1890, p.2.

⁴³ *Supra Note 19 at p.56.*

contention of *Warren-Brandeis* has come into being. In this sense, these decisions can be called pre-cursor or forerunner of *Warren-Brandeis* view of Right to Privacy.

4.2.4. Periodic Growth of Right to Privacy in U.S.A. : An Appraisal

The growth of Right to Privacy in U.S.A. has not been made at once or has not been the result of a sudden event; rather it has been the creation of time. In fact, it is a regular process, by which the Right to Privacy has been developed step by step in U.S.A. In this sense, it is a natural process, which has started automatically with the growth of modern society in U.S.A. As soon as everyone in the modern American society has felt the necessity of Privacy in their lives, the growth of Privacy has been occurred therein automatically. Judicial decisions are nothing but the reflection of social feelings and as such, when the social need and acceptance of Privacy have become common in U.S.A., Judges have also pronounced their decisions upholding Individual Right to Privacy. This has been the main reason behind the growth of Right to Privacy in U.S.A.

In fact, *Warren-Brandeis* and their urge to create a new Right called 'Right to Privacy' is just a part and parcel of this process and not an isolated event. At that point of time, many American jurists and legal scholars have thought about Right to Privacy, *Warren-Brandeis* have been just two of them. But, what they have done is that, they have boldly presented their views and have firmly established the new right, which others have failed to do. Due to their initiative, the growth of Privacy has got a further impetus in U.S.A. It has acted like an internal combustion in the process of growth of Privacy therein. Otherwise, the growth would have been very slow. The speciality of *Warren-Brandeis* has been that, they have helped to speed-up the growth; otherwise it would have taken much more time to come than it has taken. Due to this reason, the contribution of *Warren-Brandeis* is noteworthy in the growth of Right to Privacy in U.S.A. However, it is to be remembered that, the process of growth of Privacy can be divided into various stages or periods, each of which has not evidenced the growth of this right in positive direction, because sometimes the growth has suffered from various obstacles and has moved towards negative direction. Therefore, the growth of Privacy in U.S.A. has not followed any uniformity and has been subjected to various ups and downs.

Don R. Pember, in his book “*Privacy and the Press : The Law, the Mass Media, and the First Amendment*”, has clearly specified the phasic or periodic development of Right to Privacy in U.S.A. According to him, development of Right to Privacy in U.S.A. can be divided into the following six phases or periods:-

- (i) 1890 – 1910.
- (ii) 1911 – 1930.
- (iii) 1931 – 1940.
- (iv) 1941 – 1950.
- (v) 1951 – 1960.
- (vi) 1961 – 1970.⁴⁴

A study of the development of Right to Privacy in U.S.A. since 1890 to 1970 has evidenced the growth of Privacy in U.S.A. in various dimensions. The American states have recognised this right step by step and ultimately the law has taken a concrete shape in 1970. A discussion of the development upto 1970 does not mean that, the development has stopped at that time. In fact, it has been the time, when the law has reached its highest level, a level which is equal with the present format. As such, since this period modern development of the law of Privacy has been started. The law which has grown at that time has become relevant for today’s time also. Due to this reason, it can be said that, development ends in 1970 and the present formation of the law has been emerged at that period. The contemporary law of Privacy has been originated during the seventies, hence the seventies can not only be called an era of development of Law of Privacy, rather would be called the forefather of the present Law of Privacy in U.S.A.

4.2.5. Present Privacy Laws of U.S.A. : A Representation

The Present Laws of Privacy in U.S.A. have been formulated into various legislative enactments in somewhat haphazard manner. Though it is said that, U.S.A. is well-versed country in Privacy Laws, but practically it is not true. The well-versed nature of Privacy Laws has generally been referred in comparison with the Privacy Laws of other countries. Among the Common Law Countries, U.S.A. is having a good number of Privacy Legislations and Judicial Precedents granting Right to Privacy, whereas, the other Common Law Countries are mainly dependant on

⁴⁴ *Id at p.xiii.*

Customary Laws for the protection of their Right to Privacy. In this sense, U.S.A. is well-versed in Privacy Laws. But, in comparison to Romano-Germanic family of laws, U.S.A. is not so well-versed in Privacy Laws, because France and Germany also have good number of Privacy Laws in the form of both Legislations and Judicial Precedents. Moreover, France and Germany have tried to protect both the Right to respect for Private Life and Right to Privacy, whereas, U.S.A. has covered only Right to Privacy under legislative protection. In this respect, U.S.A. has no full-proof laws covering every aspect of Right to Privacy.

The U.S. Law of privacy is based on both federal and state laws. The foundation of the Federal Privacy Law is based on the U.S. Constitution, which has no express provision relating to Privacy, but has tried to protect it in implied manner. Mostly, the Law of Privacy has been developed therein by the judicial interpretation of U.S. Supreme Court, but the trend of judicial pronouncements project the idea that, U.S. Supreme Court has not always strictly followed the constitutional provisions and as such, the Law of Privacy has become inconsistent, fluctuating and haphazard. It is not always easy to interpret in uniform manner. Apart from this peculiar nature of Federal Privacy Laws, State Privacy Laws are also not advantageous for the protection of Right to Privacy, because there are at least fifty different State Legal Systems having separate Privacy Laws. The U.S. State Legal Systems are unique from one another in their very existence owing to the reason that, each of them has been based on separate customary rules and regulations. As such, each of those States has developed its own Privacy Laws distinct from the others, none of which is insignificant from the perspectives of Legal Right to Privacy. Therefore, U.S.A. is well known for multidimensional Privacy Laws covering various aspects of Right to Privacy. In this sense, the U.S. Privacy Law has enriched itself with multidimensional aspects, but due to its scattered nature, the law has not gathered itself at one point and hence, the law has not still reached at its highest level. However, a representation of the U.S. Federal and State Privacy Laws is required for analysing the Privacy Laws of U.S.A.

The Present Laws of Privacy in U.S.A. can be categorised as follows:-

(i) *The U.S. Constitution, 1789.*

(ii) *Federal Privacy Laws –*

- (a) The Privacy Act, 1974.*
- (b) Consumer Privacy Laws.*
- (c) Health and Medical Privacy Laws.*
- (d) Family Education Rights and Privacy Act, 1974.*
- (e) Electronic Communications Privacy Act, 1986.*
- (f) Children’s Online Privacy Protection Act, 2000.*
- (g) Neighbourhood Children’s Internet Protection Act, 2001.*
- (h) The USA PATRIOT ACT, 2001.*
- (i) The Federal Trade Commission, 2001.*
- (iii) State Privacy Laws – Laws on Workplace Privacy.*

The Privacy Laws of U.S.A. can be categorised as above. Though the above list is not exhaustive and there are many other laws on Privacy covering different important Privacy Laws of U.S.A. The relevancy of those laws for the protection of various components of Right to Privacy is presented hereunder.

4.2.5.1. Right to Privacy under the U.S. Constitution, 1789

The U.S. Constitution has never guaranteed Right to Privacy, but it has protected this right in implied manner. Most of the U.S. Supreme Court judges are unanimous on this point. According to them, the Penumbras of the Bill of Rights of the *U.S. Constitution* contain provisions relating to Right to Privacy. Based on those Penumbras, judges have interpreted Right to Privacy in various cases. A study of different provisions of Bill of Rights will provide the idea that, though protection of Right to privacy has not been the prime concern of various amendments of the *U.S. Constitution*, but each and every amendment is quite capable of giving protection to various aspects of Right to Privacy. A protection of the different amendments of the *U.S. Constitution* will provide a clear picture in this respect, which is presented hereunder:-

- (i) First Amendment provides protection of the freedom to associate, which necessarily protects privacy of one’s associations.*
- (ii) Third Amendment deals with prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner. As such, it protects the privacy of home.*

(iii) *Fourth Amendment guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”. Obviously it protects the Individual Privacy.*

(iv) *Fifth Amendment contains the “Self Incrimination Clause”, which enables citizens to create a zone of Privacy which government may not force citizens to surrender to their detriment. Therefore, it provides protection to the Privacy of Personal Liberty.*

(v) *Ninth Amendment provides that, the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. It means, express enumeration of certain rights in the Constitution does not mean the implied denial of other rights; rather it means the implied protection of other rights. In this sense, Right to Privacy also gets implied protection under this amendment along with other rights.*

(vi) *Fourteenth Amendment says that, the dual rights of due process of law and equal protection under the law have been held to protect Individual Rights to Privacy, especially in the area of sexual or marital activity, which some states have criminalized, like the right to contraception, interracial marriage, abortion and consensual sexual activity. Therefore, Right to Privacy of these private activities of individual life has been recognised impliedly by the U. S. Constitution. It also provides the idea that, guarantee of these private activities of life includes the guarantee of Right to Privacy of Family and Marriage along with the Individual Privacy.⁴⁵*

Therefore, Bill of Rights of the *U.S. Constitution* has provided implied protection to various components of Right to Privacy. It has well been supported and further elaborated by the U.S. Supreme Court. Along with the Constitutional Right to Privacy, U.S.A. is also well-versed with the Privacy Torts, as enumerated by *William Prosser*. He has written an article titled “*Privacy*” in *California Law Review* in 1960, wherein he has specified these four classes of torts violating the individual Right to Privacy. He has termed those as “*Privacy Torts*”. In the absence of express provisions protecting Right to Privacy in the *U.S. Constitution*, these

⁴⁵ Helen R. Adams, Robert F. Bocher, Carol A. Gordon and Elizabeth Barry – Kessler, *Privacy in the 21st Century: Issues for Public, School and Academic Libraries*, Libraries unlimited, Wesport, Connecticut, 1st Edn., 2005, pp.2-3.

“*Privacy Torts*” have become important instrument for protection of Right to Privacy in U.S.A.

4.2.5.2. Federal Privacy Laws

Apart from the *U.S. Constitution*, a number of Federal and State Privacy Laws have been found in *U.S.A.* Among those laws, Federal Privacy Laws will come first in the discussion of U.S. Privacy laws. Most important among those from the viewpoint of protection of various components of Privacy are summarised hereunder:-

4.2.5.2.1. Privacy of Personally Identifiable Information : The Privacy Act, 1974

The Privacy Act, 1974 is the most important federal privacy statute of U.S.A. passed by the U.S. Congress. Though it has been passed long before, but till now, it is the most important and most relevant privacy statute in *U.S.A.* It is considered as the first effort to regulate any government’s collection, maintenance, use and dissemination of personally identifiable information (PII). Personally identifiable information means the information specific enough, like full name, home, address, email address, library patron, record etc. which are helpful to enable someone for identification of an individual. The primary focus of the *Privacy Act* is the government’s collection of PII and the use of computer technology for sharing such information across federal agencies.⁴⁶ Most important feature of this Act is the introduction of “Fair Information Practices”, which has the following elements:-

I) Openness and Transparency – People should be aware that records are being created and kept. There should be no secret record collection.

II) Review and Correction – People should have access to records related to themselves and should have the opportunity to correct mistakes in those records. The *Privacy Act* has given this right to U.S. Citizens and resident aliens, but not to foreign visitors.

III) Collection limitations – The government should not collect personally identifiable information it does not need.

IV) Relevant, Accurate, Complete and Timely – Personally identifiable information should only be collected, if it is relevant, accurate, complete and timely.

⁴⁶ *Id at pp.3-4.*

V) Use Limitations – Personal data should only be used for purposes related to the reason for which they were collected.

VI) Limitations on Sharing Information – Personally identifiable information should only be shared across agencies with the express permission of the person.⁴⁷

Basically, the *Privacy Act, 1974* has been created at the verge of increased use of computer technology to prevent the evil effects of excessive use of computer on Right to Privacy. The prime concern of this Act has been the impact of creation and use of computerized databases on Individual Privacy Rights. It has tried to safeguard Right to Privacy with the help of four procedural and substantive rights in personal data, which are stated below:-

- (i) It requires government agencies to show an individual any records kept on him or her.
- (ii) It requires agencies to follow the principles of “fair information practices”, when gathering and handling personal data.
- (iii) It places restrictions on how agencies can share and individual’s data with other people and agencies.
- (iv) It lets individuals sue the government for violating its provisions.⁴⁸

However, the Act has certain exceptions, which have been incorporated therein with the passage of time and in the wake of changing circumstances after the 11.9.2001 attacks. As the intelligence and law enforcement agencies have required special protection in the post 11.9.2001 era, therefore, the following exceptions have been added therein:-

- (i) Government agencies engaged in law enforcement can excuse themselves from the “fair information practices” or other rulings of the Act owing to the very nature of their activities.
- (ii) Government agencies can also escape their liability of information sharing or “fair information practices” with the help of “routine use” clause, wherein they are exempted from doing so owing to the “routine use” of the information.

The Act has tried to protect Right to Privacy at the threshold of the excessive use of computerised personal data, but the Act has never declared Right to Privacy as an absolute right. As such, it has put the above-stated exceptions, wherein

⁴⁷ *Id at p.4.*

⁴⁸ www.epic.org/privacy/1974_act.html, visited on 28.10.2016.

Individual Right to Privacy can be compromised with, in the interest of the national security or for other use of law enforcement or of the intelligence bureau. Incorporation of *Subsection (b) of the Privacy Act*, which permits disclosure of personally identifiable information by the government agencies in the twelve specific cases, in fact, projects towards the idea of limited protection of Right to Privacy. In this sense, Right to Privacy is not an absolute right in U.S.A. But, incorporation of penal provisions for violating the provisions of the Act provides the idea that, government agencies can escape their liability of “fair information practices” only in reasonable circumstances and not in unreasonable circumstances or manner. Hence, the Act has provided, though not absolute, but a good amount of protection to Right to Privacy.

4.2.5.2.2. Consumer Privacy : The Laws

Since the passing of the *Privacy Act, 1974* U.S. Federal Government has taken initiatives for the protection of Consumer Protection Rights, which include mostly consumer financial information and medical or health-related information, but have been extended upto every area of consumer privacy, like the servant or driver licensing agencies keeping records of the servants or drivers enlisted therein and the photographers keeping records of our personal photographs and video recordings. All these are important areas of consumer privacy, which need to be protected carefully; otherwise there is every chance of loss of Consumer Privacy of the individual citizens. Among all these, financial and medical records are most important personal records, as such; U.S. Federal Government has provided legislative protection in these cases.

Consumer Privacy protection is one of the top priorities of the U.S. Federal Government. Companies usually share financial information of their clients in order to earn more profits, but these cases are vulnerable for the individual citizens, because their loss of Privacy may be caused owing to the use of the customer’s personally identifiable information by the financial institutions. In this respect, two policies followed by the Companies are pertinent to mention hereunder:-

1) Opt-in Policy – *The term commonly used where you have the choice on whether and how any of your PII will be used. In other words, you are in control of your PII*

and anyone wanting to use it must ask your permission. This is the current European Union's standard for the protection of its citizens' PII.⁴⁹

2) Opt-out Policy – The opposite of opt-in is opt-out, where any PII you make available on paper, via the web, and so forth, can be used in any manner, unless you specifically “Opt-out” and request that it not be used. Unfortunately, opt-out and provisions may not be available on a web site or paper form where you are entering PII. Of course if no opt-out provision is given, you always have the option not to continue using the web site or service.⁵⁰

Therefore, the basic nature of the policies suggests that, *Opt-in Policy* is better than *Opt-out Policy* for the purpose of protection of Consumer Privacy of the individual citizens. But, it is to be remembered that, none of the policies is full proof and cannot provide adequate protection to Individual Right to Privacy. Due to this reason, U.S. Federal Government has enacted various legislations for protection of Consumer Privacy and Consumer financial information. Among them, most important are *the Electronic Fund Transfer Act, the Right to Financial Privacy Act, the Fair Credit Reporting Act and the Gramm-Leach-Bliley Act (GLBA)*. Though all these laws are relevant for protection of Consumer Privacy in U.S.A., but *GLBA* is the most contemporary and best suited legislation for the loss of Consumer Privacy Rights.

GLBA is formally known as *Financial Modernization Act, 1999*. It has removed federal statutory language prohibiting the merger of certain financial institutions, like banks and insurance companies.⁵¹ In fact, *GLBA* has encouraged financial merger, but simultaneously it has also raised concern about the access to huge amount of financial data by the newly merged financial institutions and their agents. In order to protect the Privacy of those financial data, the Act has incorporated following provisions in the *Title V* of the Act:-⁵²

(i) *With limited exceptions, financial institutions can disclose a customer's personal information to a third party only upon notifying consumers, and allowing them the option to prevent such disclosure (an “Opt-out” provision).*

⁴⁹ *Supra Note 45 at p.5.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² “*In brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act*”, Federal Trade Commission, <http://www.ftc.gov/bcp/online/pubs/buspubs/glbshort.htm>, visited on 12.4.2004.

(ii) *Financial institutions cannot disclose a consumer's access number or code to a non-affiliated third party for use in marketing to consumers.*

(iii) *Financial institutions must ensure the security and confidentiality of customer financial records and information and protect against unauthorized access to such information.*

(iv) *At least once annually financial institutions must in a "clear, conspicuous, and accurate statement"⁵³ notify their customers of the institution's privacy policies.⁵⁴*

However, *GLBA* has been criticized by various jurists owing to its failure to provide comprehensive protection to Consumer Privacy Rights. More specifically, it has the following defects:-

(i) It has a number of privacy protection notifications, but none of them is full-proof.

(ii) It is mainly dependent upon the Opt-in and Opt-out policies.

(iii) It has only restricted sharing of information to non-affiliated third parties, but has not made any provision to prevent sharing of information among the affiliated third parties.

(iv) Prevention of unauthorized access to customer financial information under this Act is not so stringent.

(v) Privacy notifications under this Act are very cumbersome in language and as such, not always possible for the ordinary customers to read and understand those notifications.

(vi) The Act is not strong enough to override the State Laws, some of which are even more stringent than this Act, like the *California, Connecticut and North Dakota* laws.

In this sense, though U.S.A. has tried to protect Consumer Privacy Rights, but still not in a position to provide comprehensive protection in this respect, because of the defects as well as inadequacies of the *GLBA*.

4.2.5.2.3. Health and Medical Privacy : The Laws

Health Care Privacy is a new dimension of Right to Privacy, which has a great significance in the present social structure. Health Care Privacy is closely associated with doctor-patient relationship, where maintenance of secrecy about the patients' medical condition is the duty of the doctors. It is also obvious to maintain

⁵³ *Ibid*, visited on 5.4.2004.

⁵⁴ *Supra Note 45 at p.6.*

privacy in the Health Insurance Policies; otherwise the Policy Holders' right to privacy will be violated. Public disclosure of all information about a Policy Holder's health condition is unwarranted.⁵⁵ In this respect, the importance of Health and Medical Privacy laws can be understood. U.S.A. has tried to protect the Health and Medical Privacy of the individual citizens and for this purpose, has enacted the *Health Insurance Portability and Accountability Act (HIPAA), 1996*.

The *Health Insurance Portability and Accountability Act (HIPAA), 1996* is the only piece of legislation passed by the U.S. Congress in 1996 for protection of Health and Medical Privacy Rights. This Act provides for the improved efficiency and effectiveness of the health care system by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information. Therefore, the Act prevents the unauthorized transmission of electronic health information records. The insurance providers are also bound to prevent such unauthorized transmission of electronic medical insurance records of their policy holders.⁵⁶ As such, the Act has tried to establish a full-proof mechanism for the protection of Health and Medical Privacy Rights.

In fact, *HIPAA* has provided federal privacy protections related to personally identifiable information (*PII*) in a patient's medical records or other health-related records, irrespective of the format of such information.⁵⁷ In this respect, this is the first federal law to provide country-wide protection towards the relevant PII, which was not available in U.S.A. prior to this Act. Most important creation of this Act is defining the term "*Protected Health Information*", which includes within its ambit individual names, street addresses, email addresses, telephone and fax numbers, Social Security numbers, full-face photos, biometric identifiers, like finger and voice prints and any medical record identification numbers and health plan member

⁵⁵ Sangeeta Chatterjee, "*Emergence of Health Care Privacy in the Health Insurance Sector: A Modern Approach*", in Manas Naskar(ed.), *Impact of Reforms on Indian Insurance Sector*, Manav Prakashan, Kolkata, 1st Edn., 2013, pp.255-260 at p.255.

⁵⁶ *Id* at p.258.

⁵⁷ "*Protecting the Privacy of Patients' Health Information*", U. S. Department of Health and Human Services, <http://www.hhs.gov/news/facts/privacy.html>, visited on 6.4.2004.

numbers.⁵⁸ The law specifically covers medical clinics, hospitals, other health care providers and health insurers.⁵⁹

It is pertinent to mention that, the privacy provisions of the Act have become fully effective since April, 2003. The Act has provided following general guidelines for the health care providers:-⁶⁰

- (i) *Notify patients of their rights under the new privacy regulation, including the right to review and obtain a copy of all their medical records and to correct errors in their records.*
- (ii) *Take reasonable steps to ensure that communications with the patient are confidential.*
- (iii) *Have administrative, technical and physical safeguards to prevent the misuse of a patient's health information.*
- (iv) *Obtain an individual's permission (Opt-in) before disclosing a patient's medical information for marketing purposes.*⁶¹

Though the *HIPAA* has been proved to be an effective mechanism for protection of Health and Medical Privacy Rights of the individual U.S. Citizens and it has the above-mentioned advantages, but it is also suffering from the following disadvantages:-

- (i) It is good that, it has created a new era of digitization of patients' medical records, but simultaneously digitization has increased threats to individual Privacy, for which *HIPAA* has not provided any full-proof protection.
- (ii) Another problem is the outsourcing of transcription of medical records to other countries, wherein there is every chance of Privacy violation.
- (iii) Other countries, where outsourcing is made, if not have adequate Privacy protection laws, then U.S. Government has nothing to do in case of loss of Privacy of medical records therein.
- (iv) In spite of the Privacy protection guidelines, the *HIPAA* is dependent on Opt-in policies and nothing new has been made under the Act.

⁵⁸ "Standard for Privacy of Individually Identifiable Health Information; Final Rule", Federal Register, Vol.67, No.157, August 14, 2002, <http://www.hhs.gov/ocr/hipaa/privrulepd.pdf>, visited on 28.5.2004.

⁵⁹ *Supra Note 45 at p.7.*

⁶⁰ *Supra Note 57.*

⁶¹ *Supra Note 45 at p.7.*

(v) Genetic testing, a newly emerged medical issue is not specially protected under this Act and comes under ordinary “Protected Health Information”. As such, Privacy of the Genetic testing records and their medical information is not protected under this Act.

Therefore, *HIPAA* is subjected to various loopholes, which should be removed with the passage of time. More specifically, a new dimension of Health and Medical Privacy called the Genetic or *DNA* testing to determine one’s susceptibility to various diseases, has been emerged, wherein protection of Privacy of Genetic or *DNA* testing records, is the urgent need of the hour. Hence, U.S. Laws should cover these new areas of Privacy protection in the Health and Medical sector.

4.2.5.2.4. Privacy of Educational Records : Family Education Rights and Privacy Act, 1974

Another important aspect of Right to Privacy in U.S.A. is the Privacy of Educational records and freedom of maintaining secrecy of those records. In this respect, the U. S. Federal Government has passed the *Family Education Rights and Privacy Act (FERPA), 1974*. The Act is enacted specifically to provide access to parents and adult students to their educational records in order to review those records and to correct the errors occurred therein. Also the Act provides right to have control over those records by the parents and adult students, so that, they can prevent the schools to use those records apart from the predetermined enlisted purposes. As such, the schools cannot share educational information of their students according to their wishes without the permission from the parents and adult students.

The Act is advantageous in this sense that, it prevents any unauthorised sharing of educational information of individual U.S. Citizens. As such, it protects the Right to Privacy of educational information of U.S. Citizens. But, it is to be remembered that, it should be helpful morefully in case of digitized records. Also threats are more serious in case of digitization of educational records. However, one disadvantage of this Act is that, it has not covered Public Library records under educational records and as such, protection of those records would not be covered under this Act. Hence, enactment of *FERPA* is a good initiative for protection of

Privacy of Educational rights in U.S.A., though its scope and ambit should be enlarged further.

4.2.5.2.5. Privacy of Communication in the Electronic Media : Electronic Communications Privacy Act, 1986

The *Electronic Communications Privacy Act, 1986* is a federal legislation in U.S.A., which is enacted for the purpose of protection of Communication Privacy in the Electronic medium. Privacy of Communication is an important element of Right to Privacy, which is suffering from serious threats with the invention of information and communication technology. With the invention of electronic media, any information can be tapped easily. Apart from that, advanced scientific technology has brought into effect various tracking devices with the help of which Privacy of Communication can be violated easily. As such, age-old telephone wiretap laws have become obsolete and new laws have been required. At this juncture, U.S. Federal Government has enacted the *Electronic Communications Privacy Act (ECPA), 1986*.

ECPA has updated the existing telephone wiretap laws to incorporate computer and wireless communications. It has tried to create balance between Individual Privacy and government need to use wiretapping as a tool in criminal investigation. It has authorized wiretapping of electronic communication, like email, but has provided that, a law enforcement agent seeking such a wiretap should show probable cause and obtain a warrant before collecting the information.⁶² Therefore, it is an effective piece of legislation, which has allowed interpretation of electronic communication in the interest of national security, but has simultaneously remembered the loss of Privacy owing to it. As such, it has imposed reasonable restriction on interception of electronic communication, even by the law enforcement agencies, so that the Act should never be misused. In this sense, it is a good attempt for protection of Communication Privacy in U.S.A.

4.2.5.2.6. Online Privacy of Children : Children's Online Privacy Protection Act, 2000

Children's Online Privacy Protection Act (COPPA), 2000 is an important federal legislation for protection of 'Online Privacy' of children in U.S.A. Children

⁶² *Supra Note 45 at pp.8-9.*

are vulnerable sections of the society and they can be easily exploited owing to their immaturity in any society, irrespective of time and place. As such, protection of children is the prime concern of every country and U.S.A. is not an exception to it. Right to Privacy is such a Human Right, which is applicable to every individual including children. Privacy of children is utmost important for their healthy living and upbringing, otherwise their childhood may be lost owing to sharing of unnecessary information about them, which may be used in detriment to their interest. Such changes are more in the present era of information technology, wherein children are habituated with regular use of internet, more specifically in a developed country, like U.S.A. Children usually surf internet without knowing the negative side effects of the internet, where they may be misused by the porn sites for child prostitution or the like crimes. In most of the cases, these incidents happen by getting personal information from the children using various websites and obviously information is gathered beyond their knowledge. In such cases, Right to Privacy, especially 'Online Privacy' of children is seriously threatened, for the prevention of which, Acts, like *COPPA* is very much necessary.

Though Right to Privacy of children from every aspect, is not protected in U.S.A. till now, but the U.S. Federal government has enacted *COPPA* for protection of 'On-line Privacy' of children therein, which is a more serious issue in the present social circumstances. For the protection of 'On-line Privacy' of children and young adults, the age limit has been determined as twelve and under. This age limit is very vulnerable, because children at this age are very immatured and highly prone to various exploitation. As such, the law is passed by the Congress. The law has targeted the commercial websites which collect personally identifiable information (*PII*) from young website visitors.⁶³ According to *COPPA*, these sites should fulfil the following requirements:-

- (i) *Post a privacy policy.*
- (ii) *Provide notice of data collection practices.*
- (iii) *Get verifiable consent from parents to collect personal information from children.*

⁶³ *Id at p.9.*

(iv) Allow parents to review the information collected, revoke their consent and/or request deletion of the collected information.

(v) Establish procedures to safeguard the confidentiality and integrity of the data.⁶⁴

COPPA has various advantages, like control of Federal Trade Commission over the popular children websites, 'verifiable parental control' on seeking personal information from children and penal provisions including monetary compensation and fine for violating the provisions of *COPPA*. But, it has the following disadvantages:-

(i) Non-profit seeking organizations, like Libraries are not covered under the Act, but children surf websites in the libraries also. Hence, there is every chance of Privacy violation.

(ii) As the libraries are not covered under the Act, children using library websites do not require 'verifiable parental control' for surfing those sites. This is a big demerit.

(iii) In case of children surfing any website requiring 'verifiable parental control' in the libraries, Librarian generally offers alternative websites. Therefore, *COPPA* compliance can be easily escaped.

(iv) *COPPA* privacy provisions are very complex and not easily understandable for the children. Therefore, staffs and officers are always required for explaining those provisions to children.

However, every initiative is subject to advantages as well as disadvantages and *COPPA* is not an exception to it. In spite of its disadvantages, *COPPA* has been proved to be a fruitful legislation for prevention of 'Children's On-line Privacy' violation, because various statistical data and survey reports show that, seeking children's *PII* in unauthorized manner by the websites has been decreased significantly after the passing of *COPPA*. In this sense, it is a good initiative of the U.S. federal government for protection of 'Children's On-line Privacy'.

4.2.5.2.7. Privacy of Students in Internet : Neighbourhood Children's Internet Protection Act, 2001

Neighbourhood Children's Internet Protection Act (NCIPA), 2001 is an important U.S. federal legislation for providing mandatory Internet filtering requirements on a community-oriented basis. In fact, it is a community-oriented

⁶⁴ "Protecting Children's Privacy under *COPPA*: A Survey of Compliance", April 2, 2002, Federal Trade Commission, <http://www.ftc.gov/os/2002/04/coppasurvey.pdf>, visited on 10.8.2003.

legislation and requires that, schools and libraries should maintain internet safety policies for the students or children admitted therein. The main difference between *COPPA* and *NCIPA* is that, *COPPA* prevents websites to gather PII of children using the sites and *NCIPA* prevents school and libraries from unauthorized using of PII of students over the internet. It is a piece of legislation for controlling the communities, like schools and libraries. The similarity between both the Acts is that, both of them have been enacted for internet safety purposes. Another difference between the two is that, *COPPA* is a legislation prescribing preventive measures, but *NCIPA* is policy-oriented or directive legislation for controlling the monitoring standards and techniques of the Schools and Libraries in respect of the internet use by the students.

As such, enactment of *NCIPA* is a good initiative for providing internet safety measures and standards in U.S.A. Though it is not a full-proof legislation, but is a good attempt for protection of Right to Privacy of the students using the internet or in case of electronic surveillance of students in the Schools or Libraries.

4.2.5.2.8. Privacy vs. Terrorism : The USA PATRIOT Act, 2001

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 2001 (The USA PATRIOT Act) has been passed in U.S.A. at the verge of the acute terrorism activities in wake of the 9/11/2001 attacks therein. This Act has made numerous changes in various privacy protections in a number of existing laws. The most important feature of this Act is that, it is not privacy protection legislation, rather a privacy reducing legislation. In fact, it reduces privacy rights and increases interception of personal information for prevention of terrorism. In this sense, there is a huge difference between *USA PATRIOT Act* and other privacy protection laws, like *HIPAA* and *COPPA*. Where these two laws have provisions for protection of Privacy, *USA PATRIOT Act* does not have so. It is very complex statute and has been enacted keeping in view of the long run consequences. Due to this reason, it portrays a confusing picture in front of the common people. Moreover, it has amended nearly 100 sections of 15 existing federal statutes concerning Right to Privacy on account of which also, it can be understood as a privacy preventive statute in the common parlance.

Most important changes introduced by the *USA PATRIOT Act* can be summarized as follows:-

- (i) It permits “roving” surveillance – that is, surveillance orders attached to specific people, not necessarily specific locations or telephone numbers.*
- (ii) It allows application for Foreign Intelligence Surveillance Act (FISA) surveillance or a search order if gathering foreign intelligence is a significant reason for the application rather than the reason.*
- (iii) It authorizes pen register and trap and trace device orders for email as well as telephone communications.*
- (iv) It permits secret FISA court to order access to any “tangible thing”, rather than only business records held by lodging, car rental and locker rental business.*
- (v) It prohibits U. S. financial institutions from maintaining “correspondent accounts” for foreign banks.*
- (vi) It creates new customer identification and record keeping standards, especially for foreign customers.*
- (vii) It encourages financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities.*
- (viii) It prohibits laundering the proceeds from cyber crime or supporting a terrorist organisation.*
- (ix) It provides explicit authority to prosecute overseas fraud involving American Credit Cards.*
- (x) It allows confiscation of property located in this country for crimes committed in violation of foreign law.*
- (xi) It creates new federal crimes of terrorist attacks on mass transportation facilities and for offences involving biological weapons.*
- (xii) It creates new federal crimes for conducting the affairs of an enterprise which affects interstate or foreign commerce through the patterned commission of terrorist offences.*
- (xiii) It creates new federal crimes for fraudulent charitable solicitation.*
- (xiv) It authorizes “sneak and peak” search warrants.*
- (xv) It permits nationwide execution of warrants in terrorism cases.*

(xvi) *It allows the attorney general to collect DNA samples from prisoners convicted of any federal crime of violence or terrorism.*⁶⁵

Therefore, the Act has created and allowed the use of new surveillance devices and mechanisms for prevention of terrorism. In this respect, it has curtailed individual Right to Privacy by allowing the sharing of personal information by the law enforcement agencies and authorizing the issue of “sneak and peak” search warrants in the interest of national security. But, simultaneously it has created new customer identification and record keeping standards for identification of foreign customers. Though all these measures are found as privacy violative but simultaneously it protects Right to Privacy of individual citizens by controlling cyber crimes and other fraudulent activities. Hence, it is a very useful piece of legislation at the threshold of terrorist activities throughout the world and not a weapon of oppression like the totalitarian regimes. Terrorism is an instrument of mass killing and as such, even the Right to Privacy can be compromised with for its prevention.

4.2.5.2.9. Competition Privacy : The Federal Trade Commission Privacy Agenda, 2001

The Federal Trade Commission has been established in U.S.A. on September 26, 1914 by the *Federal Trade Commission Act, 1914*. Practically, the *Federal Trade Commission (FTC)* has started functioning on March 16, 1915. Basically, *FTC* is engaged for protection of Consumer Rights and promotion of Competition. Since its establishment, this has been the main vision of *FTC*, but with the passage of time, it has included the task of protection of Consumer Privacy within its basic objective. In this respect, the *Federal Trade Commission (FTC) Privacy Agenda, 2001* is very important. For the purpose of protection of Consumer Privacy, *FTC* gathers power from various Privacy protection legislations in U. S. A., like the *Gramm-Leach-Bliley Act, the Fair Credit Reporting Act and the Children’s Online Privacy Protection Act*.

Most important initiative by the *FTC* for Privacy protection is the *FTC’s Privacy Agenda, October 2001*, the main features of which are summarised below:-

(i) *Creation of national DO NOT CALL list.*

⁶⁵ *Supra Note 45 at pp.11-12.*

- (ii) *More aggressive enforcement against spam mail.*
- (iii) *Helping victims of identity theft.*
- (iv) *Putting a stop to “pretexting” the collection of PII under false pretences.*
- (v) *Encouraging accuracy in credit reporting and compliance with the Fair Credit Reporting Act.*
- (vi) *Enforcing corporate privacy statements or policies.*
- (vii) *Increasing enforcement and outreach related to children’s online privacy in conformity with COPPA.*
- (viii) *Encouraging consumer privacy complaints.*
- (ix) *Enforcing telemarketing sales regulations.*
- (x) *Restricting the use of “preacquired” account information.*
- (xi) *Enforcing the Gramm-Leach-Bliley Act.*
- (xii) *Holding workshops on emerging technologies.*⁶⁶

Since 2001, *FTC* is busy in propagating its Privacy Agenda organizing various conferences and workshops for awareness generation as well as for protection of Consumer Privacy. In this sense, *FTC* is having a broad legal authority in the field of Consumer Privacy in U.S.A. Its website is very informative as well as useful. It provides information to visitors and gives opportunity to file complaint against privacy violation through this website simultaneously. Moreover, *FTC* is working in conformity with the *Controlling the Assault of Not-Solicited Pornography and Marketing (CAN-SPAM) Act, 2003*, enactment of which is a good initiative on the part of the congress. Hence, *FTC* is acting as an umbrella or a guardian of individual Privacy Rights in the field of Consumer Privacy in U.S.A.

4.2.5.3. The State Privacy Laws on Workplace Privacy

In U.S.A., not only the Federal Govt., but the State Governments are also concerned with the protection of Right to Privacy and have enacted various laws protecting different components of Right to Privacy, like Consumer Privacy, Anti-spam laws for prevention of spamming seeking personal information, Identity theft and related criminal activity, laws for blocking the appearance of “Caller ID”, Spyware prevention laws as well as the laws for prevention of Internet scam. In all these cases, express laws are not available in each and every state; rather different

⁶⁶ “Privacy Agenda”, Federal Trade Commission, <http://www.ftc.gov/opa/2001/10/privacyagenda.htm>, visited on 17.2.2017.

states have given impetus on different aspects of Right to Privacy, wherein some laws have already been enacted, but some are under process. Moreover, some laws have been challenged in the courts or have been objected to due to various controversy or absence of unanimity. In fact, Right to Privacy is a debatable issue, the existence of which is not equally acceptable to each and everyone at the same time in the same sense. Due to this reason, absence of comprehensive legislation is found in various States of U.S.A.

As regards Workplace Privacy, it is to be remembered that, it is a new aspect of Right to Privacy and has not flourished adequately in U.S.A. Workplace Privacy is mainly associated with the maintenance of Employees' Privacy at the workplace. It is again a debatable issue between the Employer and the Employee, because employers always would like to keep employees under surveillance in order to control their workplace activity. On the contrary, employees feel this type of surveillance as a case of violation of their Workplace Privacy. But, the employers have introduced the use of tracking devices for tracking of telephone or internet use of employees at the workplace. Moreover, electronic surveillance at workplace has been introduced which is under the process of legislation. But, in most of the cases, those electronic surveillances are violative of the provisions of either *Privacy Act* or *Electronic Communications Privacy Act*. As such, the problem is not solved and the debate is continued. As the concept of Workplace Privacy has not been developed as a unanimous issue, no comprehensive legislation has been enacted in this respect. Again, employer supportive electronic surveillance at the workplace is also another issue in this context, which also cannot be overruled. In this situation, enactment of legislation supporting the Workplace Privacy is not an easy task. As such, taking recourse to the *Privacy Act* and *Electronic Communications Privacy Act* is the only remedy. However, judiciary is taking active step in this respect in U.S.A., which will be discussed later on.

An analysis of Privacy Protection laws in U.S.A. has provided the idea that, since the emergence of modern America or the birth of U.S.A., it is concerned with the violation of Privacy and protection of Right to Privacy thereof. As such, the U.S. Supreme Court and other courts have always been busy in forming this right into a concrete shape. Also the U.S. Federal and State Legislatures have enacted various

legislations covering various aspects of Right to Privacy, so that, each and every component of this right would be protected. Though certain areas have still been neglected, but the overall steps taken by U.S.A., in this respect, are no doubt praiseworthy.

4.3. Privacy Laws in U.K. : Analytical Perspective

At the very beginning, English Laws were very slow and unwilling to develop Laws of Privacy. In fact, they did not recognise Right to Privacy at all and as such, no laws were framed to protect this right. Romans were the first in Europe to recognise the importance of the sanctity of the individual's identity and provided a legal remedy for mental suffering resulting from humiliating treatment or insult.⁶⁷ Prior to that, no such laws were found protecting the individual personality or addressing the mental sufferings from humiliating treatment. In fact, most of the lawyers and judges were concerned about the property rights and were unaware about the rights relating to human feelings and sentiments. Moreover, they were unwilling to consider such a kind of right and to introduce the remedy thereof. Due to this reason, Right to Privacy was not recognised as a human right at the very beginning of the modern period in England. As this right was basically concerned with the human feelings and sentiments as well as could not be enforced with straight-jacket formula like the property rights, this right was totally neglected.

4.3.1. Development of Right to Privacy in U.K. : A Brief History

Gradually with the passage of time, recognition of this right came into being with the hands of the judiciary. Surely, it was difficult to fix a financial value for mental sufferings by the judiciary, owing to which recognition of Right to Privacy was not found in the 16th – 17th centuries. A good example of such judicial hesitancy could be seen in a series of cases, found in the early 18th century, wherein violations of rights involving ancient lights or windows were in question. Most of the jurists usually consider these cases as the earliest assertion of legal right to Privacy in England. Though these cases were not cited by Warren-Brandeis, but these were equally important and vital for explaining the viewpoint of British Courts in the 18th century for upholding property rights over personal rights, even if the cases of

⁶⁷ *Supra Note 19 at p.42.*

invasion of Privacy was involved.⁶⁸ As the property rights were tangible and Privacy rights were intangible, the courts did not consider Privacy rights and always upheld property rights over the Privacy rights. However, development of Right to Privacy through judicial interpretation with its all pros and cons is discussed below.

The first legal principle involved in this respect was the contradiction between “*Ancient Light Principle*” and “*Principle of Right to Privacy*”. If an issue was involved for violation of Right to Privacy on the one side and violation of ancient light or window on the other, British Courts always upheld the Right of Ancient Light over the Right to Privacy. Though they opined that, one party could claim his or her Right to Privacy on the property, but that could not override other’s Right to Ancient Light on his or her property and as such, ancient light to ancient window could not be obstructed on the ground of violation of Privacy. This was the viewpoint of British Courts on Privacy during the 18th century, which portrays a clear picture of upholding tangible property rights over intangible Privacy Rights associated with mental feelings and sufferings. However, gradually it was recognised that, other lights or windows might be obstructed on the ground of violation of Privacy, but the ancient lights or windows could never be obstructed.

The first recorded case, wherein this principle was established was the *Cherrington v. Abney*⁶⁹ case, which was decided in 1709 in the British High Court of Chancery. In this case the dwelling owner attempted to increase the number of windows on the side of his building. The Court rules that the building owner had by increasing the number of windows, changed the existing relationship to the prejudice of the contiguous property. The dimensions or the number of windows might not be increased, even when a new building would be constructed.⁷⁰ In this case the decision was given on the basis of the “*Ancient Light Principle*” and not on the basis of Right to Privacy. Protection of Right to Property was the main question at that period and judges were entrusted with the duty of protection of property.

After the *Cherrington* case, British Courts continued with the same opinion and gave decisions in a series of cases following the same precedent. Till 1811, all these decisions continuously rejected the existence of Right to Privacy as a legally

⁶⁸ *Id* at p.43.

⁶⁹ 2 Vernon 645 (1709).

⁷⁰ *Supra* Note 19 at p.43.

binding right. Only in 1811, one of the British Justices gave a bookish recognition of this right by mentioning the existence of this right in the books, but still rejected the existence of this right as an actionable right. Few other examples can be cited in this respect. In *Turner v. Spooner*,⁷¹ it was decided that, intrusion upon a neighbour's Privacy would not be a ground for interference by the Courts either in law or in equity. Again in *Tapling v. Jones*⁷² it was held that, violation of Privacy might be an arguable ground in ancient light cases, but could not be treated as a legal wrong which could be remedied. Therefore, it cannot be said that, ancient light cases are fruitful for the recognition of Right to Privacy in U.K.; rather those cases have vehemently rejected the existence of Right to Privacy as a legal right. But, a discussion of these cases is important herein, because at least a considerable and argumentative position of Right to Privacy has been found in the ancient light cases.

After the ancient light cases in U.K., came the question of protection of *Literary Property*, which was a landmark event in the era of development of Right to Privacy therein. The concept of property, a well-established legal entity, was expanded in the 18th and 19th centuries in U.K. To include not only physical, tangible things, but also the incorporeal rights surrounding those things, and even products and processes of the mind. A law of *Literary Property* developed, and it was in the expansion of these concepts that *Warren and Brandeis* found the most adaptable pillar to support their contention that a legally enforceable Right to Privacy already existed, though it was not recognised as such.⁷³

In this respect, the question of *Literary Property* is noteworthy, because prior to the expansion of this concept, Right to Property included only physical and tangible property. But, with the expansion of the concept of Right to Property by judicial interpretation, various intangible and incorporeal rights were included within it. More specifically, the intangible and incorporeal rights included the products and processes of the mind, which in other words, meant the creation of the mind or literary creations. Literary creations were personal creations, which required legal protection and as such, those creations came under *Literary Property*. British Courts gave protection to literary creations under the head *Literary Property*,

⁷¹ 30 L. J. Ch. 801 (1861).

⁷² 11 H. L. C. 290 (1865).

⁷³ *Supra Note 19 at p.44.*

because property rights were the most prominent right at that period. But, *Warren-Brandeis* tried to find out Right to Privacy from the concept of *Literary Property*. According to them, as those creations were personal creations, personal rights would be included within those. Moreover, those creations were personal and private property, as such, every individual would be entitled to the protection of privacy of that property. In this sense, Right to Privacy became part and parcel of *Literary Property* in view of *Warren-Brandeis*. But, the development was not easy in U. K. and the British Courts did not accept this contention easily; rather they enforced the Right to Privacy in disguise of the Right to *Literary Property*.

Development of the Right to *Literary Property* began in the British Courts since 1741 and continued upto 1758 mostly in favour of the protection of *Literary Property*, but the growth of Right to Privacy was found during this period in negative direction. Protection of *Literary Property* during this period covered every type of literary creation including books, articles and even letters. It was held by the Courts that, these types of literary creations were the properties of the creator and the ownership of these properties would vest with the creator. Due to this reason, publications of these creations were not allowed by the Courts without the permission of the creator. Also it was held that, sharing of any literary creation any literary creation with any person would not make that person, the owner of the literary creation and as such, would not be published by him or her without the consent of the owner. Accordingly, ownership of the creation would always remain with the creator. This point could be found somewhat similar with the idea of Right to Privacy, but the courts did not recognise that right, instead they gave decisions on the ground of protection of *Literary Property*. But, this point of similarity attracted *Warren-Brandeis* to draw their contention. According to them, ownership of literary creation by the creator would amount to the freedom to hold and use the literary creation according to the wish of the creator. Such freedom, according to *Warren-Brandeis* would mean the existence of Right to Privacy of the creator regarding the literary creation. On the basis of this ground, they developed Right to Privacy from the Right to *Literary Property*.

Warren-Brandeis tried to develop their concept of Right to Privacy on the basis of the Obiter Dicta of *Miller v. Taylor*⁷⁴ Case, wherein it was cited that, every man should have a right to preserve or publish his or her sentiments according to his or her choice. On the basis of this view, *Warren-Brandeis* contended that, it was nothing but the supporting of existence of a freedom to enjoy one's private feelings and sentiments as per one's wishes, which in other words, would support the existence of Right to Privacy. However, the Ratio Decidendi of the case never talked about Right to Privacy and the case was decided on the basis of Right to *Literary Property*, wherein the right to first printing or publishing the literary work by the creator was recognised. But, the Obiter Dicta reflected certain amount of positive dimension towards Right to Privacy. Due to this reason, *Warren-Brandeis* cited this case as an important one for the development of Right to Privacy in U.K.

Next important case in this respect was the *Prince Albert v. Strange, 1849*⁷⁵ case, wherein the issue of unauthorised publication of personal photographs of Queen Victoria and Prince Albert was involved. The Court held that, their personal photographs were their personal property and as such, no one could publish those without their consent. The case was decided on the basis of *Literary Property* as well as on the ground of Breach of Confidence on the part of the photographer, who sold the right of publication of those to Strange, who wanted to publish those without the consent of Queen Victoria and Prince Albert. It was a clear case of Breach of Confidence and nothing was mentioned anywhere regarding Right to Privacy. But, it was cited as an important case for development of Right to Privacy in U.K., because the right, which in fact, was protected in this case, was nothing but the Right to Privacy.

Therefore, it is quite clear from the contention of the Counsel in the *Prince Albert v. Strange* case, that the right talked about hereinabove is nothing but the Right to Privacy. The reason is that, the Counsel expressed the existence of a right to free and innocent use of a person's own property without any interference or injury by the outsiders. This concept is the concept of Right to Privacy, which means the freedom to exercise one's right according to one's own wishes without any outside interference. As the concept of Right to Privacy was not prevalent at the then period,

⁷⁴ 4 Burrow's Rep. 2303 (1769).

⁷⁵ 1 MacN. & G.25 (1849).

thereby the term 'property' was used therein to define the concept. But, in fact, they recognised the existence of Right to Privacy in implied manner without expressly mentioning the term 'Privacy'. Due to this reason, *Warren-Brandeis* argued on the existence of Right to Privacy at the then period and contended that, the conclusion drawn in *Prince Albert v. Strange* case was actually drawn on the basis of Right to Privacy. According to *Warren-Brandeis*, the case in fact, accepted the existence of Right to Privacy, but in indirect manner. Practically, the idea of existence of Right to Privacy was started to develop in U.K. only after this case. One of the reasons behind this was the writing of the *Warren-Brandeis's* article after this case and the mentioning of the existence of Right to Privacy with reference to this case. As such, this case was considered as a landmark judgement in the era of development of Right to Privacy in U.K.

4.3.2. Modern Laws of Privacy in U.K. : Indirect Application

In comparison to U.S.A., Privacy Laws are not much enriched in U.K. In fact, there has been no existence of Privacy Laws in U.K. before the passing of the *Human Rights Act, 1998 and Data Protection Act, 1998*. It means, only in the present era, Privacy Laws have been enacted in U.K. to provide remedy for violation of Right to Privacy. Whereas, in U.S.A. *Privacy Act* has been enacted in 1974, which is long before the passing of the Acts in U.K. Moreover, U.K. has no direct legislation on Privacy like U.S.A. Only legal provisions available in U. K. for protection of Right to Privacy are all indirect legal provisions, even in the present social scenario. Therefore, the situation before the passing of the above-stated legislations has been more serious. At that period, over depending on the English Common Law has been found, wherein no direct legal provision has been available for protection of Right to Privacy. In this sense, U.K. is lagging far behind U.S.A.

The Modern Laws of Privacy in U.K. are mostly Common Law based indirect legal applications for protection of Right to Privacy. A number of such indirect laws are found in U.K., which are discussed below:-

4.3.2.1. Privacy vs. Laws on Libel and Slander

In U.K. actions are available under the Common Law Torts of Libel and Slander. These laws are mostly used against media in cases of violation of Individual Privacy by media. That means, violation of Privacy is adjudged on the

same footing with Defamation and same remedy is provided, which is inappropriate. This is because no such defence of “Public Figure” is available in U.K. like U.S.A. and the privilege of private life cannot be enjoyed as such. Another related cause of action is seldom used in those cases on the ground of malicious falsehood.⁷⁶ Therefore, laws of libel and slander can be indirectly used in U. K. for cases of Privacy violations.

4.3.2.2. Privacy vs. Laws on Contempt of Court

Laws on Contempt of Court are another indirect application to address the cases of violation of Privacy. These laws can be available for protection of Privacy of court cases on the ground of Contempt of Court. In this respect, the *Contempt of Court Act, 1981* has been enacted. Though such application is again inappropriate, because Contempt of Court and violation of Privacy both are not same things, but in the absence of any other remedy, this law can be used to protect Privacy of Court proceedings in U.K.⁷⁷ As such, stringent legal provisions are available to prevent the more extreme forms of reporting on Court cases. It is provided that, a publication must not cause a substantial risk of serious prejudice to a trial.⁷⁸

4.3.2.3. Privacy vs. The Laws of Nuisance

Nuisance is another important Common Law remedy which is indirectly used to prevent violation of Privacy. Though the law of nuisance is stringent law, but it is not easy to prove media activity or the activities of journalists as nuisance, because they usually take the plea of public interest or right to information of the general public. As such, it is necessary to prove that, what is published by them that has nothing to do with the public interest. Then only it can be proved as a case of violation of Privacy. On the other hand, what is not done in the public interest, spreading of that is nothing but the creation of Nuisance. Action can be taken only on this ground. However, an injunction is the only remedy likely to be obtained to prevent the journalists causing disturbance over a period of time in a public place. Practically, this tort does not offer great protection from invasions of Privacy by the Press or Media,⁷⁹ because injunction is a temporary remedy and also not available in

⁷⁶ Simon L. Galiant, “*Privacy and the Press: The English Perspective*”, Indian Advocate, Vol.24, 1992, pp.54-59 at p.55.

⁷⁷ Section 2 (2) of the Contempt of Court Act, 1981.

⁷⁸ *Supra Note 76 at p.55.*

⁷⁹ *Id at p.56.*

each and every case. Moreover, these matters are not considered serious for granting permanent injunction.

4.3.2.4. Privacy vs. The Law of Trespass

Law of Trespass is again another Common Law remedy for violation of Privacy. Though trespass and violation of Privacy both are not same things, but violation of Individual Privacy can be remedied on the ground of Trespass to Person or Land under the Common Law of Tort, in the absence of any other remedy. However, this is also an indirect application and no full-proof remedy is available under this provision. Only a injunction can be obtained by a landowner to prevent media to enter into his land. This is really protecting Privacy by the back door and in practice is not a particularly powerful instrument to protect Privacy.⁸⁰

4.3.2.5. Privacy vs. The Law of Copyright

The law of copyright can be used to prevent unauthorised copying of a literary creation only after the publication, but before publication, it has nothing to do with the literary creation to prevent its unauthorised copying beforehand. Again, it can only address the physical loss occurred owing to unauthorised copying but has no power to address the mental loss. According to *Warren-Brandeis*, these are the limitations of Law of Copyright, on account of which Law of Privacy is required. Only Law of Privacy can prevent unauthorised publication beforehand on the ground of violation of Privacy. Again, only it has the power to remedy the loss of mental feelings owing to unauthorised publication. But in the absence of express Law of Privacy in England, the Law of Copyright is indirectly used to address the cases of violation of Privacy. In this respect, the law considers the intimate photographs taken by a Plaintiff to be his or her own property and as such, a newspaper can be prevented by a Court from publishing them. In this case, only the person who owns the copyright in the photographs can sue.⁸¹ This provision directly points towards the limited application of this law. Hence, the law is not full-proof.

4.3.2.6. Privacy vs. The Law of Breach of Confidence

Both the laws of Trespass and Copyright are essentially rights based on ownership of property rather than Rights of Privacy. This has been taken a step further by the tort of Breach of Confidence. This enables a Plaintiff to prevent

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

confidential information being published. The information must have been communicated to another party in such a way as to impose on that party an obligation of confidence. If the information is already in the public domain, it is a defence to any proceedings that publication is for the purpose of exposing wrongdoing. This tort has largely been developed to prevent use of commercial secrets. However, it has been used to prevent publication of information imparted in the context of personal relationships.⁸²

Therefore, the tort of Breach of Confidence has been developed to protect the secrecy of confidential information and to prevent the publication thereof. To some extent, this tort is applicable in the cases of violation of Privacy, but only in cases of protection of confidential information and not in other cases. Moreover, confidential information is only a part of Privacy and not everything of it. As such, it is not possible to protect every component of Privacy by this tort. Again, it is only indirect recognition of Right to Privacy, because no express provision of Right to Privacy has been established by it and the judgement is given on the ground of Breach of Confidence. Privacy and Breach of Confidence both are not the same things. Due to this reason, it is also not a full-proof law for the protection of Right to Privacy.

4.3.2.7. Privacy vs. Other Statutory Provisions

In U.K., there are also other statutory provisions dealing with the protection of Privacy, but obviously those are also indirectly protecting Privacy. Most relevant in this respect, is the offence of using wireless telegraphy apparatus with intent to obtain information as to the contents, sender or addressee of any message except with proper government authority.⁸³ Apart from that, the Broadcasting Complaints Commission is another authority, which adjudicates on complaints of unwarranted infringements of Privacy in television programmes or complaints about programmes containing unjust or unfair treatment. But, there is one limitation of this legal provision. To get remedy under this provision, complaint should be made after broadcast of the programme concerned.⁸⁴ There is also a separate body, called the Broadcasting Standards Council, which hears the complaints relating to taste and

⁸² *Ibid.*

⁸³ Section 5 of the Wireless Telegraphy Act, 1949.

⁸⁴ *Supra Note 76 at p.57.*

decency. Both bodies can require their adjudications to be broadcast.⁸⁵ These are the relevant other statutory provisions for protection of Privacy in U.K.

Therefore, the other statutory provisions available in U.K. are relevant to some extent for the protection of Privacy thereof. Most probably these provisions are more suitable for protection of privacy in comparison to the Common Law actions of Law of Torts. Nonetheless, these provisions have talked about express protection of various aspects of Privacy, which the Common Law actions of Law of Torts have never spoken about. In this sense, these provisions are no doubt beneficial in the field of protection of Privacy. But, these laws have some limitations, like the bodies mentioned hereinabove have limited powers of protection and can take complaints only after broadcasting of the events and not before that. In this sense, these laws have similar effects like the Copyright Laws. None of these can prevent the violation of Privacy before it occurs; only compensate it after its occurrence. Therefore, express Privacy protection laws are required in U.K.

The modern laws of Privacy are mostly having indirect application for protection of Privacy. None of them are suitable to provide full-proof protection to Right to Privacy. But, use and application of those laws have pointed towards a positive dimension towards the growth of Law of Privacy in U.K. Moving on this positive dimension ultimately various Committees have been formed to suggest a full-proof Law on Right to Privacy in U.K. These committees have provided various recommendations, on the basis of which few more statutory provisions have been enacted in U.K., which have become fruitful to protect various aspects of Right to Privacy. Next part of the study will proceed towards that discussion.

4.3.3. Present Laws of Privacy in U.K. : An Evaluation

Apart from the indirect legal provisions for protection of Privacy in U.K., there are various statutory provisions enacted in the present era, few portions of which are directly applicable for the protection of Right to Privacy. In fact, Privacy Protection Laws have been enacted in the forms of Parliamentary initiatives, different reports, British Constitution and various statutory enactments. A list of those laws is placed below:-

⁸⁵ Broadcasting Act, 1990.

- (i) Law of Tort or Civil Wrong.*
- (ii) Law of Confidence or Trust.*
- (iii) The Wireless Telegraphy Act, 1949.*
- (iv) The Theft Act, 1968.*
- (v) Parliamentary Initiatives – Private Members Bills, 1961-1970.*
- (vi) The Younger Committee Report, 1972.*
- (vii) The Rehabilitation of Offenders Act, 1974.*
- (viii) The Interception of Communications Act, 1985.*
- (ix) The Public Order Act, 1986.*
- (x) The Financial Services Act, 1986.*
- (xi) The Access to Medical Reports Act, 1988.*
- (xii) The Official Secrets Act, 1989.*
- (xiii) The Criminal Justice and Public Order Act, 1994.*
- (xiv) The Broadcasting Act, 1996.*
- (xv) The Press Complaints Commission Code of Practice, 1997.*
- (xvi) The Protection from Harassment Act, 1997.*
- (xvii) The Broadcasting Standards Commission’s Code of Fairness and Privacy, 1998.*
- (xviii) The Data Protection Act, 1998.*
- (xix) The Human Rights Act, 1998.*
- (xx) The Telecommunications (Data Protection and Privacy) Regulations, 1999.*
- (xxi) The BBC Producers’ Guidelines, 2000.*
- (xxii) The Regulation of Investigatory Powers Act, 2000.*
- (xxiii) The Criminal Justice and Police Act, 2001.*
- (xxiv) Protection of Freedoms Act, 2012.*
- (xxv) The British Constitution, 2015.*

An evaluation of the above-stated laws with respect to the protection of various components of Right to Privacy is presented hereunder.

4.3.3.1. Privacy as a Civil Wrong under Law of Tort

Law of Tort is an age-old system for prevention of civil wrong in U.K. It is a branch of English Common Law. In the present social scenario, violation of Privacy is considered as a Civil Wrong, the remedy for which is available under the Law of

Tort. In the absence of express statutory provisions for protection of Right to Privacy, the English jurists have considered violation of Privacy as a Tort by following the views of American jurist *William Prosser* and have tried to redress the violation thereof under the torts of *Libel, Slander, Nuisance and Trespass*. In this respect, the relevant legal provisions have already been discussed.

4.3.3.2. Privacy of Confidential Information under Law of Confidence or Trust

The law of confidence or trust, which is an equitable protection of confidential information, seeks to ensure that confidential information disclosed. Under an obligation of confidence is not disclosed or used other than as contemplated by the person making the disclosure. The law of confidence protects the privacy or confidentiality of the information and not the person suffering the intrusion.⁸⁶ Contract, professional codes of conduct and fiduciary duties impose a duty of confidence between professional and client, employee and customer, doctor and patient etc. More specifically, an equitable duty of confidence can arise between parties where confidential information was passed to another who knew or ought to have known that the information was not to be disclosed, provided it has the requisite quality of confidence.⁸⁷ To establish an action for breach of confidence in either contract or equity, the information communicated must be secret and not trivial and be given in circumstances where the recipient knew or ought to have known that it was to be kept confidential and used for a limited purpose.⁸⁸

Law of Confidence is also an age-old application of English Law, wherein remedy is provided on the ground of Breach of Confidence. Under this law, remedy for violation of Privacy is granted on the ground of Breach of Confidence, which has already been discussed. But, the limitation of this rule is that, it protects only the confidentiality of the information, but does not protect the person, the confidentiality of whose information is lost. In this sense, it is not only a limited principle, but also it protects the Privacy of Information and not the Individual Privacy or Privacy of Person.

⁸⁶ Robyn Durie, “United Kingdom”, in Michael Henry (ed.), *International Privacy, Publicity and Personality Laws*, Butterworths Publication, 2001, pp.435-454 at p.441.

⁸⁷ *Id* at pp.441-442.

⁸⁸ *Coco v. A. N. Clarke (Engineers) Ltd.*, [1969] RPC 41.

4.3.3.3. Privacy of Correspondence and Communication : The Wireless Telegraphy Act, 1949

This Act has been enacted in U.K. for preventing of interception of communication. It is not a directly Privacy protection statute, but various provisions of this Act are used for prevention of interception of post and telephonic conversation. In this sense, it protects only the privacy of correspondence and communication and not other components of Right to Privacy. Interception of post and the unauthorised telephone tapping of the public switched network for whatever purpose is a criminal offence in U.K., including disclosure of any information acquired from it under *Section 5(b) of the Wireless Telegraphy Act, 1949*. The penalty is a fine or imprisonment not exceeding two years.⁸⁹ Therefore, it is not a Privacy protecting statute, but declares interception of communication as a criminal offence. However, with the help of this law, Privacy of Communication is protected.

4.3.3.4. Privacy and Criminal Trespass : The Theft Act, 1968

This Act is again a Penal Statute as a part of English Criminal Law and not a Privacy protecting statute. It is enacted to prevent Criminal Trespass and the commission of Theft in consequence thereof. The principle of Trespass is the oldest principle of U.K. law. It is a civil wrong under the English Common Law and not a crime. Accordingly, Trespass, even to a private dwelling house, is not a crime in Common Law. As such, a criminal offence is only committed where the defendant possesses certain types of intent, which is the intent required by *Section 9 of the Theft Act, 1968* to commit the offence of burglary, that is entry with intent to steal or commit rape or on any ground specified in the *Public Order Act, 1986*.⁹⁰ Therefore, this Act deals with theft after rightful entry or in other words, *Trespass-ab-initio*. It means, after lawful entry, when a person commits theft by misusing the lawful authority, his or her entry becomes wrongful and makes him or her liable for Trespass from the very beginning or *Trespass-ab-initio*. Therefore, this Act prevents theft, but simultaneously violation of Privacy caused due to Trespass is also addressed by this Act.

⁸⁹ *Supra Note 86 at pp.438-439.*

⁹⁰ *Id at p.439.*

4.3.3.5. Parliamentary Initiatives for Privacy Protection : Private Members Bills, 1961-1970

U. K. has witnessed paradigm shift in the legal field as an aftermath of the *European Convention on Human Rights and Fundamental Freedoms, 1950* and the membership of the *European Economic Community*. After becoming a member of *EEC*, U K. has seen that, most of the other member-countries have written constitutions and have taken various initiatives for protection of Right to Privacy. It is found that, both English Legislature and Courts have neglected the protection of this right, which is a very important human right in the modern social scenario. Definitely, this situation has proved the failure of English legal system to protect this right. Due to this reason, British Parliament has started to take initiatives for the protection of this right since *1960*.

One important initiative taken by the British Parliament has been the introduction of *Private Members Bills* in the Parliament. In this respect, an early attempt to prescribe legally defined rights has come when *Lord Mancroft* has introduced his *Right to Privacy Bill* in the *House of Lords* in *1961*. *Lord Denning* has supported this Bill by commenting that, “if the law does not give us the right of privacy, the sooner this Bill gives it the better”. Though the Bill has been limited in scope, but it has touched various important areas of protection of Privacy. It has aimed “to give every individual such further protection against invasion of privacy as may be desirable for the maintenance of human dignity, while protecting the right of the public to be kept informed in all matters in which the public may be concerned”. The main purpose of the Bill has been praiseworthy, because it has tried to solve the larger problem of excessive encroachment of the Press in the private affairs of the citizens. But, due to its limitations, the Bill has only been able to solve this problem partly. However, the Bill has been criticized by *Lord Denning* due to narrowness of its scope by saying that, it has not considered the areas of telephone tapping and opening of correspondence, which should also be considered.⁹¹ Therefore, *Lord Mancroft’s Right to Privacy Bill, 1961* has been a limited initiative for protection of Privacy in Britain, but it has been a good initiative, because it has recognised the urge of protection of Privacy for the sake of human dignity as well as

⁹¹ Donald Madgwick and Tony Smythe, *The Invasion of Privacy*, Pitman Publishing, 1st Edn., 1974, p.11.

simultaneously has raised concern for the maintenance of public right to information. It is very good that, it has understood the necessity of creating a balance between Individual Right to Privacy and Public Right to Information and has therefore, suggested the balancing between the two.

Though *Lord Mancroft's Right to Privacy Bill, 1961* has been the first initiative for protection of Right to Privacy in U.K. by introducing a new era of *Private Members Bills* in the Parliament, but few other initiatives have also been found before it. One such attempt has been made in 1950, when *Viscount Samuel* has introduced his *Liberties of the Subject Bill*. It has been a document with significant privacy aspects. It has sought to restrict authority for entry into buildings and also to restrain employers from discriminating against employees on religious or political grounds.⁹² However, it has mainly concentrated on the liberties as a whole and not on the specific aspects of Right to Privacy. While doing so, it has touched few areas of Right to Privacy, but as a whole, it is not totally a Privacy protection Bill. Due to this reason, it is not considered as the first *Private Members Bill on Right to Privacy and Lord Mancroft's Bill* is considered as the first one.

Next attempt has been taken by the introduction of two bills in the *House of Commons in 1967*. One has been *Peter Bessell's Unauthorized Telephone Monitoring Bill*, which has aimed at safeguarding telephone users and the other has been *Alexander Lyons Right of Privacy Bill*, which has been designed "to protect a person from any unreasonable and serious interference with his seclusion of himself, his family or his property from the public".⁹³ Therefore, these two bills have somewhat been concrete for the protection of Right to Privacy in Britain, because these have highlighted the areas of violation of Privacy due to unauthorized telephone tapping and protection of Individual Privacy, Privacy of Family and Property from any unreasonable as well as serious interference. Hence, it has been a good attempt.

Next attempts have been the introduction of *Sir Edward Boyle's Industrial Information Bill*, *Kenneth Baker's Data Surveillance Bill* and *Antony Gardner's Private Investigators Bill*.⁹⁴ But, the next important initiative has been taken by the

⁹² *Id at p.12.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

National Council for Civil Liberties (NCCL), on behalf of which *Jo Jacob* has drafted two bills in 1969. The first bill has aimed at a general Right of Privacy and the second has been concerned with data banks. Both bills have been successfully passed by the *MPs* as the *Private Members Bills*. Consequently, *Brian Walden* has decided to introduce a general *Right to Privacy Bill* on the basis of *Alexander Lyon's Bill* and the *Bill of NCCL*. Though both bills have been written in the same line, but *Walden* has accepted the *Lyon's Bill* and has kept a clause in the *NCCL Bill*, which ensures that the press should not be restrained any more than it has been already.⁹⁵ It means that, *NCCL and Walden* have supported Press freedom over the Individual Right to Privacy. Due to this reason, they have suggested that, further restriction on Freedom of Press should be prohibited. In this sense, attempts taken during this period for protection of Privacy have not been full-proof.

However, *Walden* has worked together with *NCCL* for the preparation and presentation of a general *Right to Privacy Bill* backed by the *Parliamentary Civil Liberties Group* to get wide support throughout the country. But, the Government has not been psychologically ready to pass such a bill at that point of time. As such, the then *Home Secretary, James Callaghan* has informed *Mr. Walden* that, the Government would not support the bill. Instead he has suggested constituting an inter-departmental toothless committee for investigation of invasions of Privacy and making recommendations thereof. Suggestions have also been given to restrict the activities of the Committee in the private sector only.⁹⁶

In this manner, a committee has been formed to provide recommendations regarding the urge of a general Right to Privacy in U.K. The committee has also been called the *Younger Committee* established in 1970. However, in the meantime, *Jo Jacob's Second NCCL Draft Bill* has been adopted by *Leslie Huckfield* in 1971, when he has introduced his *Control of Personal Information Bill*. The aim of this Bill has been to establish a data bank tribunal, license the operation of data banks containing personal information and enable the individual to see and correct any inaccurate, incomplete or irrelevant information and to know the purpose for which such information is used.⁹⁷ Therefore, the era of *Private Members Bills* in U. K. ends

⁹⁵ *Ibid.*

⁹⁶ *Id at pp.12-13.*

⁹⁷ *Id at p.14.*

with the constitution of *Younger Committee* therein. The main theme of this era is that, it has shown a number of high promises, but ultimately none of these have become fruitful. In this sense, it is an era of high promises, suggestions and recommendations, but not the era of practical implementation. Hence, at the end of this era, no concrete decision has been framed in U.K. for the protection of Right to Privacy.

4.3.3.6. General Right to Privacy : The Younger Committee Report, 1972

The Younger Committee on Privacy has been established in U.K. in 1970 for considering the necessity of a general Right to Privacy therein. It has been in existence for just two years from 13 May, 1970 to 25 May, 1972 and has contained sixteen members in totality. The Committee has strictly been directed to confirm within the spheres of private sector. As such, the committee, at its first meeting, has decided to ask the Home Secretary to clarify the lines of demarcation, so that the terms of reference would at least be as wide as possible under the circumstances, because most difficulties have arisen especially in connection with the *BBC and IBA, Local Authorities, Universities and the Computerization of Personal Records*.⁹⁸

Gradually, the Committee has started its working and has tried to gather public response regarding the necessity of a general Right to Privacy. But, consequent to general lack of public response, the Committee has decided to conduct a survey of public attitudes to Privacy. This has produced a much more positive reaction by showing a public awareness that a serious problem exists. To the question, "What does the word Privacy mean to you?" 94% have been able to give useable answers. Nearly a half of those questioned have defined Privacy as meaning non-interference with their private lives, while substantial minorities have opted for confidentiality and for being allowed to do what they would like in their own homes, with various sub-divisions of emphasis.⁹⁹

On the basis of the public survey conducted, the *Younger Committee* has considered various aspects of Privacy. In this respect, the aspects of Privacy investigated by the *Younger Committee* have fallen into the following categories:-

I. Unwanted Publicity: (a) Press, (b) Broadcasting.

⁹⁸ *Id at p.15.*

⁹⁹ *Id at p.18.*

II. Misuse of personal information: (a) Credit rating agencies, (b) Banks, (c) Employment, (d) Students and teachers, (e) Medicine.

III. Intrusion on home life: (a) Prying by neighbours, landlords and others, (b) Sales and promotional methods, (c) Private detectives, (d) Noise.

IV. Intrusion in business life: Industrial espionage.

V. Modern technical developments: (a) Technical surveillance devices, (b) Computers.¹⁰⁰

However, after considering all the aspects, the Committee has expressed its difficulty to define Privacy in concrete sense of the term. In fact, it has failed to define the term 'Privacy' at all. Moreover, it has criticized the courts to deal with the matter of Privacy and trying to define it. The Committee has also judged that, Right to Privacy should not be synonymous with the Right to be let alone. Finally, the Committee has held its utter dissatisfaction with the concept of 'Privacy' by calling it 'unrealistic'. It has held that, a concept regarding which people have not been absolutely aware or conscious, it should not need any protection. Accordingly, if this right would not have been protected, there would be no loss suffered by the general public, because they have not been adequately aware about its existence. On the basis of this viewpoint, the Committee has made its recommendations, which have excluded the enactment of a general Right of Privacy. In fact, all the fourteen members of the Committee among the sixteen have contended against the need of a general Right to Privacy but only two of them have contended in favour of the right. Therefore, on the basis of the recommendations of the *Younger Committee*, no general Right to Privacy has been formed in U.K.¹⁰¹

In an evaluation of the *Younger Committee*, it is found that, this Committee is not a good initiative for proceeding towards the creation of a positive Right to Privacy in U.K. In fact, it has denied the existence of such a right. Due to that reason, it is not a helpful instrument for establishment of protection of Privacy in U.K.; rather it has taken it in negative direction. The Committee has observed that, while Privacy is widely recognised as a legally defensible right in the United States, it is not established as a coherent principle of law and it has not significantly contributed to respect for privacy in everyday life, especially by the mass publicity

¹⁰⁰ *Ibid.*

¹⁰¹ *Id at p.19.*

media.¹⁰² It has also commented that, Great Britain has less in its law aimed specifically at the invasion of Privacy than any other country whose law it had examined.¹⁰³ Moreover, the Committee has noted, it is questionable whether a topic which is subject to such rapid changes in social convention as Privacy can be regulated on the basis of case law, slowly built up, which would tend to reflect the values of an earlier period rather than of contemporary society.¹⁰⁴ Hence, the conclusion drawn by the *Younger Committee* has not been fruitful to create a general Right to Privacy in U.K. and it is not a good initiative for the protection of this right.

4.3.3.7. Privacy of Rehabilitated Offenders : The Rehabilitation of Offenders Act, 1974

Rehabilitation of offenders is a matter of great social importance and for that purpose; sometimes the previous criminal records of a convict are removed. In those cases, publication of such records would amount to violation of Privacy of the rehabilitated person. However, in the absence of express statutory provisions in this respect, those matters have been dealt with as defamation under the *Rehabilitation of Offenders Act, 1974*. Rehabilitated persons are assumed as respectable citizens of the society and as such, publication of their previous criminal record would certainly amount to defamation. However, offenders can be rehabilitated whereby they no longer have to disclose their previous convictions. Under the *Rehabilitation of Offenders Act, 1974* certain prior convictions are to be removed from an individual's criminal record. The relevant convictions include those which have resulted in a sentence of not more than 30 months' imprisonment and where a period of five years has elapsed for a sentence of less than six months or where seven years have elapsed for a sentence of six months or more. If a newspaper maliciously publishes information about a person's rehabilitated criminal past, an action for defamation may be made.¹⁰⁵ Therefore, it would be a case of violation of Information Privacy of an individual, which would be remedied on the ground of defamation. In this sense, enactment of this Act is a good initiative, because it could provide remedy to the cases of violation of Privacy in whatever manner.

¹⁰² Report of the Committee on Privacy, Cmd.5012 of 1972 at p.30.

¹⁰³ *Id* at p.28.

¹⁰⁴ *Id* at p.11.

¹⁰⁵ *Supra* Note 86 at p.444.

4.3.3.8. Privacy vs. Interception of Communications : The Interception of Communications Act, 1985

Interception of Communication is a serious threat on Right to Privacy in the modern age of information and communication technology. Though Right to Privacy of Information, which is seriously threatened thereby, cannot be remedied directly due to the absence of express law in this respect, but the *Interception of Communications Act, 1985* is a good help to provide remedy because the wrong is treated as a crime under the Act. When the criminal is punished under the Act, simultaneously violation of Privacy is remedied in indirect manner. Interception of post and the unauthorised telephone tapping of the public switched network for whatever purpose and the disclosure of any information acquired from it, is a criminal offence in U.K. under *Sections 10 and 11 of the Interception of Communications Act, 1985*. The punishment is a fine or imprisonment not exceeding two years. Therefore, enactment of this Act is a good initiative for protection of Privacy of Information in U.K. However, this Act has been prompted by litigation, which has established that telephone tapping has not been a tort at Common Law, although it has been a violation of the *European Convention for the protection of Human Rights and Fundamental Freedoms, 1950*. On the basis of this contention, the *Interception of Communications Act, 1985* has been replaced by the *Regulation of Investigatory Powers Act (RIP Act), 2000*.¹⁰⁶

4.3.3.9. Privacy of Home or Land : The Public Order Act, 1986

The wrong of Trespass has been considered as a Common Law civil wrong since the very old period in U.K. But, it has never been considered as a crime. The situation has been changed with the passage of time and enactment of criminal laws. Under those Acts, trespass has become a crime, if it is coupled with other crimes or the entry with lawful authority would become trespass, if would coupled with wrongful activities committed after lawful entry, which has been called Trespass-ab-initio. The *Public Order Act, 1986* is a good help in this respect. According to this Act, if trespass is coupled with any wrong committed under the Act, it would amount to a crime. The police has powers under the *Public Order Act, 1986* to move on trespassers who are attempting to live on privately-owned property where they

¹⁰⁶ *Id at pp.438-439.*

have been threatening or abusive to the occupiers or where they have brought 12 or more vehicles onto the land. The trespassers commit an offence, if they fail to leave the land or if they re-enter the land within three months of the notice to leave.¹⁰⁷ Therefore, this Act is a good attempt to prosecute the trespassers and to prevent trespass. But, it is not a Privacy protecting statute. However, it would be a good help to protect Privacy in indirect manner by preventing Trespass, due to which Right to Privacy of Home or Land is seriously threatened.

But, there is a provision under the *Public Order Act, 1986*, wherein certain activities are permitted as not amounting to trespass. Under such provision crowds are granted a right to assembly and a limited right to obstruct highway. Individuals seeking Privacy from large number of journalists, fans or even disband a crowd.¹⁰⁸ In this sense, this provision of the *Public Order Act, 1986* is derogatory to the protection of Privacy. As such, this Act has provided protection of Privacy on the one side and simultaneously has prevented the enjoyment of this right on the other side. This is because; it is not a Privacy protection statute, only few portion of it can be used for protection of Privacy in indirect manner. In this sense, this Act has taken a good initiative.

4.3.3.10. Financial Privacy : The Financial Services Act, 1986

Apart from the English Common Law of Confidence, which is unwritten law, there are a number of statutory enactments enforcing law of confidence in U.K. As such, a duty of confidence may be imposed by statute or by codes of practice imposed by regulatory bodies. As for example, civil servants must not disclose unauthorised information under the *Official Secrets Acts*, doctors must maintain the Privacy of patient's medical records as part of their fiduciary duties, but also under the *Data Protection Act*. Therefore, maintenance of confidential information is enforced by various statutes in U.K. In this respect, one important contribution is the enactment of the *Financial Services Act, 1986*. Under this Act, those persons who obtain and use confidential financial information are restricted to disclose or publish such information without any reason.¹⁰⁹ No doubt, enactment of this Act is a very important step to prevent unauthorised disclosure of financial information.

¹⁰⁷ *Id at pp.439-440.*

¹⁰⁸ *Id at p.441.*

¹⁰⁹ *Ibid.*

Disclosure of financial information without permission may create many serious consequences. As such, protection of Privacy on confidentiality of that information is urgent need of the hour. In this respect, enactment of this Act is a very good initiative for protection of Information Privacy.

4.3.3.11. Privacy of Medical Records : The Access to Medical Reports Act, 1988

The *Access to Medical Reports Act, 1988* is another important statute for protection of confidential information. It is enacted in addition to the fiduciary duties of doctors to maintain the Privacy of patient's medical records and the *Data Protection Act*, wherein Data Privacy of medical records is protected. In fact, protection of Privacy or confidentiality of medical records is a very important issue, because misuse of medical records may create many serious consequences, which include wrong medical treatment, seeking money in lieu of returning the medical records or publication of those records and media hike. In this sense, enactment of this Act is an important initiative. The *Access to Medical Reports Act, 1988* states that, individuals who are the subject of any medical report which is to be used for employment or insurance purposes must give their consent before such a report can be disclosed by the medical practitioner. The legislation also gives the subject of the report other rights in relation to the relevant medical report, including those of access and correction.¹¹⁰ Therefore, this Act has tried to protect Data Privacy and Confidentiality of the medical records.

4.3.3.12. Privacy of Official Secrets : The Official Secrets Act, 1989

The *Official Secrets Act, 1989* makes it criminal offence for civil servants and others, subject to the Act to disclose unauthorised information. According to *Sections 1-6 of the Official Secrets Act, 1989*, unauthorised information is any information which relates to security and intelligence, defence or international relations or any information which is likely to result in an offence or other related consequential information resulting from unauthorised disclosures, and any information entrusted in confidence to other states or international organisations.¹¹¹ Therefore, the Act defines unauthorised information, which is highly associated with the national security and international relations of the country. Disclosure of such information is prevented by the subjects of the Act. As such, this Act protects

¹¹⁰ *Ibid.*

¹¹¹ *Id at p.444.*

Privacy of Information or Confidentiality of Information in cases of matters concerned with national security.

4.3.3.13. Threats to Individual Privacy : The Criminal Justice and Public Order Act, 1994

This Act is closely related to the Common Law tort of Trespass. It prevents trespass and thereby protects Privacy of Home or Land in indirect manner. But, it is similar with the *Public Order Act, 1986* and as such, it has certain exceptions like that Act. Accordingly, the *Criminal Justice and Public Order Act, 1994* grants the crowds a right to assembly and a limited right to obstruct the highway. Individuals seeking Privacy from large numbers of journalists, fans or even an abusive crowd have little power to disband a crowd.¹¹² Therefore, the Act is not a full-proof law for Privacy protection, because some provisions of the Act are made in derogation of the Individual Right to Privacy.

4.3.3.14. Privacy of Reputation : The Broadcasting Act, 1996

Section 110 of the Broadcasting Act, 1996 places a duty on the *Broadcasting Standards Commission* to consider and adjudicate complaints which relate to an unwarranted infringement of Privacy in, or in connection with the obtaining of material to be included in particular programmes.¹¹³ The *Broadcasting Standards Commission's Code of Fairness and Privacy, 1998* has been established under *Section 107 of the Broadcasting Act, 1996*, which seeks to limit the invasion of Privacy and prevents interviewees being misled by programme makers.¹¹⁴ Therefore, this Act is a very important piece of legislation, which is directly related to protection of Right to Privacy. Indeed, it is a very good initiative. But, the limitation is that, this Act is applicable in case of broadcasting of programmes only and not in other cases. It is a specific legislation. However, it is a good initiative, because it protects Privacy of Information and Reputation directly.

4.3.3.15. Privacy vs. Freedom of Press : The Press Complaints Commission Code of Practice, 1997

The *Press Complaints Commission* is a private body funded by the newspaper proprietors with half of its members drawn from the public. It has its own

¹¹² *Id at p.441.*

¹¹³ *Id at p.446.*

¹¹⁴ *Id at pp.445-446.*

Code of Practice. The *Press Complaints Commission* voluntary *Code of Practice* has been incorporated in 1997. It includes guidance on Privacy in the media, such as telephoto lens photography, hotel room surveillance and electronic bugging. It prohibits the photography of individuals in 'private places' without their consent, and sets out further general rules regarding the circumstances under which journalists and photographers may obtain information. The Code specifically prohibits the interviewing or photographing of a child under the age of 16 years in the absence of or without the consent of a parent or other responsible adult. Complaints about newspapers and journals may be made to the Commission and although it has no legal powers, adjudications are usually published by the paper complained against and after by rival papers.¹¹⁵

Clause 4 of the Code specifically deals with Privacy. According to that clause, intrusion and enquiries into an individual's private life can only be justified when they are in the public interest. An exhaustive definition of "public interest" is not provided but does include the following situations:-

- (a) *Exposing crime or serious misdemeanour;*
- (b) *Exposing seriously anti-social conduct;*
- (c) *Protecting public health and safety; and*
- (d) *Preventing the public from being misled by some statement or action of that individual.*¹¹⁶

Therefore, the *Press Complaints Commission Code of Practice* is a good initiative for protection of Right to Privacy in the sector of Press. It has defined Privacy, taken initiatives for protection of Privacy and has provided exception to the rule only in case of public interest. As such, under the Code, violation of Right to Privacy is allowed only on the ground of public interest and not otherwise. One advantage of the Code is that, it has created express provisions for the protection of Privacy in U.K. But, there are various limitations of the Code, which are summarised hereunder:-

- (a) *It is a voluntary Code and as such, it has no binding force.*
- (b) *It is established by a private body and not by the government. Hence, it has no enforceability.*

¹¹⁵ *Id* at p.445.

¹¹⁶ *Supra* Note 76 at pp.57-58.

(c) Another limitation is that, Press Complaints Commission can take action only after the publication of the article and not before that. Hence, Privacy protection before publication is not possible under the Code.

(d) Most important limitation is that, Press Complaints Commission cannot take action or cannot hear complaints when Court proceedings are intended on the particular subject.

Hence, this Code is a good initiative for protection of privacy in U.K. Though its application is limited or has been confined only to the private sector, but it can be used as a helpful guideline for enactment of express statutory laws on Privacy in U.K., especially on Privacy of Information.

4.3.3.16. Privacy of Person : The Protection from Harassment Act, 1997

The *Protection from Harassment Act, 1997* is another important legislation in U.K. for protection of Right to Privacy. *Section 1* of the Act protects an individual from behaviour of another which amounts to harassment, unless that conduct would be reasonable in the circumstances. The action must be hostile but an intention to injure is not a requirement. The remedies for a civil action are an injunction or damages for, among other things, any anxiety caused by and any financial loss resulting from the harassment. The defendant commits a criminal offence where an injunction has been granted and without reasonable excuse the defendant does something which is prohibited under the terms of the injunction.¹¹⁷ Therefore, this legislation has a very broad scope and ambit regarding the cases of harassment, but the courts have constructed it narrowly.

The main importance of this legislation is that, it has covered the areas of mental anxiety caused owing to harassment. It has prescribed the granting of injunction or monetary damages in case of financial loss caused and the mental anxiety occurred due to harassment. Therefore, it has not measured harassment in physical sense of the term only, but in mental terms also. In fact, harassment also hurts Privacy of a Person and as such, violation of Right to Privacy is a direct consequence of harassment. But, it cannot be measured physically. The mental agony and mental sufferings are effects of violation of Privacy due to harassment. This Act is a good piece of legislation, because it has tried to redress that mental

¹¹⁷ *Supra Note 86 at p.440.*

feelings and sentiments. In this sense, it is a good initiative for protection of Privacy of Person and Privacy of Reputation in U.K.

4.3.3.17. Privacy vs. Broadcasting Standards : The Broadcasting Standards Commission's Code of Fairness and Privacy, 1998

The *Broadcasting Standards Commission's Code of Fairness and Privacy* has become effective in U.K. on *January 1, 1998*. This code is not a guideline like the *Press Complaints Commission's Code* and as such, it has statutory effect under *Section 107 of the Broadcasting Act, 1996*. In this sense, this code is far better than the *Press Complaints Commission's Code*. It seeks to limit the invasion of Privacy and prevents interviewers being misled by programme makers. Under the Code, an invasion of Privacy should be justified by an overriding public interest. In this respect, public interest includes revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, or disclosing significant incompetence in public office. The means of attaining the information must be proportionate to the matter under investigation. Even where the material is not used in a broadcast or where the matter under investigation is in the past, Privacy could still be infringed. Those in the public domain and their friends and family are protected under the Code.¹¹⁸

Secret recording is permitted only under the code where it is necessary and in the public interest. An individual's consent must be granted to broadcast secret recordings made for entertainment purposes. Investigative film documentaries can use secret filming where there is an overriding public interest and where the questions are fair. The Commission also considers Privacy as a function of taste and decency.¹¹⁹ Therefore, this code has taken fairly positive initiatives for protection of Privacy in U.K. it has allowed violation of Privacy on the ground of public interest and not otherwise. In this sense, Privacy protection in the field of broadcasting is no doubt praiseworthy in U.K. It is very much helpful for protection of Privacy of Information and Reputation.

4.3.3.18. Data Privacy : The Data Protection Act, 1998

Though there is no comprehensive law on Privacy covering every aspect of Right to Privacy in U.K., but it has taken a good initiative by enacting the *Data*

¹¹⁸ *Id at pp.445-446.*

¹¹⁹ *Id at p.446.*

Protection Act, 1998 in the field of protection of Data Privacy therein. This law is more or less, parallel to the *Privacy Act, 1974* of U.S.A. It has covered the same areas of Data or Information Privacy, but the years of enactment of U.K. and U.S.A. legislation show that, U.K. is lagging far behind U.S.A. in the field of protection of Data Privacy.

Data Protection law ensures protection of living individuals with respect to the disclosure of personal data relating to them which is stored on computer. In this sense, the *Data Protection Act, 1998* controls the compiling and use of data relating to living individuals processed in the U.K. or elsewhere under the control of a U.K. established person or company, called a data controller. The Act limits the extent of data which may be stored, the processing of data and how it can be disclosed. Data must be fairly and lawfully processed, relevant and kept up-to-date. Limits are put on the transfer of data outside the European Economic area. Those who are the subject of processed data have rights including being informed of the purpose of the processing, access to the data, the right to prevent direct marketing, rights to correct or block the processing of data and to prevent the taking of decisions relating to them automatically.¹²⁰

The Act has come into force on *March 1, 2000*. It has implemented the *EU Data Protection Directive (95/46/EC)*. It provides greater protection of individuals with regard to the processing of personal data than its predecessor, the *Data Protection Act, 1984*. By 2007, the Act has further updated itself and has included certain manual data and the free movement of such data within its periphery.¹²¹ In certain cases, the Act requires the consent of individuals or data subjects as they are known, to the obtaining of data, the giving of notice if data is processed and limits such processing to the extent that it is 'fair and lawful'.¹²² Also there are various exceptions incorporated in the Act. Most notable among them is the processing of data in pursuant to a contract. Stricter requirements apply, including the obtaining of specific consent, to what is defined as 'sensitive personal data'. This includes data in relation to health, race, religion and sexual preferences.¹²³ New provisions have also been incorporated under the Act, which relate to the gathering of data for the

¹²⁰ *Id at p.436.*

¹²¹ *Ibid.*

¹²² Schedule 1, Part II of the Data Protection Act, 1998.

¹²³ *Supra Note 86 at p.436.*

purposes of investigatory journalism and literary and artistic purposes. They limit the access to data otherwise given to data subjects.¹²⁴

Therefore, enactment of *Data Protection Act, 1998* is surely a positive dimension in U.K. regarding the protection of Data Privacy. More or less, this is a comprehensive legislation in the field and has covered all areas of the subject. In this sense, it is a good initiative. But, it is not helpful for protection of Individual Privacy. Till today, U.K. has not understood the necessity of protection of individual Privacy. However, it is good that, it has understood the necessity of protection of Data Privacy, which is an urgent need of the hour in this era of advance scientific developments.

4.3.3.19. Privacy vs. Private Life : The Human Rights Act, 1998

U.K. has ratified the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* in 1951, but it has taken until *October 2, 2000* to implement the Convention into U.K. law. Prior to that time, the Convention has been merely a persuasive authority which could be used to clarify statute or Common Law where there have been ambiguities.¹²⁵ Therefore, though the Convention has been very old, but the Convention rights have been enforced in U.K. only in the last decade. Without ratification any international or regional legal instrument would have no enforceability, so has happened in U.K. regarding the enforcement of rights set out in the *European Convention*. Due to this reason, though 'Right to respect for Private and Family Life' has got a prominent place in the Convention, but has not been enforced in U.K. till the ratification of the Convention.

The *Human Rights Act, 1998* has received the Royal assent on *September 9, 1998*. The purpose of the Act has been to give further effect to the rights and freedoms guaranteed under the *European Convention*. But, the Act has not incorporated the Convention into domestic law in the way that the *European Communities Act, 1972* has incorporated the *Treaty of Rome*. What the *Human Rights Act* has done is that, it has given certain provisions of the Convention and its Protocols a defined status in English Law. In effect it has created a new constitutional statutory tort only applicable to public authorities when they breach

¹²⁴ *Ibid.*

¹²⁵ *Id at p.437.*

rights enshrined in certain provisions of the *European Convention on Human Rights*. The Act has also provided that, the existing rights and obligations, including those under statute, should be interpreted in a way which is consistent with the Convention.¹²⁶

The *Human Rights Act, 1998* has finally come into force in *October, 2000*. The Act nowhere states that the Convention rights are incorporated or that all U.K. citizens now have rights set out in the Convention or even its purpose is to achieve these two objections. *Section 1 and Schedule 1 of the Act* has listed the Convention rights which are included in the Act. The Convention rights which have been incorporated under the Act are listed hereunder:-

(a) *Articles 2 to 12 and 14 of the Convention.*

(b) *Articles 1 to 3 of Protocol 1.*

(c) *Articles 1 and 2 of Protocol 6.*¹²⁷

Therefore, all the rights set out in the Convention have not been incorporated into the Act. It means that, the Act has been intended to enforce certain rights of the Convention and not the others. However, the *Human Rights Act, 1998* refers to the relationship between public authorities and the individual, rather than between citizens. *Schedule 1* of the Act sets out the Convention. *Article 8 of the Convention* provides for 'respect for private and family life, home and correspondence'. *Article 8* has been relied on unsuccessfully to challenge the legality of telephone tapping. The introduction may encourage the development of Privacy case law especially with respect to the media, although the limitations on the application of the Act make it unlikely that a general Right to Privacy will be established. *Article 8* is counterbalanced by *Article 10*, which deals with 'freedom of expression, ideas and information'.¹²⁸

Therefore, *Schedule 1* of the *Human Rights Act, 1998* has incorporated the *European Convention for Protection of Human Rights and Fundamental Freedoms, 1950*. Basically, the Act has been enacted to provide the convention rights, constitutional and statutory status as well as to enforce the convention rights. Though the Act has not been expressly stated about the incorporation of the rights

¹²⁶ Maureen Spencer and John Spencer, *Human Rights Law in a Nutshell*, Sweet and Maxwell Publication, London, 1st Edn., 2001, pp.30-31.

¹²⁷ *Id* at p.36.

¹²⁸ *Supra* Note 86 at p.437.

therein as the guarantee of those rights to all U.K. citizens, but in fact, the Act has been enacted for incorporation and enforcement of the convention rights. Due to this reason, the Act has not enlisted any specific rights to be guaranteed under the Act, it has only incorporated the Convention rights. It shows that, the Act has been enacted for ratification and enforcement of the convention rights. However, the Act has not incorporated all the convention rights, which means that, it has no intention to ratify or enforce the convention in its totality.

As regards Right to Privacy, the convention has clothed this right with the term 'Right to respect for Private and Family life'. Though both the rights are not same things, but there are certain similarities between the two. In fact, Privacy is a part of private life and private life is a broad periphery. In this respect, detailed discussion has been made previously, wherein a critical analysis of the convention right to respect for private life has already been made. Moreover a comparison between Privacy and Private Life has also been made therein. Therefore, in this part, the discussion will be confined only to the extent of incorporation of Convention rights in the Act. It means, which portion of the Convention right to respect for private life has been incorporated into the Act and how it has been enforced.

Article 8 of the Convention deals with 'Right to respect for private life' and so is the Act. The purpose of this article is to protect privacy, family life, home and correspondence, the right to marry and to found a family, the equality of spouses and property. It has raised complicated questions of what is meant by "private life", "family" and "home". The effect of incorporation is wide, because of the following reasons:-

- (a) *English law has traditionally given little respect for privacy as a free standing right; and*
- (b) *Since these are essentially individual rights they potentially involve conflict with other competing interests, such as that of the public in accessing information about the activities of individuals.*¹²⁹

A further interpretation of this article brings out the groups who are likely to be affected by *Article 8*, which include those whose homes are threatened by pollution, homosexual couples who wish to be defined as a family for housing or

¹²⁹ *Supra Note 126 at p.72.*

adoption and employees who are subject to intrusive surveillance.¹³⁰ The rights to private life, family and home, if are protected by *Article 8* of the Convention, and then the question comes regarding what would be the exact definitions of these elements. In this respect, various judgements have come into being on account of various cases brought before the Human Rights Courts in U.K. As a matter of fact, if private life is considered absolute, then State cannot prevent any criminal activity conducted privately or any information can be suppressed from media on the ground of confidentiality of private life. Moreover, government can take unilateral decisions without informing general public through media pleading the ground of confidentiality of private matter. Due to this reason, these aspects should not be considered as parts of private life and private life should never be made absolute.

Similarly, right to respect for home or family life have come into question before the courts. If right to home is considered absolute, then State cannot demolish the homes threatened by pollution. Again, homosexual activities cannot be called illegal on the ground of respect for private or family life. An individual may call these activities as private activities and homosexuals may claim to create their own families according to their wishes. State cannot prevent these activities, because these are the parts of individual liberty, which cannot be curtailed by the State on the ground of violation of natural justice. If these civil or individual liberties are to be curtailed by the State, then the procedure to be adopted should be just, fair and reasonable procedure or according to the rules of natural justice. Therefore, these rights have got special status after the enactment of the said article. However, these are the chances of misuse of this article at the time of exercise of right to respect for private life, if appropriate limitations are not imposed on it.

Again, we should come to the question of workplace or employee surveillance as against the right to respect for private life. Employees generally use mechanisms of workplace surveillance to keep check upon the employees' activities. After the enactment of *Article 8*, this mechanism has suffered from serious hindrances, because employees can take the plea of Right to Privacy or private life against the workplace surveillance. New concept has also come into being, called the concept of Workplace Privacy, on the basis of which employees cannot use

¹³⁰ *Ibid.*

unlimited surveillance techniques on employees, so that, their individual liberty at the workplace may be violated. Therefore, *Article 8* has upheld various human rights, which the State cannot curtail easily and as such, a new dimension has come into being in U.K. thereafter in the arena of Right to respect for Private Life.

There are few more provisions of the *Human Rights Act, 1998* which are pertinent to mention in this respect. The Act makes it unlawful for public authorities to act in a way which is incompatible with the Convention. Courts will not be able to ignore previous law, but common law and legislation is so far as they relate to public authorities must be developed and interpreted taking into account the Convention, as interpreted by the *European Human Rights Commission and Court of Human Rights*.¹³¹

In this respect, *Section 12 of the Human Rights Act, 1998* is the most important section, which has upheld the Right to Freedom of Expression. This section provides that, Right to Freedom of Expression should always be upheld, except in case of any express privacy Code and that could also be curtailed on the ground of public interest or material in the public domain. *Section 12(3)* increases the application for breach of confidence, but it equates breach of confidence with libel. Due to this reason, it has become a serious impediment for development of Right to Privacy, even after the passing of the *Human Rights Act, 1998*, because considering the aspect as libel means, rejection of the mental feelings of the sufferer, which is the basic outline of Right to Privacy. The *Section 12(4)* dwells upon the aspects of public domain as well as the *Press Complaints Commission Code of Practice*, which is a Privacy Code, but in the ultimate effect, this section brings a dichotomy between Right to Privacy and Freedom of Expression.¹³² This is the effect of *European Convention* which has upheld both Right to Privacy and Freedom of Expression. As such, the *Human Rights Act* has also suffered from the same problem, because it has tried to implement the said Convention. Hence, it can be said finally that, the *Human Rights Act, 1998* has given birth to a new dimension in the periphery of Right to Privacy and that is the dichotomy between Privacy and Freedom of Expression.

¹³¹ *Supra Note 86 at pp.437-438.*

¹³² *Id at p.438.*

4.3.3.20. Telecommunications Privacy : The Telecommunications (Data Protection and Privacy) Regulations, 1999

The *Telecommunications (Data Protection and Privacy) Regulations, 1999* is another important regulation in U.K. for protection of Privacy of Communication. It is amended by the *Telecommunications (Data Protection and Privacy) Regulations, 2000* in order to implement the *EU Telecommunications Data Protection Directive (97/66/EC)*, which has further been amended in 2000. The provisions of the Regulations supplement the *Data Protection Act* by providing for the processing of personal data in connection with the provision of publicly available telecommunications services and public telecommunications networks. The Regulations include limiting the use of traffic and billing data by those operating in the telecommunications sector and in particular prohibit the sending of unsolicited direct marketing faxes to corporate subscribers to receive direct marketing phone calls.¹³³

Therefore, these Regulations are helpful for protection of Privacy of Communication and more specifically, for prevention of direct mail services. Direct mail service providers are getting personal information of the telephone subscribers from the telecommunications departments and are sending unsolicited mails, faxes or calls relating to promotional offers to the telephone subscribers. As these calls, mails or faxes are made without the permission of the telephone users as well as the information is taken without their knowledge or consent, these activities amount to gross violation of their Privacy of Communication. In this sense, these Regulations have created a new dimension for protection of Privacy of Communication in U.K. Receiving of unsolicited direct mail is a serious problem in the contemporary social scenario, which should be prevented for the sake of the protection of Right to Privacy of Communication. In this respect, these Regulations have taken a good shape.

Apart from these provisions, there are few more provisions important for the protection of Privacy of Communication in these Regulations. Subscribers to telecommunication services will be able to protect their Privacy, free of charge, in respect of Calling Line Identification, whereby incoming calls can be identified by

¹³³ *Ibid.*

either a Caller Display Service which requires equipment capable of displaying the calling number on a screen or by a Call Return Service whereby the previous caller's number can be identified. Conversely, receiving parties, such as charity helplines will be able to block access to incoming caller's numbers. Subscribers will also be able to determine the scope of their telephone directory entries and go ex-directory free of charge.¹³⁴

Therefore, the Regulations have also created various provisions for protection of Privacy of Communication by providing independency to the telephone subscribers in respect of identification of the callers, blocking them and remain private by keeping themselves outside the purview of the telephone directory. As such, the scope and ambit of the Regulations are wide. The Regulations have been implemented concurrently with the *Data Protection Act, 1998. Article 5 of the Directive*, which deals with confidentiality of communications, will have the greatest impact on privacy issues. It has been implemented by the *Regulation of Investigatory Powers Act, 2000*.¹³⁵ This part of the Directive is really an important measure for protection of Privacy of Communication. Confidentiality of communication is utmost important for the sake of the protection of Right to Privacy.

4.3.3.21. Privacy of Public Figures : The BBC Producers' Guidelines, 2000

The *BBC* issues guidelines to its producers which include Privacy. In this respect, the *BBC Royal Charter and Agreement* has come into effect on *May 1, 1996*.¹³⁶ Since then, a number of *BBC Charter and Agreements* have been entered into and those have highlighted various aspects of producers as well as editorial guidelines. Among those, the *BBC Producers' Guidelines, 2000* is noteworthy in this respect. These guidelines have come into being in *2000* and being the fourth edition of the Guidelines, contains a summary of the *BBC's* fundamental editorial values, like impartiality, accuracy, fairness, editorial independence and the commitment to appropriate standards of taste and decency.¹³⁷

¹³⁴ *Id at pp.436-437.*

¹³⁵ *Id at p.437.*

¹³⁶ *Id at p.446.*

¹³⁷ *Producers' Guidelines The BBC's Values and Standards, 2000* – producers-guidelines. pdf, pp.1-255 at p.1, <http://downloads.bbc.co.uk/guidelines/editorialguidelines/Legacy-Guidelines/2000-producers-guidelines.pdf>, visited on 18.3.2017.

Chapter 4 of the BBC Producers' Guidelines, 2000 deals with the protection of Privacy. It is divided into the following parts:-

- 1. Basic principles.**
- 2. Private Lives and Public Issues.**
- 3. Operating on Private Property.**
- 4. Doorstepping.**
- 5. Media Scrums.**
- 6. CCTV Footage.**
- 7. Missing People.**¹³⁸

1. Basic Principles

The Basic principles provide that, the *BBC* should respect the Privacy of individuals, recognising that any intrusions have to be justified by serving a greater good. Accordingly, the Right to Privacy is qualified by:-

- (a) The Public Interest** – People are less entitled to Privacy when protection of Privacy means concealing matters which are against the public interest.
- (b) Behaviour** – People are less entitled to Privacy where their behaviour is criminal or seriously anti-social.
- (c) Location** – The Right to Privacy is clearly much greater in a place such as a private home than it is in public places.¹³⁹

The Basic Principles further provide that, private behaviour, correspondence and conversation should not be brought into the public domain unless there is a clear public interest. It is essential that *BBC* should operate within a framework which respects people's Right to Privacy, treats them fairly, yet allows *BBC* to investigate and establish matters which it is in the public interest to know about.¹⁴⁰

2. Private Lives and Public Issues

According to these guidelines, public figures are in a special position, but they retain their Rights to a Private Life. The public should be given the facts that bear upon the ability or the suitability of public figures to attain or hold office or to perform their duties, but there is no general entitlement to know about their private behaviour, provided that, it is legal and does not raise important wider issues. As a

¹³⁸ *Id at p.56.*

¹³⁹ *Id at pp.56-57.*

¹⁴⁰ *Id at p.57.*

general principle, *BBC* programmes should not report the private legal behaviour of public figures unless broader public issues are raised either by the behaviour itself or by the consequences of its becoming widely known.¹⁴¹

3. Operating on Private Property

On most occasions programme makers will seek permission before operating on private property. But there will be instances when it is acceptable for programme makers to operate on private property without seeking permission. For example, it may be acceptable to film or record in a public shopping precinct or a railway station, places where the public has general access. Or it may be acceptable in more restricted places where serious criminal or anti-social activity is being exposed. Sometimes going onto private land without authority can constitute a civil offence. Sometimes, however, there is a risk of committing criminal trespass. It is important for programme makers to understand the laws of trespass in detail and to seek advice, if they are in doubt about how to proceed. When the programme makers are on private property and are asked by the legal occupier to leave, they should normally do so promptly.¹⁴²

4. Doorstepping

Doorstepping is the term used in broadcasting to mean occasions on which a reporter confronts and records a potential interviewee without prior arrangement, either in public or sometimes on private property. People who are currently in the news must expect to be questioned and recorded by the media. Questions asked by reporters as public figures come and go from buildings are usually part of legitimate newsgathering, even if the questions are sometimes unwelcome, and the rules on doorstepping are not intended to prevent this.¹⁴³

Apart from the cases mentioned above, in all other cases doorstepping should generally be a last resort. As such, it needs to be approved in advance by the *Head of Department* who should do so only if:

(a) the investigation involves crime or serious anti-social behaviour, and

¹⁴¹ *Ibid.*

¹⁴² *Id at p.58.*

¹⁴³ *Ibid.*

*(b) the subject of the doorstep as failed to respond to a repeated request to be interviewed, refused an interview on unreasonable grounds, or if they have a history of such failure or refusal.*¹⁴⁴

Accordingly, it is to be remembered that, doorstepping should not be used merely to add drama to a factual report. Controller, Editorial Policy (CEP) must approve in advance, any proposal to doorstep where there has been no prior approach to the interviewee. CEP will usually grant permission only if there is clear evidence of crime or significant wrong-doing and if there is reason to suspect that a prior approach will result in the individual evading questioning altogether.¹⁴⁵

5. Media Scrums

When a person suddenly features in a news event, it may be proper for representatives of many media organisations to go to a private home for trying to secure pictures or interviews. This can result in large numbers of media people gathered in the street outside. It is important that the combined effect of legitimate newsgathering by a number of organisations does not become intimidating or unreasonable intrusive. The media people must not harass people unfairly with repeated telephone calls or repeated knocks at the door or by obstructing them as they come and go, because this could amount to a criminal offence of aggravated trespass if it takes place on private property. In these cases, *BBC* team may totally withdraw themselves from interviewing the person or may take any other decision. The appropriate decision will depend upon the precise circumstances, but considerations to bear in mind are:-

(a) is the subject a private citizen or a public figure?

(b) is the subject victim, villain or merely interested party?

*(c) has the subject expressed a clear intention or wish not to appear or give interviews?*¹⁴⁶

BBC generally follows these guidelines and as such, there will be cases when the *BBC* judges it proper to withdraw and therefore, misses material which other organisations gather and publish. However, prominent public figures must expect media attention when they become the subject news stories, but the open use of

¹⁴⁴ *Id* at pp.58-59.

¹⁴⁵ *Id* at p.59.

¹⁴⁶ *Ibid.*

cameras or other equipment on public property aimed at recording them on private property must be appropriate to the importance of the story. Any use of such equipment must respect the rights of public figures to a proper level of Privacy.¹⁴⁷

6. CCTV Footage

When dealing with Close Circuit Television (CCTV) video or recordings provided by the emergency services or other bodies or individuals, special care must be taken over issues of Privacy, Anonymity and Defamation. Any ignorance of the circumstances surrounding the recording increases the risk in using it and *BBC* must apply the same ethical, editorial considerations for recording the same as they would follow at the time of recording themselves. In these cases, the principles of this Chapter and Chapter 5, dealing with Surreptitious Recording should be applicable. If illegal or anti-social activity is shown, there may be real risks of defamation or contempt.¹⁴⁸

7. Missing People

BBC programmes sometimes broadcast details of missing people sent in by relatives and friends. While helping to trace people may be a useful public service, care must be exercised when deciding what details to broadcast for fear of causing embarrassment or distress to the person who is the subject of the message. Programme makers should bear in mind the fact that not all missing people wish to be traced and should exercise caution in accepting everything the family or friends say at face value. Before broadcasting, programme makers should consider whether to hold back information, the missing person might regard as being personal and private and which they might wish to keep secret.¹⁴⁹

Among the *BBC Producers' Guidelines*, only *Chapter 4* is not important for protection of Privacy, *Chapter 5* is also applicable for protection of Privacy and as such, pertinent to mention in this respect. *Chapter 5* deals with *Surreptitious Recording*, which means, recording in clandestine or hidden manner. According to this Chapter, surreptitious recording should be allowed only in certain specific cases and not always. Therefore, such recording should always be made with special care and should follow the guidelines set out in *Chapter 4* for protection of Privacy. As

¹⁴⁷ *Ibid.*

¹⁴⁸ *Id at p.60.*

¹⁴⁹ *Ibid.*

these recordings are made in hidden manner, observance of rules of Privacy is must in these cases, because there is every chance of violation of Privacy of an innocent person.

The *General Principles of Surreptitious Recordings* are discussed hereunder. The *BBC's* use of hidden cameras and microphones are governed by the principles set out in *Chapter 4: Privacy*. They should operate within a framework which respects people's Right to Privacy, treats them fairly, yet allows *BBC* to investigate and establish matters which it is in the public interest to know about. Surreptitious recording should not be used as a routine production tool, nor should it be used simply to add drama to a report. The *BBC* will normally only allow the use of surreptitious recording for broadcasting for one of the following purposes:-

(a) *As an investigative tool to expose matters which raise issues of serious anti-social or criminal behaviour, where there is reasonable prior evidence of such behaviour (Section 5).*

(b) *To gather material, which could not be gathered openly, in countries where the local law appears inimical to fundamental freedoms or democratic principles or represents a serious impediment to responsible programme-making (Section 9: Observing Local Law, in Chapter 3: Fairness and Straight Dealing).*

(c) *As a method of social research where no other methods could reasonably capture the behaviour under scrutiny. In such cases, it will be usual practice to disguise the identities of the individuals concerned (Section 6).*

(d) *For purely entertainment purposes where the secret recording and any deception involved are an intrinsic part of the entertainment. In these cases it will always be necessary to obtain the consent of the individual recorded afterwards (Section 9).¹⁵⁰*

The use of long lenses can be a legitimate technique which may sometimes have the effect of recording people who do not know the camera is present. The deliberate use of such lenses, or of small video cameras, to conceal the camera from targeted individuals being photographed counts as surreptitious recording and is subject to these guidelines. Many ordinary people now carry video cameras or DVCs. Where the *BBC* uses people or equipment, including DVCs, to give the

¹⁵⁰ *Id at pp.60-61.*

impression of recording for purposes other than broadcasting, that recording is regarded as being carried out surreptitiously, and is subject to these guidelines. Occasionally recording for broadcasting can be performed openly but without declaring its end purpose. This may be preferable to recording which is entirely concealed. This qualifies as surreptitious recording and is subject to these guidelines.¹⁵¹

The *BBC Producers' Guidelines, 2000* has highlighted the aspects of protection of Privacy in good manner. These have covered various important aspects of Right to Privacy. The Guidelines have prescribed that, *BBC* Producers, Journalists and Photographers should always keep in mind the purview of protection of Individual Privacy at the time of taking photographs, covering news and producing any programme. These have suggested that, private individuals should always enjoy their Right to Privacy in their home and outside, doorstepping of media is not allowed except in exceptional circumstances, CCTV Coverage should be made without violating the Individual Privacy, and even the missing persons' Privacy should be maintained while making any news about them. Accordingly, protection of Privacy of the public figures has also been suggested in respect of their private lives, while they are in private property and as such, unnecessary doorstepping as well as media scrums are not allowed. The positive side of these guidelines is that, these have tried to protect every aspect of Individual Privacy at the time of making any *BBC* news. Even these guidelines have upheld the protection of Privacy over the news gathering process. In this sense, *BBC* even supports compromise in the process of news gathering for the sake of protection of Individual privacy. Another important aspect is that, *BBC* has also prevented surreptitious recording, which is allowed only in limited circumstances.

Therefore, the *BBC Producers' Guidelines, 2000* has become fruitful for protection of Individual Privacy. According to these Guidelines, such Right to Privacy can be curtailed only on the grounds of Public Interest, Criminal or Anti-social Activities and in the Public places. In this sense, more or less this right is absolute under these guidelines and can be curtailed only in the Public Interest or Criminal matters. No doubt, these guidelines are beneficial for protection of

¹⁵¹ *Id at p.61.*

Individual Privacy, but it is also necessary to examine the bindingness or enforceability of these guidelines. As these are only guidelines and not statutory provisions, these are having lesser enforceability. These are having only persuasive value and for the enforcement purpose, *BBC* requires entering into contracts with the Producers, so that, they are bound by the terms of the Contract to follow these guidelines. This is the limited force or negative side of these guidelines.

In this respect, the nature of these guidelines is presented hereunder. These Guidelines are a working document for programme teams to enable them to think their way through some of the more difficult dilemmas they face. What the Guidelines can do is to help *BBC* to make sensible calculations about those risks by learning on the experience of others who have been in similar situations. *BBC* staff, those freelancers working with *BBC*, and the independent Producers *BBC* commission – all need to be familiar with these Guidelines and to apply their underlying principles. This is more than just a moral responsibility. It is also a contractual obligation for everyone who makes programmes for the *BBC*. Where there is any doubt about the right approach, programme makers must consult their editorial manager. The *BBC*'s Controller of Editorial Policy must be consulted if any departure from the Guidelines, or their underlying principles, is contemplated. *BBC* has published the Producers' Guidelines, firstly so that audiences can read for themselves the editorial standards that *BBC* aspires to, and secondly so that they can judge *BBC*'s performance accordingly.¹⁵²

Hence, the bindingness and enforceability of the guidelines can be understood. These are of contractual nature and the producers are bound to obey these guidelines as parts of the terms of the contract. In this sense, these are having more nature than mere moral guidelines. The main thrust of *BBC* is to reach the heart of the audiences through these guidelines. Due to this reason, *BBC* has published these guidelines, so that, these will be proved helpful for building the goodwill of *BBC* in front of its audiences. Finally it can be said that, these guidelines are of contractual nature and as such, violation of Privacy can be redressed under these guidelines as a breach of contract. In this sense, it is like the age-old remedy of breach of confidence. Hence, no new right or remedy is created by these guidelines.

¹⁵² *Id at p.1.*

However, these can be taken as good initiative in the field of protection of Privacy in U.K., because something is better than nothing.

4.3.3.22. Privacy of Public Network : The Regulation of Investigatory Powers Act, 2000

In U.K. *Article 5* of the *EU Telecommunications Data Protection Directive (97/66/EC)*, which has further been amended in 2000, deals with the confidentiality of communications and will have the greater impact on privacy issues. This article has been implemented by the *Regulation of Investigatory Powers Act, 2000 (the RIP Act)* which has come into force on 24th October, 2000. The *RIP Act* prohibits listening, storage or other kinds of interception or surveillance of communications by means of a public telecommunications network or a publicly available telecommunications service without the user's consent, except when legally authorised. There is a limited exception which enables the Secretary of State, by regulations, to authorize the recording of communications in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or any other business communication. Regulations, relating to lawful business practice in relation to the interception of communications, are currently being drafted.¹⁵³

Therefore, the *RIP Act* has become a good piece of legislation for protection of Privacy of Communication. Not only that, it has also prohibited the unreasonable use of listening devices for interception or surveillance of the means of communication. In this sense, it has also prevented the evil effects of advanced scientific technology on Privacy of Communication. Such surveillance is allowed only in exceptional circumstances and according to procedure established by law. Hence, the Act is very much relevant in the contemporary social scenario, because interception of communication is a very serious matter in the modern day society owing to the invention of advanced scientific technology. In this respect, this Act is a product of the time.

Issues of Intercepted Communications have been dealt with seriously in U.K. In this respect, the *Interception of Communications Act, 1985* has been enacted. But, the Act has been prompted by litigation which has established that telephone tapping

¹⁵³ *Supra Note 86 at p.437.*

would not be a tort at Common Law, although it would be a violation of the *European Convention on Human Rights*. Due to this reason, this Act has been replaced by the *RIP Act*.¹⁵⁴

The *RIP Act, 2000* also extends the networks to which the *Interception of Communications Act, 1985* has been applicable. It applies to network like the internet when used as a public network. The *RIP Act* makes it an offence to intercept communications on a private telecommunications system; unless a person has the right to control the system or the express or implied consent of the person whose calls are intercepted – *S.1(2)*. It provides limited exceptions to the offence of interception and the new tort which the *RIP Act* establishes, covering the activities of the police and security services, and also for limited business purposes. Regulations are currently being drafted under the *RIP Act* setting out when such exceptions will apply, but also extending it to private networks, such as internal office networks. Currently there is a suggestion that both parties to a call will have to consent to this, unless it is a type of call for which there is a reasonable expectation that it will be taped to provide proof of business transactions, such as trading of securities. The *RIP Act* has been the subject of controversy as it will permit the police and security forces to require access to de-encrypted versions of encrypted communications and, in limited circumstances, the cryptographic keys to enable such communications to be de-encrypted.¹⁵⁵

Therefore, *RIP Act* has taken various good initiatives for the protection of Privacy of Communication and for prevention of interception of communications. But, a number of defects of this Act have also been found. The Act has given profound powers to police and security forces for the purpose of interception of communications as a security measure. Though it is an exception under the Act, but there is every chance of misuse of the Act owing to this exception, because of the unlimited powers given under this exception. Police or security forces may leak any important security provision in lieu of money, taking the help of the exception of the Act, which may amount to serious threat towards the national security of the country. This is a very common instance of corruption on the part of police or security forces. Hence, finally it can be said that, enactment of *RIP Act* is a very

¹⁵⁴ *Id at p.439.*

¹⁵⁵ *Ibid.*

good initiative for protection of Privacy of Communication in U.K., but it is not a full proof protection, because this protection should be exercised, subject to its exceptions.

4.3.3.23. Individual Privacy against Police Powers : The Criminal Justice and Police Act, 2001

The *Criminal Justice and Police Act, 2001* is an Act passed by the U.K. Parliament in order to tackle crime and disorder more effectively by giving extra powers to the police force. This Act has mainly been enacted for introduction of on-the-spot penalties for disorderly behaviour, restrictions on alcohol consumption in public places and the creation of a new criminal offence for protesting outside someone's house in an intimidating manner.

Though this Act is not directly applicable for the protection of Right to Privacy, but various provisions of the Act can be indirectly made applicable for the protection of Privacy thereof. In this respect, the important provisions of the Act are prevention of harassment of a person in his home (S.42), prevention of intimidating and harming witnesses (SS.39 & 40), prevention of doorstepping (though in indirect manner), incorporating codes of practice relating to visual recording of interviews (S.76) as well as making rules for taking fingerprints and samples (SS.78 & 80). All these provisions have been incorporated for prevention of crime in general. But, these provisions contain various components of Privacy and as such, Right to Privacy of Home, Individual Privacy as well as Privacy of Honour and Reputation can be protected in indirect manner with the help of these provisions. In this sense, various components of Right to Privacy get protection under Criminal Law, which would also help to protect Right to Privacy in U.K., though in limited extent.

4.3.3.24. Privacy of Biometric Information : Protection of Freedoms Act, 2012

The *Protection of Freedoms Act, 2012* has been enacted in U.K. to provide for the destruction, retention and use of certain evidential material, to impose consent and other requirements in relation to certain processing of biometric information relating to children, to provide for a code of practice about surveillance camera systems and for the appointment and role of the Surveillance Camera Commissioner, to provide for judicial approval in relation certain authorisations and notices under the *Regulation of Investigatory Powers Act, 2000*, to make provision

about criminal records including provision for the Disclosure and Barring Service and the dissolution of the Independent Safeguarding Authority as well as to make provision about the release and publication of database held by public authorities and to make other provision about freedom of information and the Information Commissioner. Therefore, this Act deals with the protection of various freedoms in U.K., which include the protection of Right to Privacy, Secrecy, Confidentiality and allied freedoms.

In order to analyse the provisions of Privacy protection under this Act, it is necessary to discuss various parts of the Act. This Act is divided into seven parts, under which various chapters of the Act are included. Some of those parts are related to the protection of Right to Privacy and allied freedoms, which are discussed hereinbelow:-

Part 1 : Regulation of Biometric Data

This is the most important part related to the protection of various components of Right to Privacy. *Chapter 1* of this part makes provision for the destruction, retention and use of fingerprints, footwear impressions and DNA samples. In addition it covers profiles taken in the course of a criminal investigation. In this respect, a new scheme has been added in this chapter, wherein it is provided that, the fingerprints and DNA profiles taken from persons arrested for or charged with a minor offence will be destroyed after the decision of either acquittal or not to charge. Moreover, this *Part* amends or omits *Sections* from the *Police and Criminal Evidence Act, 1984* and *Crime and Security Act, 2010* relating to the retention of fingerprints. In this respect, few provisions of this *Part* are worth mentioning, which are discussed below:-

(i) *Section 20 of Chapter 1* instructs the Secretary of State to appoint a Commissioner, to be known as the *Commissioner for the Retention and the Biometric Material*, to review the use and retention of biometrics by the government.

(ii) *Section 29 of Chapter 1* instructs the Secretary of State to make arrangements for a “*National DNA Database Strategy Board*” to oversee the operation of a DNA Database.

(iii) *Chapter 2* requires schools and colleges to obtain consent of one percent of a child under 18 years for acquiring and processing the child's biometric information and gives the child, rights to stop the processing of the biometric information without any parental consent. It also provides that, the processing of biometric information should be discontinued in case of any objection given by any parent of the child.

Part 2 : Regulation of Surveillance

This *Part* is important, because it has provided rules and regulations for preventing unjustified surveillance on the citizens of the country. In this respect, *Chapter 1 of the Part* creates new regulation and instructs the Secretary of State to prepare a code of practice for the use of *Closed-circuit television automatic number plate recognition*. *Chapter 2 of the Part* amends the *Regulation of Investigatory Powers Act, 2000*.

Part 5 : Safeguarding Vulnerable Groups, Criminal Records etc.

This *Part* is important for destruction of criminal records of the persons acquitted or not charged for minor offences, which is utmost important for protection of Privacy or confidentiality of information regarding the past lives of those persons, so that, they can live a healthy and respectable life in the society in future. In this respect, *Chapters 1 and 2 of the Part* amends the *Safeguarding Vulnerable Groups Act, 2006 and Police Act, 1997* with regards to carers and Criminal Records Bureau checks. It also removes the Controlled Activity and Monitoring sections from the *Safeguarding of Vulnerable Groups Act*. *Chapter 3* creates a new body corporate to be known as the "Disclosure and Barring Service", which adopts some functions of the previous *Independent Safeguarding Authority*.

Part 6 : Freedom of Information and Data Protection

This *Part* is another important portion of the Act, because it deals with the freedom of information and data protection. For the purpose of protection of Privacy it is necessary to create a balance between Freedom of Information and Data Protection. In this respect, this Act has created few provisions. This *Part* extends the existing *Freedom of Information Act, 2000* extending the scope of the Act and amending the role of the *Information Commissioner*. It includes widening the rules on applying for and receiving datasets from public authorities for re-use.

Hence, the *Protection of Freedoms Act, 2012* is a good initiative for protection of various aspects of Right to privacy, because it has tried to regulate the circulation of biometric data, the use of electronic surveillance, to protect and safeguard the disclosure of criminal records as well as to protect the freedom of information and data protection. Protection of the secrecy of biometric data or prevention of disclosure of criminal records is obviously necessary not only for the protection of Right to Privacy, but also for the prevention of many serious consequences, like the commission of various crimes. In this sense, the Act has taken good steps. Moreover, biometric data is private data and one needs the protection of Privacy thereof. Old criminal records of a rehabilitated person should not be disclosed to anyone, because it may create obstacles in the path of leading a respectable life for that person or may take away his or her dignified status in the society. In this respect, protection of Privacy of those records is utmost important. Freedom of information is required in the public interest and on the contrary, data protection is required for the protection of Privacy of that information. In this respect, one legislation dealing with the protection of both the aspects is the need of the hour. As such, this Act has done a good job by doing the same.

4.3.3.25. The British Constitution, 2015

The British or U.K. Constitution has not yet been framed, which means, U.K. has no written Constitution till date. Though it is said that, U.K. has an unwritten Constitution, but it is not easy task to establish an unwritten Constitution. Moreover, the principles of an unwritten Constitution are based on customary law and as such, not always easy to enforce. Due to this reason, it is hard to find out British Constitutional law on Privacy. However, in the recent period, British Parliament and the legal field have felt the necessity of enacting a written Constitution. In this respect, Parliament, through the Political and Constitutional Reform Select Committee of the House of Commons, has spent the full fixed five-year term of the 2010 Parliament for the possible codification of the United Kingdom's Constitution. As such, they have prepared a *Draft U.K. Constitution in March 2015*¹⁵⁶ with options for further reform. In fact, it is draft form of a codified Constitution, which is published for further consultation from various sections of U.K. society. When the

¹⁵⁶ Second Report of the Political and Constitutional Reform Committee, Session 2014-15, *A new Magna Carta?*, HC 463.

urge for codification of a written Constitution is felt and favourable responses have come into being from different sections of the society, this draft Constitution has been prepared.

Though this written Constitution is in the draft stage and requires further approval for codification, but it can be said that, it is a good attempt in U.K. This Constitution contains good amount of features of a modern Constitution and more or less it has a scientific basis. The most important part of this Constitution is that, it has framed Bill of Rights on the basis of the *European Convention on Human Rights and Fundamental Freedoms, 1950 and the Human Rights Act, 1998*. Under the head '*Bill of Rights*', a number of basic human rights have been guaranteed without qualification to all persons within the United Kingdom. It has also listed a number of other human rights, which may be qualified by law and guaranteed to all persons within the United Kingdom. The list contains two important rights declared in the *European Convention on Human Rights* relating to protection of Right to Privacy. Those are:-

- (i) *The right to respect for private and family life, home and correspondence.*
- (ii) *The right to marry and found a family.*

Therefore, at last, the concern for protection of Right to Privacy has been raised in U.K. Though it has never recognised the necessity of codification of separate law on Privacy therein, but ultimately it has understood the urge of recognising the convention rights and as such, has upheld those rights as Constitutional provision of Bill of Rights. In this respect, incorporation of Right to respect for Private Life and Right to marry and found a family, is an important aspect, because protection of Right to respect for private life gives certain amount of protection to Individual Privacy and protection of Right to marry and found a family gives certain amount of protection of Right to Privacy of Family and Marriage. In this sense, U.K. has finally realized the necessity of providing constitutional status to the Convention rights as well as the need for protection of Right to respect for private life at the Constitutional level.

As such, it is a very good attempt in U.K. for protection of Right to Privacy at the Constitutional level. But, the negative side is that, this Constitution is only at the draft stage till date and has no enforceable capacity as well as needs further

reconsideration. In this respect, it has a long way to go. However, inspite of its negative sides, it is positive that, U.K. has finally understood the necessity of a written Constitution in the year 2015. This draft Constitution can, at least raise general awareness about the basic human rights and public awareness for the making of a written Constitution. This awareness will ultimately lead towards the enactment of a written Constitution and incorporation of Right to Privacy therein, finally. So, we can hope for a better future in U.K.

4.4. Privacy Laws in India : An Introspection

Right to Privacy in India is not of recent origin; it is an age-old concept and can be traced back from ancient Indian society. In fact, traces of Right to Privacy or the law governing this right are found both in the ancient Indian Hindu religious texts and in the medieval Indian Muslim religious texts. This right is recognised by the Vedas and Koran both. In this sense, it was a well-established right in India since the very beginning. Though Indian society, since the ancient period, was an open society and as such, free mixing without maintaining any Privacy was a very common Indian culture, but the recognition of Right to Privacy was witnessed from the ancient Indian texts. Privacy was a very common feature in the closed societies of the western culture, which was absent in the Indian society. But, the *Grihya-Sutras* of the *Vedas* and the rules relating to construction of houses in the *Kautilya's Arthashastra* were the examples of following of Privacy norms in the ancient Indian society. Moreover, observing the custom of '*Purdah*' by the Hindu women in the ancient period and the Muslim women in the medieval period would provide ample evidence of existence of Right to privacy in India. In this sense, concept of Privacy was not alien in India.

The nature of Right to privacy in Indian society is typical owing to the Indian social system. It is a peculiar blend of constitutional, customary and common law right scattered over various legal fields in India. Therefore, this right is not confined to a particular area only in India; rather it has various dimensions and covers various types of rights thereof. As a customary right, it is treated as an easement forming part of statutory law. As a part of our constitutional rights to life and liberty, it is considered to be the illustration of progressive development of human rights and

basic freedoms.¹⁵⁷ The western concept of ‘Privacy Tort’ has not been developed in India in the same manner, but violation of Right to Privacy can be redressed under the tort of defamation. In this respect, Supreme Court of India has also pronounced important judgments. Again, in case of defamation, Right to Privacy of Reputation is also harmed, which can be redressed simultaneously under *Article 21 of the Indian Constitution* on the ground of Right to Life and Personal Liberty. Apart from that, various statutory provisions are available in India, which can provide protection to various components of this right. But, a comprehensive legislation protecting this right separately is still unavailable in India.

Though every component of Right to Privacy has not been developed equally in India, but the growth of this right as a customary, constitutional and statutory right has been marked as the threshold of a new era in India. Right to Privacy and Right to Information, both the rights are essential for the establishment of a well-balanced society. Indian society is an open society and cultural development through social interaction as well as close connection, is a common feature therein. In this type of society, people are happy to help their neighbours without their consent or asking for help. As such, social relationship is so close herein, that the people do not need consent for helping each other, they are always voluntarily ready to do that. In this type of society, people never feel the urge of having Privacy as well as they never feel the violation of privacy, whenever any neighbour or outsider comes into one’s house without prior permission or consent. Therefore, it is very tough to develop a concept, like Right to Privacy in India. Due to this reason, it has not been developed in well manner in India.

But, it is not true that, Privacy is a concept alien in India. The traces of Privacy have been found in the ancient and medieval religious texts in India, like *Ramayana, Mahabharata, Vedas, Smritis, Kautilya’s Arthashastra and Koran*. In fact, idea of Privacy has been flourished in India, at first, as a customary right. The need for Privacy has been felt in the construction and residing of houses, especially in the areas, where women have been resided. The necessity of Purdah among Hindu and Muslim women has also been found in India, wherein the root of Privacy is also rest. In fact, there are several customary rules prevailing in India which protect

¹⁵⁷ Kiran Deshta, *Right to Privacy under Indian Law*, Deep and Deep Publications Pvt. Ltd., New Delhi, 2011, p.107.

privacy interest of an individual. Apart from that, constitutional provisions have provided protective umbrella to this right. Besides customary rules and constitutional provisions, several other statutes recognize Right to Privacy directly or indirectly.¹⁵⁸ In this respect, a detail discussion of the Customary, Constitutional and Statutory Laws of Privacy is required, which is presented hereinbelow.

4.4.1. Privacy under Customary Laws of India : An Examination

Custom has been recognised as one of the important sources of law in India. It takes birth in some need felt by the society and satisfaction of such need might have been obtained in the beginning, through some transitory and isolated acts gradually giving rise to general conviction of the necessity of such satisfaction. The acts would develop into a Customary Law of people. There are so many rights derived from customary rules. Not all of the customs but few of them are codified as the law of the nation. It is not only Acts of the legislature or subordinate legislation but also customs and usages having the force of law. This is made clear by the definition of the expression “law” in *Clause (3) (a) of Article 13 of the Constitution of India*. The term “law” includes “customs” and “usages” having the force of law.¹⁵⁹

Indian judicial history indicates that, Privacy as a right was recognised as a part of custom from ancient times and received statutory recognition in *Section 18 of the Indian Easement Act, 1882*. *Illustration (b)* of that section is said to be providing legitimacy to this customary right and ensures its continuous enjoyment in accordance with custom. There exists in some parts of India a principle, based upon Hindu customary law, that a property owner, to ensure his Privacy, may acquire an easement over the property of a neighbour preventing him from erecting a window, overlooking the window of his own house. This principle in a codified form has existed since 1773 and in some States of India; it is judicially enforced under the *Indian Easements Act, 1882*.¹⁶⁰

It is, however, clear that there is no general recognition of this right as such and the courts before they could grant relief in a complaint of invasion of Privacy, insisted on proof of custom. So when it is generally known that in a particular town

¹⁵⁸ *Id at pp.107-108.*

¹⁵⁹ *Id at p.108.*

¹⁶⁰ *Ibid.*

or State, the Privacy was customary, the courts took judicial notice of the custom under *Section 57 of the Evidence Act, 1872*. In such case the plaintiff was absolved of this responsibility of proving the custom as a fact. *Illustration (b) of Section 18 of the Easement Act* makes it clear that, such a right can be acquired as a customary easement. In spite of it, the judicial trend does not appear to be either permitting its acquisition otherwise or extending the ambit and scope of this right.¹⁶¹

Therefore, Privacy as a Customary Easement Right was recognised in India since the very beginning, traces of which are found in the *Indian Easement Act, 1882*. From this, such contention can be drawn that, the recognition of Customary Easement Right to Privacy since the ancient period has got statutory recognition in India in the pre-independence era by the passing of the *Indian Easement Act, 1882*. According to *Section 18* of this Act, any person can claim his Privacy as an easement upon his neighbour's property by preventing him from construction of a window in his premises overlooking the premises of the person claiming the Privacy. It means, a person cannot construct a window in his premises from which the premises of his neighbour is seen in such a manner, that his neighbour's Privacy, within the premises, is violated. This provision was existed in India as a customary right since the ancient period and later on, it has got statutory recognition under *Section 18 of the Indian Easement Act, 1882*.

Apart from the Customary Right to Privacy relating to possession or enjoyment of land or property, there are other types of Customary Right to Privacy prevalent in India. One of them is *Section 509 of the Indian Penal Code, 1860*, which specifically declares that, any intrusion upon the Privacy of a woman, intending to insult her modesty, should be called a crime. Therefore, it is another example of statutory recognition of Right to Privacy in India since the pre-independence era. It considers violation of Right to Privacy of a woman as a crime, but this right has certain limitation. Recourse under this section can be taken only when Privacy of the woman is violated with the intention to insult her modesty and not otherwise. In this sense, this is not a full-proof provision for protection of Privacy of a woman. Under this section, violation of Privacy of a woman should always be coupled with the intention to insult her modesty. Due to this reason, it is

¹⁶¹ *Id at pp.108-109.*

felt that, India has not yet developed any full-proof law for protection of Right to Privacy only. However, this attempt gives protection to Right to Privacy partly; hence it is a good attempt.

Another important aspect of this section is that, it provides a Customary Right to Privacy separate from the land or property right. Moreover, this right has not borrowed from England, because England has never considered the existence of any Customary Right to Privacy. Therefore, it is a long practised tradition in India, which has been codified in the form of *Section 509 of the Indian Penal Code, 1860*.¹⁶² There is no doubt about the existence of Customary Right to Privacy in India, because traces of such right are found in the ancient and medieval period. Biggest example of existence of this right is found in the texts of ancient literatures, like *Vedas, Manusmriti, Kautaliya's Arthashastra, Ramayana and Mahabharata*. Again, similar contention is found in the *Koranic* injunctions of the medieval period. Hence, incorporation of this right in the *Indian Penal Code* is nothing but the codification of an existing Customary Right to Privacy. Another example of a separate Customary Right to Privacy in India is *Section 26 of the Indian Limitation Act, 1963*. Under this section, a Right of Privacy cannot be acquired, but may arise by express grant or local usages.¹⁶³ This section gives recognition to the acquisition of Right to Privacy by local usages. Hence, in India, a number of instances are found regarding the existence of Customary Right to Privacy.

Recognition of Customary Right to Privacy is not only subjected to the statutory recognition, but also under the auspices of the Indian Judiciary. Therefore, it is found that, the Customary Right of Privacy has been upheld by majority of the High Courts of India. It would, therefore, appear that Privacy Right as a custom covers a part of Common Law wrong amounting to tort and would overlap *Dean Prosser's* first category of intrusion cases with the main difference that such cases in tort have a wide ambit and scope and include personal acts as well. It may, however, appear that with the modernisation of the society, practice of '*Purdah*' system has been reduced and therefore, not many cases of invasion of Customary Right to Privacy now go to our law courts.¹⁶⁴ Hence, Privacy as a Customary Right is not

¹⁶² *Id* at p.110.

¹⁶³ *Srinarain V. Jadu Nath* 5 CWN 147; *Kesho Saha v. Mt. Muktakimn*, AIR 1931 Pat 212.

¹⁶⁴ *Supra Note 157* at p.116.

practically found in large numbers in the Indian society in the present social infrastructure. Use and exercise of this right have been minimized in this manner, whereas, it is flourished in some other form, like the Constitutional Right to Privacy.

4.4.2. Privacy under Constitutional Law of India : An Estimation

The basic issue is whether we, in India, by Constitutional creed, belong to the system of Open Government and respect for human Privacy in communication processes or otherwise or whether, we propose to, perpetuate the imperial ethos of the State's paramount power to rape Privacy in communication and to police human intimacy tearing up confidential relations of individuals as of no concern to the dignity and worth of the human person.¹⁶⁵ This is a perfect thinking regarding the need for protection of Privacy in the contemporary Indian society. Privacy is a part of human dignity and if Privacy is denied, actually human dignity is denied. Right to live with human dignity is such a human right, which can never be denied in a civilized human society, because without the existence of this right, human being can never live as a human being. The very basis of human existence is the human dignity. United Nations has tried to protect the human dignity since its inception and as such, it has enacted the *Universal Declaration of Human Rights, 1948*, wherein a long list of human rights has been provided, the very basis of which is the establishment of human dignity.

Therefore, Right to live with human dignity has got international protection with the hands of the United Nations. It is fulfilled only when the Right to Privacy is recognised and protected, because Privacy means freedom to quarantine oneself or share information with others. As such, if one would like to remain secluded or not wants to share personal information with others, then taking of his or her personal information without his or her knowledge would certainly amount not only to the violation of Privacy, but the violation of human dignity also. Moreover, freedom or Privacy is the very root of a democratic form of Government. People are the very basis of democracy and if people are not having freedom, then how can a democratic form of Government be continued or what would be the meaning of that democracy? Therefore, every fundamental or basic human right of the people should be upheld in a democratic set up, otherwise it would turn into a totalitarian state. As such, India

¹⁶⁵ Justice V. R. Krishna Iyer, "*Privacy is human right*", Press Council of India Review, Vol.11, 1990, pp.15-18 at p.15.

being a country by having democratic form of government, should try to protect the Privacy and human dignity of its people. Then only it is possible to establish the other tenets of democracy, like Rule of Law, Good Governance and Constitutionalism. In this respect, what is necessary is the establishment of a strong Constitutional Law and the protection of Privacy as well as human dignity under that law. Hence, it is necessary to examine the Constitutional Law of India to find out its appropriateness for the protection of Right to Privacy in India.

As a matter of fact, Indian Constitution does not cover Right to Privacy expressly as one of the Fundamental Rights. There was no existence of this right at the time of the making of Indian Constitution. It has been developed later on. But, it has been developed later on. But, it has a great Constitutional history of its development.

4.4.2.1. Development of Right to Privacy in India : The Constitutional History

The Constituent Assembly Debates on “*Fraternity Clause*” of the Preamble project the importance of the dignity of the individual. A few members, like *B. Pattabhi Sitaramayya, Srimati Durga Bai, Thakurdas Bhargava, B. V. Keskar, T. T. Krishnamachari, M. Ananthasayanam and K. Sanathanam* of the Constituent Assembly moved an amendment in order to change the drafting of the clause in the following form:-

*“Fraternity assuring the unity of Nation and the dignity of the individual.”*¹⁶⁶

But, the proposed amendment was not supported by the other members of the Constituent Assembly. They rejected the proposal amendment on the ground that, “dignity of the individual” should come first, because unless and until the “dignity of the individual” is assured, “unity of Nation” is impossible to achieve. In this sense, main contents of the said amendment were supported, but the order of the wordings was not. Further, in the Constituent Assembly amendment on the lines of the *Fourth Amendment of the U. S. Constitution* was moved by *Kazi Karimuddin* and it was also supported by *Dr. B. R. Ambedkar*.¹⁶⁷

In this respect, the contention of *Dr. Ambedkar* is quoted hereunder:-

“I am however, prepared to accept amendment No. 512 moved by Mr. Karimuddin. I think it is a useful provision and may find place in our Constitution. There is nothing novel in it because whole of the clause as

¹⁶⁶ *Supra Note 157 at p.172.*

¹⁶⁷ *Ibid.*

suggested by him is to be found in Criminal Procedure Code so that it might be said in a sense that there is already the law of the land. It is perfectly possible that the legislation of the future may abrogate the provisions specified in the amendment, but they are so important so far as personal liberty is concerned that it is very desirable to place these provisions beyond the reach of the legislatures and I am, therefore, prepared to accept this amendment".¹⁶⁸

However, *Dr. Ambedkar's* support was a little reserved one and not forceful enough to secure incorporation of Right to Privacy in the Indian Constitution. Possibly the Constituent Assembly members did not visualize the importance of the Right to Privacy as an aspect of personal liberty. But, the Constituent Assembly after postponement of this question voted against the adoption of this amendment. Although the Right to Privacy similar to *Fourth Amendment of the U. S. Constitution* was denied, yet the Constitution guaranteed the second right as is available in the *Fifth Amendment of the U. S. Constitution*, that is *Protection against Self-incrimination vide Clause (3) of Article 20 of the Constitution of India*.¹⁶⁹

Protection against self-incrimination is an important aspect of personal liberty; not only that, if that right is recognised, it means, every person should have the freedom to decide, whether he or she will confess his or her guilt or not. It means, State cannot force any person to confess his or her guilt or nobody can be forced for self-incrimination by the State. Grant of freedom for confession is one aspect of Right to Privacy. If one has the freedom to decide whether he or she will confess or not, then he or she has the Privacy of Confession. This is also one important aspect of personal liberty as an individual person is granted such liberty. In this sense, it is the Privacy of Personal Liberty. As such, it is a good attempt in India for protection of Right to Privacy in indirect manner. It is indirect, because it has never spoken about the Right to Privacy expressly. Interpretation of Right to Privacy under this Article has been made by the Judiciary only. In this sense, it is not a full-proof protection; however, the attempt is good.

4.4.2.2. Constitutional Right to Privacy in India : The Present Position

Though granting of protection against Self-incrimination has guaranteed certain amount of Personal Liberty, but rejection of recognition of Right to Privacy in express manner has prevented the full-proof protection of Personal Liberty under

¹⁶⁸ Constituent Assembly Debates, Vol.VIII, pp. 794 and 796.

¹⁶⁹ *Supra Note 157 at p.173.*

the Indian Constitution. Due to this reason, Personal Liberty has suffered to a great extent in India. But, the main article relating to Personal Liberty under Indian Constitution is not the *Article 20* but the *Article 21*. *Article 21* provides protection to each and every person the Right to Life and Personal Liberty in India. This article has extended its scope and ambit enormously after the judgment in the case of *Maneka Gandhi v. Union of India*. After such extension, this article has included a number of human rights as fundamental right to Life and Personal Liberty by way of judicial interpretation in India. As such, *Article 21* is playing an important role for protection of Right to Privacy in India, but it is also not a full-proof protection without the help of judicial activism in India.

The Preamble of the Constitution of India has assured the dignity of the individual. As such, it has created the door open for protection of Right to live with human dignity. As already discussed, Privacy is an integral part of human dignity and in this sense; Preamble has accepted this concept as well as created the path for development of Right to Privacy. But, the fallacy of the Indian Constitution is that, it has failed to recognise and protect this right expressly in Part-III of the Constitution as a Fundamental Right. In this sense, it can be said that, Right to live with human dignity has also remained incomplete and is dependent for its enforcement only on the mercy of the judiciary. This is not the only failure for protection of Right to Privacy under the Indian Constitution, but there are others also. In this respect, another important aspect, which is pertinent to mention is that, Right to Privacy has also not been mentioned as a “*reasonable restriction*” to the Right to Freedom of Speech and Expression under *Article 19 (1) (a)*. *Article 19 (1) (a)* guarantees Right to Freedom of Speech and Expression and *Article 19 (2)* imposes “*reasonable restrictions*” on the Right to Freedom of Speech and Expression on the following grounds:-

- (i) *Sovereignty and Integrity of India.*
- (ii) *Security of the State.*
- (iii) *Friendly relations with Foreign States.*
- (iv) *Public order, decency or morality.*
- (v) *Contempt of Court.*
- (vi) *Defamation.*

(vii) Incitement to an offence.

Therefore, it is found that, *Article 19 (2)* allows “reasonable restrictions” on the Right to Freedom of Speech and Expression only on the above grounds, which do not include the ground of Right to Privacy. It means that, Right to Freedom of Speech and Expression can be curtailed, if it violates any of the above-mentioned grounds, but it can never be curtailed, if it violates the Right to Privacy of an individual human being. As such, it is another impediment on the growth of Right to Privacy under the Constitutional Law of India. Right to Privacy is an important human right as also a part of Right to live with human dignity. But, Freedom of Speech and Expression can never be curtailed for the violation of this right. It is another negative side of Part-III of the Indian Constitution as well as an obstacle on the exercise of Right to live with human dignity. It is also noteworthy in this context that, the result of the restrictions being exhaustively enumerated is that, unless a publication that involves the individual’s Privacy is “immoral” or “indecent” it does not fall foul of *Article 19 (2)*.¹⁷⁰ Hence, Right to Privacy can be enforced under this article only in implied manner by taking the help of the ground of “decency or morality”. This should not be the right approach, because Right to Privacy is an important right on its own and it is not dependent on decency or morality. Hence, its enforcement through back door in this manner is not expected in a democratic country like India.

However, this lacuna has not prevented the courts from carrying out a Constitutional Right to Privacy by the creative interpretation of Right to Life under *Article 21* and the Right to Freedom of Movement under *Article 19(1)(g)*. In other words, in the absence of any express constitutional or statutory provisions recognising Right to Privacy the Indian Courts have seized the opportunities whenever they came and tried successfully to bring the Privacy right within the purview of fundamental rights. Even though Right to Privacy is not enumerated as a fundamental right in our Constitution, it has been inferred from *Article 21*.

Similarly, *Article 20* of the Constitution of India provides right against self-incrimination. This privilege against self-incrimination is one of the great landmarks

¹⁷⁰ *Id at pp.176-177.*

in man's struggle to make himself civilized¹⁷¹ which exempts a person to speak against himself. It enables the maintenance of human Privacy and observance of civilized standards in the enforcement of criminal justice.¹⁷² Moreover, there are also other articles in this respect. *Article 23* of the Constitution of India prohibits traffic in human beings, beggar and other similar forms of forced labour. It protects the person's autonomy and individuality. It recognizes the inviolate personality. According to *Warren-Brandeis*, Privacy means the inviolate personality. In this sense, *Article 23* protects the Individual Privacy. Further, the Constitution guarantees freedom of conscience and right to profess, practice and propagate religion to all persons subject to public order, morality and health. Any religious Privacy, if it exists, can be protected under *Article 25* of the Constitution of India. Right to Equality or equal protection of law under *Article 14* of the Constitution provides everyone similar kinds of Right of Privacy.¹⁷³ Hence, instances of various components of Right to Privacy can be found in various articles throughout the Part-III of the Indian Constitution.

Instances of Right to Privacy can be found not only under Part-III of the Indian Constitution, but also under other parts. In this respect, it is necessary to mention that, all the fundamental rights can be remedied under *Articles 32 and 226* of the Indian Constitution. As a safeguard, the Supreme Court of India and other High Courts exercise wide powers for enforcing these rights by issuing writs of *Habeas Corpus, Certiorari, Mandamus, Quo Warranto and Prohibition* under *Articles 32, 226 and 228* of the Constitution. *Article 13* of the Constitution forbids the State from making any law or regulation in contravention of these rights and if any such law is made, that can be declared void. Constitutional Right to Privacy is emanated under these provisions of the Constitution.¹⁷⁴ Therefore, in case of violation of Right to Privacy, remedies can be sought under these articles of the Constitution. In this sense, though Right to Privacy is not directly remedied under the Constitution, but violation of this right can be redressed under the above-stated articles of the Constitution. Right to Privacy is recognised as a fundamental right in

¹⁷¹ *Griswold v. Connecticut, 381 vs 479 (1965).*

¹⁷² M. P. Jain, *Indian Constitutional Law*, 1987, p.568.

¹⁷³ *Supra Note 157 at pp.177-178.*

¹⁷⁴ *Id at p.178.*

indirect manner under various articles of the Constitution and as such, it can be redressed under the provisions of the Right to Constitutional Remedies.

4.4.3. Privacy under Statutory Laws of India : An Assessment

In the backdrop of international recognition of Right to Privacy and the Constitutional protection of Right to Privacy in India, it can be said that, the term 'Privacy' has not been used in most of the Indian statutes. This contention draws the inference that, there has been no statutory recognition of Right to Privacy in India. But, this inference is not true, because the Customary Right to Privacy in India has got statutory recognition under the *Indian Penal Code, 1860* by declaring that "intrusion of Privacy" is an offence under the said code. Such recognition provides the idea that, inspite of India being an open society; Right of Privacy has found an important place in India since the very beginning as a Customary Right, which later on, has been recognised as a Statutory Right. Privacy is a feeling, a sentiment which rests upon the minds of the individuals in a given society, the need for which is felt by the individual human beings at a certain point of time. In this sense, the existence of Privacy in India proves the concern of Indian citizens for Right to Privacy as well as the recognition of this right by the Indian Legal Thought and its codification therefrom.

Taking into account the contemporary problems relating to the protection of Right to Privacy in India, the statutory protection of Right to Privacy is evaluated hereunder. In this respect, a number of statutes covering one or two aspects of protection of Right to Privacy, either directly or indirectly are listed below:-

- (i) The Indian Penal Code, 1860.*
- (ii) The Divorce Act, 1869.*
- (iii) The Indian Contract Act, 1872.*
- (iv) The Indian Evidence Act, 1872.*
- (v) The Indian Trusts Act, 1882.*
- (vi) The Indian Easements Act, 1882.*
- (vii) The Indian Telegraph Act, 1885.*
- (viii) The Indian Post Office Act, 1898.*
- (ix) The Official Secrets Act, 1923.*
- (x) The Emblems and Names (Prevention of Improper Use) Act, 1950.*

- (xi) The Special Marriage Act, 1954.*
- (xii) The Hindu Marriage Act, 1955.*
- (xiii) The Children Act, 1960.*
- (xiv) The Medical Termination of Pregnancy Act, 1971.*
- (xv) The Code of Criminal Procedure, 1973.*
- (xvi) The Press Council Act, 1978.*
- (xvii) The Family Courts Act, 1984.*
- (xviii) The Indecent Representation of Women (Prohibition) Act, 1986.*
- (xix) The Public Records Act, 1993.*
- (xx) The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.*
- (xxi) The Information Technology Act, 2000.*
- (xxii) The Right to Information Act, 2005.*
- (xxiii) The Press Council of India Norms of Journalistic Conduct, 2010.*
- (xxiv) The Juvenile Justice (Care and Protection of Children) Act, 2015.*

An evaluation of the above-mentioned statutes with respect to the protection of Right to Privacy is stated hereinbelow.

4.4.3.1. Privacy and Insult on the Modesty of Women : The Indian Penal Code, 1860

The Indian penal Code, 1860 is a comprehensive penal code in India for punishment of Crimes within and outside India committed by Indian Citizens or otherwise. But, it has not expressly dealt with the protection of Right to Privacy. In spite of that fact, certain provisions of the code can be mentioned which either expressly or impliedly deal with the protection of privacy. In this respect, *Section 509 of the Indian Penal Code, 1860* is worth mentioning. The Section runs as follows:-

Section 509

Word, gesture or act intended to insult the modesty of a Woman

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the Privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

The above-mentioned *Section 509* has been amended by the *Criminal Laws (Amendment) Act, 2013* and by the said amendment, few changes have been made in the last line of the section, wherein the words “*shall be punished with simple imprisonment for a term which may extend to three years, and also with fine*” have been substituted instead of the original words. Therefore, the strictness of section in the matters of punishment has been increased in the recent period. As regards the point of view of protection of Right to Privacy, it can be said that, protection of Right to Privacy was found in India since the ancient period in the customary laws. Mention of that right was also found in the literatures of ancient and medieval period. Incorporation of *Section 509* in the *Indian Penal Code* is nothing but the statutory recognition of that age-old Right of Privacy in the Penal Laws.

The Right protected under *Section 509 of the Indian Penal Code* is not only the Right to Privacy, but it also gives protection against intrusion upon the modesty of a woman. In fact, this section declares any intrusion upon the modesty of a woman, a Crime. Under this section, intrusion or insult upon the modesty of a woman includes the intrusion upon the Privacy of a Woman. Accordingly, this section provides protection to the Privacy of a Woman, but in a limited manner, only as a part of the insult upon the modesty of a woman. However, it is a good attempt for protection of Right to Privacy in India under the Criminal Law. This provision has further been strengthened by creating enhance punishment for the commission of this Crime by the *Criminal Laws (Amendment) Act, 2013*. Therefore, the importance of violation of Privacy of a Woman has been increased in the present social scenario and due to this reason; the punishment under this section is increased by the *Criminal Laws (Amendment) Act, 2013*.

Apart from *Section 509 of the Indian Penal Code*, there are also other sections of this Code relating to the protection of Right to Privacy. But, surprisingly, all those provisions have been added by the *Criminal Laws (Amendment) Act, 2013*, which means that, the increasing urge for Privacy in the present social circumstances, has been understood by the legislature and as such, it has included few more provisions for protection of Privacy in the *Indian Penal Code* vide the *Criminal Laws (Amendment) Act, 2013*. Prior to that, *Section 509* was the only resort

in this case. In this respect, *Sections 354A, 354B, 354C and 354D* require specific mention.

Section 354A defines Sexual harassment and provides punishment for the said offence. Though it has dealt with sexual harassment of women as a crime and has not expressly spoken about the violation of Privacy as a crime, but it should be remembered that, sexual harassment of a woman does not only injure her physically, but mentally also. Sexual harassment is such a crime with a woman, which takes away her right to live with human dignity, right to reputation, right to Privacy and many other important human rights along with it.

Section 354B provides that, the commission of assault or use of criminal force to any woman with intent to disrobe her or to compel her to be naked should be considered as a crime and the section prescribes punishment thereof. Disrobing a woman in public is not only a type of harassment on her, but it also amounts to her insultation in public along with the outrage of her modesty. Moreover, it takes away various human rights of the said woman, like to Right to Reputation, Right to Live with Human Dignity and the Right to Privacy.

Section 354C is another important section of *Indian Penal Code* inserted by the *Criminal Laws (Amendment) Act, 2013*, wherein a good attempt has been taken for the protection of Right to Privacy of a woman in India. This section deals with Voyeurism, which means, a perversion wherein a person receives sexual gratification from seeing the genitalia of others or witnessing the sexual behaviour of others. Voyeurism is not only a serious crime, but it also violates the important human rights, like Right to live with Human Dignity, Right to Reputation and Right to Privacy of a woman. It is a serious attack on the Right to Privacy of a woman, because performing sexual activities or using lavatory are purely private acts, wherein no observation by any perpetrator, is expected. Watching women, in such a situation is serious violation of her Privacy and human dignity, which can never be overlooked. Moreover, the section has expressly used the terms, like “private act”, “privacy” etc., which denote the intention of the legislature to protect Right to Privacy through this section under criminal law.

Section 354D deals with the offence of Stalking committed against a woman and prescribe punishment thereof. Stalking means, a hunt for game carried on by

following it stealthily or waiting in ambush. The section declares any stalking committed by a man on a woman as an offence, wherein the man follows the woman, attempts to establish personal interaction with her inspite of her disinterest in the matter or monitors the electronic communication used by the woman. Stalking on women also violates various human rights of women, like the Right to Reputation, Right to live with Human Dignity and Right to Privacy. Watching a woman in ambush or secretly, monitoring of her private electronic communication or following her or attempting to establish personal interaction with her, without her consent or inspite of her disinterest, would surely amount to violation of Right to Privacy of the said woman. Therefore, it is understood that, the *Indian Penal Code* and the *Criminal Laws (Amendment) Act, 2013* have taken good initiatives for the protection of Right to Privacy under Criminal Law. Though the term 'Privacy' is not used expressly everywhere, but the initiatives are no doubt praise-worthy.

4.4.3.2. Privacy of Divorce Proceedings : The Divorce Act, 1869

It is found that, of all judicial proceedings, the dirtiest linen is washed in public and the greatest amount of mudslinging is to be found in matrimonial proceedings. In order to preserve Privacy in such cases and to minimize embarrassment of all concerned, all matrimonial laws contain a provision for proceedings to be conducted *in camera*, i.e. behind the closed doors, where members of the public are not allowed. Therefore, *Section 53 of the Divorce Act, 1869* lays down that, if the court thinks fit, any proceedings under the *Divorce Act* may be conducted wholly or in part, behind closed doors.¹⁷⁵ This provision has been incorporated for protection of Privacy of the matrimonial life of the parties to the divorce proceedings, which becomes open to all in front of the Court. In order to protect Privacy of the Matrimonial Proceedings, *Section 53 of the Divorce Act, 1869* prescribes *in camera* proceedings, which means, Court proceedings should be kept private, where any intrusion by any outsider as well as the publication of the said proceedings are prohibited. In this sense, this legal provision is a good initiative for protection of Privacy in Matrimonial Proceedings in India.

¹⁷⁵ Prof. H. D. Pithawalla, *The Divorce Act, 1869 – A Critical Commentary*, C. Jamnadas & Co., Educational Law Publishers, Mumbai, Revised and Edited 5th Edn., 2007, p.37.

4.4.3.3. Privacy and Law of Contract : The Indian Contract Act, 1872

There exists certain other means by which parties may agree to regulate the collating and use of personal information gathered, e.g. by means of a 'privacy clause' or through a 'confidentiality clause'. Accordingly, parties to a contract may agree to the use or disclosure of an individual's personal information, with the due permission and consent of the individual, in an agreed manner and/or for agreed purposes and any unauthorised disclosure of information, against the express terms of the agreement would amount to a breach of contract under the *Indian Contract Act, 1872* and would invite an action for damages as a consequence of any default in observance of the terms of the contract under *Sections 73, 74 and 75 of the Indian Contract Act, 1872*.¹⁷⁶ Different contractual relations, be it general, insurance or data processing contract, require maintenance of privacy or confidentiality within the contractual relationship. In every case, a contract contains different clauses, which should include a 'privacy clause' or a 'confidentiality clause' to denote what sort of information should be disclosed to the outside world and what not. In every contract, certain information should be kept private or confidential between the parties to the contract. Observance of such privacy or secrecy is must in case of insurance contract or contract of data processing. Otherwise, Data or Information privacy of individual persons with respect to their personal information would be seriously jeopardised. Due to this reason, each and every contract should contain a 'privacy clause'. The essence of 'privacy clause' lies within the Contracts Acts of different countries. Though the *Indian Contract Act, 1872* does not contain any express provision relating to the inclusion of 'privacy clause', but being an exclusive code containing general principles of contract in India, it has the essence of 'privacy clause' within it. Moreover, the Act contains provisions for compensation in case of breach of the terms of any Contract under *Sections 73, 74 and 75 of the Indian Contracts Act, 1872*. In case of breach of the 'privacy clause', remedy can be sought under these sections. Though the sections do not mention expressly about the breach of Privacy in Contract, but being remedial provisions for breach of the terms of any contract, these sections provide implied protection to breach of Privacy under Law of

¹⁷⁶ Saurabh Awasthi, "Privacy Laws in India – Big Brother is Watching You", *Company Law Journal*, Vol.3, 2002, pp.15-23 at p.20.

Contract in India. Hence, *Indian Contract Act, 1872* has taken good initiatives for protection of Data and Information Privacy under the Law of Contract in India.

4.4.3.4. Privacy and Law of Evidence : The Indian Evidence Act, 1872

The Indian Evidence Act, 1872 prescribes detail norms of procedure relating to evidence, which covers every aspect of evidentiary procedure and as such, observance or maintenance of Privacy during the judicial proceedings has not been overlooked by the said Act. Moreover, it also deals with the protection of Privacy of various evidentiary materials under the Act. Each and every person is not bound to disclose any document or communication possessed by him or her, especially, if it is of private in nature and as such, person is entitled to the Right to Privacy of his or her document or communication. In this respect, purpose of the said Act is to protect the Privacy of all evidentiary materials. Various sections of the Act cover those provisions.

Section 75 of the Indian Evidence Act, 1872 deals with the concept of Private documents. Accordingly, Private documents are those documents which are prepared by a person for his private interest under his private right. Those documents are kept in custody of the person to whom it belongs and is not available for general inspection to the public.¹⁷⁷ As such, those are entitled to the protection of Privacy thereof. This type of Privacy can be called Privacy of Documentary Evidence.

Section 122 of the Act deals with Communications during marriage. According to this section, a wife or husband may not be compelled to divulge the communication of husband to wife and the vice versa. As such, any communication during the wedlock by the husband to his wife or by wife to her husband is prevented from being proved in a Court of Law. The section prohibits the wife or the husband from disclosing the communication between them.¹⁷⁸ This type of communication is called Privileged Communication and the section protects the Privacy of Privileged Communication between husband and wife.

Section 123 of the Act deals with the evidence as to affairs of the State. This section states that, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the

¹⁷⁷ Batuk Lal, *The Law of Evidence*, Central Law Agency, Allahabad, 15th Edn., 2001, p.285.

¹⁷⁸ *Id* at pp.400-401.

permission of the officer as the head of the department concerned, who shall give or withhold such permission as he thinks fit. Accordingly, the section is meant for protecting the Privacy or Confidentiality of the unpublished official records relating to the affairs of the State. The judiciary should be prevented from unnecessary use of those materials as evidence in judicial proceedings. This type of Privacy would come under the head Information Privacy.

Section 124 of the Act deals with Official Communications. Under this section, no public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure. Every official communication would also come under the head Privileged Communication, because it also deserves Privacy or Confidentiality what a person has done under official confidence that should not be disclosed to everyone. In order to protect the Privacy or Confidentiality of such official communication as well as to prevent unregulated use of such communication as evidence in the judicial proceedings, this section has been incorporated. But, if the public interest requires the disclosure of such communication, then the Public Officer is bound to do so. Hence, the Privacy protected under this section is limited. This type of Privacy is called the Privacy of Official Communication.

Similar provision is available under *Section 125 of the Act*, which deals with Information as to Commission of offences. According to this section, no Magistrate or Police Officer shall be compelled to say when he got any information as to the commission of any offence and no Revenue Officer shall be compelled to say when he got any information as to the commission of any offence against the public revenue. The main purpose of this section is to ensure the safety and security of the persons informing the Public Officers regarding the commission of an offence. In this respect, it is necessary to preserve the Privacy or Confidentiality of the source of such information, so that, the Public Officer can never be forced to produce evidence regarding the source of Information.

In this respect, another important provision is *Section 126 of the Act*, which deals with the protection of Privacy or Confidentiality of Professional Communication. Under this section, no legal practitioner is bound to disclose professional communication made by him with his clients. Every professional

relationship is subjected to certain fiduciary relationship based on the trustworthiness of the persons concerned and legal practitioners are no exception to it. This type of Privacy is called Privacy of Professional Communication. Next important provision is *Section 127 of the Act*, which is an extension of *Section 126* and provides that, the interpreters and the clerks or servants of the Legal Practitioners are also entitled to the Privacy or Confidentiality of such Professional Communication as expressed in *Section 126*. Next relevant provision is *Section 129 of the Act*, which deals with the Confidential Communications made by the clients with the Legal Advisors. In this sense, this section is just the opposite provision of *Section 126*.

Section 130 of the Act deals with the prevention of compelling production of title-deeds of a witness, who is not a party to a suit. Only a party to a suit can be compelled to produce such documents and not a witness. Therefore, according to this section, every witness enjoys certain amount of Privacy in case of production of documents in the court.

According to *Section 131 of the Act*, no person shall be compelled to the production of documents or electronic records which another person, having possession, could refuse to produce. Therefore, this section provides protection to the Privacy of any person in case of production of documents or electronic records. In fact, the section is incorporated for protecting the Privacy of certain documents or electronic records from using as evidence. This type of Privacy is called Privacy of Documents or Electronic Records.

Therefore, a considerable amount of provisions have been found in the *Indian Evidence Act, 1872* regarding the protection of various components of Right to Privacy. Hence, the Act has taken good initiative in this respect.

4.4.3.5. Privacy of Trust Property : The Indian Trusts Act, 1882

There is no express provision relating to the protection of Right to Privacy under the *Indian Trusts Act, 1882*. But, the whole Act is based on the principle of Privacy or Confidentiality. Trust means faith or confidence. As such, the trustee, under the Act, who takes care and looks after the trust property, is bound to preserve such Privacy or Confidentiality of the trust property with respect to the interests of the beneficiary of the trust. The trustee has to preserve the benefit of the beneficiary

in the trust property and for this purpose; he should not disclose any information relating to the property to any third person. Maintenance of such Privacy or Confidentiality is must for the protection of the beneficiary. Hence, the trustee should maintain the Privacy or Confidentiality of the trust property. The Act is enacted to fulfil this objective.

4.4.3.6. Privacy of Easement Right : The Indian Easements Act, 1882

The Indian Easements Act, 1882 totally deals with various components of easement right and has never spoken about the Right to Privacy, except under *Section 18 of the Act*. In fact, Right to Privacy was a customary right in India, the traces of which were found in the principles of construction of houses as laid down in the literatures of ancient and medieval period. As those principles of construction of houses are part and parcel of the easement rights attached to the land and houses, therefore, Customary Right to Privacy has become a part of Customary Easement Right. When the *Indian Easements Act, 1882* has been enacted, such customary Right to Privacy has got statutory recognition under the Act as an easement right. In this manner, Easement Right to Privacy has got statutory recognition under *Section 18 of the Act*. It means a right to enjoy Privacy as an easement at the time of enjoyment of a land or a house.

Section 18 of the Act provides that, an easement may be acquired in virtue of a local custom. Such easements are called customary easements. Therefore, the section has never spoken about the Right to Privacy in express manner. It has only provided statutory recognition to customary easements. As such, Easement Right to Privacy being a customary easement automatically gets protection under this section. *Illustration (b) of Section 18* has clearly specified the situation, which is stated below:-

By the custom of a certain town no owner or occupier of a house can open a new window therein so as, substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to B's house.

Therefore, the above illustration clearly portrays the picture of existence of Customary Easement Right to Privacy in India in case of construction of houses. Accordingly, it is found that, every person has the Right to Privacy of the house in

the neighbouring area and no neighbour is entitled to open a new window in his house violating the Privacy of others' houses. Hence, Right to Privacy can be claimed as an Easement Right attached to the enjoyment of the house.

4.4.3.7. Privacy under Indian Telegraph System : The Indian Telegraph Act, 1885

Section 5 of the Indian telegraph Act, 1885 is worth mentioning, which has given power to the Central Government and State Governments to take possession of licensed telegraphs and to order interception of messages. But, this provision can be used only in case of public emergency or in the interest of public safety and the press is immuned from this provision. Use of this section for the interception of telegraphic messages, are no doubt a provision for violation of Privacy of Communication of individual citizens. But, Right to Privacy is a limited right and can be suspended during public emergency. In this sense, this section has permitted curtailment of Communication Privacy by way of interception of messages, only in case of public emergency and not otherwise. In this respect, this legal provision is not a Privacy disfavouring provision; rather a Privacy favouring. The Act has also created penal provisions for violating the telegraphic norms of the Act, like intrusion into the signal-room, trespass into telegraph office or obstruction under *Section 23*, unlawfully attempting to learn contents of messages under *Section 24*, intentionally damaging or tampering with telegraphs under *Section 25*, injury to or interfere with a telegraph line or post under *Section 25A*, telegraph officer or other official making away with or altering or unlawfully intercepting or disclosing messages or divulging purport of signals under *Section 26*, attempts to commit offences under *Section 32*. Therefore, the intention of the Act is to prevent the unlawful use of telegraphic system, prevent the misuse of the telegraphic norms of interception of messages as well as to prevent the violation of Privacy of Communication.

4.4.3.8. Privacy of Correspondence under Indian Postal System : The Indian Post Office Act, 1898

The Indian Post Office Act, 1898 has been enacted to establish, regulate, control and maintain the system of Post Office in India. In this respect, important sections incorporated in the Act are, *Section 20*, under which transmission by post of anything indecent etc. are prohibited, *Section 25*, under which power has been given

to the Post Office to intercept notified goods during transmission by post, *Section 26*, under which power has been given to the Post Office to intercept posted articles for public good, during the time of public emergency or in the interest of the public safety or tranquillity and *Section 27B*, under which the power is given to the Post Office to detain newspapers and other articles being transmitted by post for containing any seditious matter or for violating various provisions of different Indian Statutes.

The above stated provisions of the Act clearly portray the idea that, the Act has given enormous powers to the Post Offices for prevention of transmission of private communication on various grounds, including the grounds of indecency, morality, public good, public emergency etc. Even the Post Offices have the power to prevent transmission of newspapers by post on the ground of containing seditious matters therein. Though the view point of the legislature is that, these provisions are not meant for the violation of Privacy of Correspondence of the citizens, but in fact, exercising so much control over the private correspondence by the Post Office would certainly amount to violation of Privacy of Correspondence. Private Correspondence should always enjoy the Privacy of Correspondence in a democratic civilized country like India. When the Post Offices are given such power to control Private Correspondence, then obviously the Right to Privacy of Correspondence is seriously endangered, because what amounts to indecent and what not, varies from case to case and obviously depends upon the nature and circumstances of every case. Due to this reason, though the Act is meant for protection of Privacy of Correspondence, which can never be violated, except on the ground of indecency, but practically there is every chance of misuse of the said provision.

Similar theory is applicable in case of prevention of transmission of newspaper by post. In this case, the freedom and Privacy of the Press are violated, because it is not always easy to prove that, the newspaper contains seditious matter. Though the Act would say that, the provision amounts to reasonable restriction on Freedom of the Press as stated in *Article 19(2) of the Indian Constitution*, but practically there is every chance of misuse of the said provision. Hence, theoretically according to the Act, Privacy of Private Correspondence can be curtailed by the Post Office and Freedom and Privacy of the Press can be taken away by it only in certain

exceptional circumstances. But, practically, Privacy of private correspondence can be curtailed according to the whims of the Post Office. This is the main defect of the Act.

4.4.3.9. Privacy of Governmental Secrets : The Official Secrets Act, 1923

The Official Secrets Act, 1923 covers the Privacy and secrecy of official records of the Central and State Governments. In fact, it is a Privacy protection legislation and it protects the Information Privacy of the Government records. It has created provisions for imposing penalty for spying in order to communicate or publish secret official codes and acting for any purpose prejudicial to the safety or interests of the State. It has also created penalties for the communications with foreign agents for commission of offences, wrongful communication of information relating to official secrets, which is likely to affect the sovereignty and integrity of India and the security of the State as well as unauthorized use of uniforms, falsification of reports, forgery, personation and false documents. Along with these provisions and others, it has also created penalty for harbouring spies and made provisions for execution of public from proceedings relating to official secrets. As such, it has also created provisions for in camera or private or closed door proceedings in the cases relating to official secrets.

Therefore, the Act has created provisions for protection of official secrets in full-fledged manner. The intention of the Act is to protect the official secrets, the communication or publication of which would seriously endanger the defence, external or internal security of the State, the sovereignty and integrity of India as well as the friendly relations with foreign States. It has also tried to protect the official secrets, the communication or publication of which may amount to gross violation of public interest. Due to these reasons, the whole Act is meant for the protection of Privacy or Secrecy of the Official Secrets. Moreover, the Government as an entity is also entitled to the Right to Privacy of its records, information and other matters. The Act is also meant for the preservation of such Right to Privacy.

4.4.3.9.1. Official Secrets Act, 1923 vs. Right to Information Act, 2005

But, one thing is to be remembered that, after coming into force of the *Right to Information Act, 2005*, the *Official Secrets Act, 1923* is seriously challenged. *The Right to Information Act, 2005* is made for providing general public, various

informations, to protect their Right to Information, which they are entitled to get in the public interest. Here lies the dichotomy between the two Acts. *The Official Secrets Act, 1923* is made for presenting the official secrets, which the general public is not entitled to know. On the contrary, the *Right to Information Act, 2005* claims that, general public is entitled to know some of those information in their public interest. In a democratic country like India, government cannot run every activity secretly and general public has the Right to Information in this respect, in order to maintain transparency in the governmental activities. The Government is also accountable to the general public for its actions, as it is formed by the representatives of the people through general election. Here lies the controversy between the two Acts regarding which information should be communicated to the public under the *Right to Information Act, 2005* and which information should be kept as official secret under the *Official Secrets Act, 1923*. Balancing between these two Acts is the need of the hour for the peaceful existence of a democratic set up as well as for the protection of Information Privacy of Official Secrets.

4.4.3.10. Privacy of Personality : The Emblems and Names (Prevention of Improper Use) Act, 1950

This Act has come into force on *March 1, 1950* and is applicable to citizens of India outside India. *Section 3* of the Act is important for discussion, which provides that, no person shall, except in conditions and cases as may be prescribed by the Central Government, use or continue to use for the purpose of any trade, business, calling or profession or in the title of any patent, or in any trade mark or design, any name or emblems specified in the schedule or any colourable imitation thereof without the previous permission of the Central Government or of any authorised officer of the Government. The bar extends to any competent authority registering and Company, firm, trade mark, design or granting a patent. Penalty for contravention of the provisions of this Act is fine which may extend to 500 rupees. The Schedule annexed to the Act lists the names of institutions and personalities; which come under the bar. Moreover, *Entry 9 of the Schedule* prohibits the use of the name or pictorial representation of the *President of India*. *Entry 9A of the Schedule* prohibits the use of the name or pictorial representation of *Chhatrapati Shivaji Maharaj or Mahatma Gandhi, or Pundit Jawaharlal Nehru or Srimati Indira*

Gandhi or the Prime Minister of India, except on calendars not used for advertising goods.¹⁷⁹

Therefore, this Act prohibits the improper use of one's name or identity. In this sense, *Section 3* of the Act provides protection to Right to Individual Privacy and the Privacy of Personality. Though the section or the Act has not used the term 'Privacy' anywhere, but by prohibiting the improper use of one's name or identity, it has protected the Individual Privacy or Privacy of Personality in indirect manner.

4.4.3.11. Privacy of Matrimonial Proceedings : The Special Marriage Act, 1954

The Special Marriage Act, 1954 has created provisions for the divorce of the persons married under this Act. Each and every matrimonial proceedings show mudslinging relating to private affairs between the parties in open public. To prevent that open mudslinging among the parties as well as to protect the Privacy and sanctity of the institution of marriage, every matrimonial statute contains a provision of in camera proceedings in matrimonial cases. *The Special Marriage Act, 1954* is not an exception to it and *Section 33 of the Act* provides that, the proceedings under the Act are to be conducted in camera (privately) and may not be printed or published. According to this section, every proceeding under the Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgement of the High Court or Supreme Court printed or published with the previous permission of the Court. If any person prints or publishes any matter in contravention of the provisions contained in this section, he shall be punishable with fine which may extend to one thousand rupees.

In this sense, this section is incorporated in order to protect the Privacy of matrimonial proceedings under the Act. *Section 33 of the Special Marriage Act, 1954* corresponds to the *Section 22 of the Hindu Marriage Act, 1955* and the *Section 53 of the Divorce Act, 1869*. But, all the three sections are not fully identical, because there lies certain difference between them. More specifically, *Section 22 of the Hindu Marriage Act, 1955* and *Section 33 of the Special Marriage Act, 1954*, both are identical, because both of them have created compulsory provisions for conducting in camera proceedings in matrimonial matters and have prescribed

¹⁷⁹ Michael Henry (ed.), *International Privacy, Publicity and Personality Laws*, Butterworths Publication, London, U.K., 2001, p.237.

punishment for violating such provisions. But, *Section 53 of the Divorce Act, 1869* has not created such compulsory provision or has not prescribed any punishment for violating the said provision.

4.4.3.12. Privacy and In Camera Proceedings : The Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 has also created provision for in camera (private or closed door) proceedings in matrimonial cases to protect the Privacy and sanctity of the institution of marriage. *Section 22 of the Act* has been incorporated in this respect, which provides that, matrimonial proceedings are to be in camera and may not be printed or published. The language and coverage area of this *Section 22* are identical with the language and coverage area of *Section 33 of the Special Marriage Act, 1954*. Even the punishment prescribed under both the sections is identical. In this sense, this *Section 22* differs with *Section 53 of the Divorce Act, 1869*. As such, this *Section 22* is a stringent legal provision for protection of Privacy in matrimonial proceedings.

In this respect, it is pertinent to mention that, this section deals with publication of judicial proceedings relating to matrimonial causes. It provides that, proceedings under the Act shall be conducted in camera and may not be printed or published. This rule is contrary to the general rule which requires that, all judicial proceedings should be held in an open court. But, in exceptional cases of matrimonial proceedings, justice cannot be done unless a hearing is held in camera and prohibition of subsequent publication of the proceedings is made. This rule is based on public decency. The statutory provisions of *Section 22 of the Hindu Marriage Act, 1955*, *Section 33 of the Special Marriage Act, 1954* and *Section 53 of the Divorce Act, 1869* which deal specifically with the topic of holding trials in camera, are inevitably associated with the administration of justice itself.¹⁸⁰

4.4.3.13. Privacy of Children : The Children Act, 1960

The Children Act, 1960 applies to a child who is defined as a boy under the age of 16 years and a girl under the age of 18 years. *Section 36 of the Act* provides that, no report in any newspaper, magazine or news-sheets of any inquiry regarding a child under this Act shall disclose the name, address or school or any other particular calculated to lead to the identification of the child, nor shall any picture of

¹⁸⁰ H. K. Saharay, *Laws of Marriage & Divorce*, Eastern Law House, Kolkata, 5th Edn., 2007, p.232.

any such child be published. Any person contravening the provisions of this section shall be punishable by a fine, which may extend to one thousand rupees. Such disclosure may, however, be permitted by the authority for reasons to be recorded in writing, if in its opinion such disclosure will be in the interest of the child.¹⁸¹ Therefore, *Section 36 of the Children Act, 1960* deals with the provision for protection of Privacy of Children in the matters of any inquiry under the Act. The main reason behind this provision is to protect the reputation of the child against criminalization. In every child related matter, the welfare and interest of the child is of paramount consideration. Publication of anything relating to the identification of the child under the Act may hamper the interest and welfare of the child in future. Due to this reason, Privacy and secrecy should be maintained relating to the identity of the child.

4.4.3.14. Privacy and Medical Termination of Pregnancy : The Medical Termination of Pregnancy Act, 1971

Under *Section 7(1)(c) of the Medical Termination of Pregnancy Act, 1971*, the State Governments are empowered to make regulations prohibiting the disclosure, except to such persons and for such purposes as may be specified in such regulations, of any information regarding the particulars of a woman having undergone termination of any pregnancy under the Act. Any person who wilfully contravenes or wilfully fails to comply with any such regulations shall be liable to be punished with fine which may extend to one thousand rupees. It is evident that, these special provisions have been enacted to essentially safeguard the special interests of women and children in extraordinary circumstances.¹⁸² Therefore, *Section 7(1)(c) of the Act* has been incorporated for protection of Privacy of woman who have terminated their pregnancy under the Act. According to the Act, termination of pregnancy is permitted only on the ground of medical reasons. Again, termination of pregnancy is a private matter of the woman doing so and she may not be interested to disclose matters relating to it in public. Moreover, a number of rape victims and other young girls are subjected to termination of pregnancy under the Act. Identification of those women and girls as well as the publication of information about them may hamper the future of those girls and women by

¹⁸¹ Michael Henry, *op.cit.*, p.236.

¹⁸² *Id at p.238.*

damaging their reputation. Due to this reason, it is utmost important to maintain the Privacy and secrecy of those medical termination of pregnancy.

4.4.3.15. Privacy of Criminal Proceedings : The Code of Criminal Procedure, 1973

The Code of Criminal Procedure, 1973 has prescribed the norms of Privacy to be observed at the time of conducting any criminal court proceeding. Though the general rule is that, every judicial proceeding should be conducted in open court, but in certain exceptional circumstances, it can be conducted privately for the sake of interest of justice. This is one aspect of observance of Privacy during criminal court proceedings. First and foremost section in this respect, is *Section 164(3) of the Code*, which provides that, if at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody. According to this section, no person shall be forced by the Magistrate to make confession about the offence committed by him against his wishes. The confession should always be made by the accused person voluntarily. Therefore, the accused person should enjoy freedom or Privacy for voluntary confession of the offence committed by him. This provision is made for protection of interest of the accused person based on the Fundamental Right to protection against Self-incrimination as stated in *Article 20 of the Indian Constitution*.

Next important provision is the *Section 165(1) of the Code*, which allows only reasonable search and unreasonable search is prohibited by this section. In this sense, this section is meant for protection of Privacy and security of the person against whom such search is caused. Due to this reason, the section has given limited power of search to the police officer concerned, because giving of unlimited power to such police officer may destroy the Privacy and sanctity of one's home, security of those persons as well as can take away the right to life and personal liberty of those persons. The underlying principle behind the incorporation of this section is the Fundamental Right to protection of Right to Life and Personal Liberty as stated in *Article 21 of the Indian Constitution*.

Next important provision of the Code for protection of Privacy is *Section 327(1) of the Code*, which is meant for the protection of Privacy of rape victims and

victims of other illegal sexual intercourse during judicial proceedings. The section prescribes for in camera or private or closed door judicial proceedings in the criminal cases mentioned therein for the sake of interest of justice as well as for the protection of reputation, Privacy and secrecy of the rape victims and other victims mentioned in the section. Publication of the proceedings mentioned in the section is also prohibited by this provision in order to maintain Privacy and confidentiality of the matter.

4.4.3.16. Privacy of Press Freedom vs. Privacy of Public Figures : The Press Council Act, 1978

The Press Council Act, 1978 is passed to establish a Press Council for the purpose of preserving the freedom of the Press and of maintaining and improving the standards of newspapers and news agencies in India. The main objective of the Act is to preserve and maintain the Privacy and Freedom of the Press in India. In fact, the *Press Council Act, 1978* is passed and the Press Council of India is established to give full-fledged effect to the Freedom of Press enshrined under *Article 19(1) (a) of the Indian Constitution*. The whole Act is meant for the protection of Freedom and Privacy of the Press. *Section 4 of the Act* provides for the establishment of a Press Council, *Section 13* speaks about the objects and functions of the Council, *Section 14* deals with the power to censure a newspaper and *Section 15* states the general powers of the council, according to which, the Press Council should have the powers of a civil court according to the *Code of Civil Procedure, 1908*, while dealing with any inquiry under the Act. The Press Council is an independent agency for protection of Freedom of Privacy of the Press. Press Council is given enormous power under the Act and whatever is decided by the Press Council, shall be final and cannot be challenged in any civil court, if the action is taken in good faith. Press Council has also the power to censure any newspaper for violating the grounds specified in *Article 19(2) of the Indian Constitution*.

But, the freedom and Privacy given to the Press should not be absolute, because of the protection of Privacy of the individual persons or other entities, whose news are published by the Press. In fact, Right to Privacy is not absolute right; rather a limited right. In this sense, Right to Privacy given to the Press should also be limited. Press should remember the Right to Privacy of the celebrities and

public figures, at the time of publishing news about them. Privacy of Reputation of those persons is very much important and Press should never defame those persons, while gathering or publishing news regarding them. As the Press Council is given unfettered power to protect the freedom of Press, when acting in good faith, therefore, it should also look after that, its powers should not be misused. It is to be remembered that, if the Press Council has not acted in good faith, then its activities can be challenged. So, it should try to protect the Privacy of the other individuals and should fix certain rules and regulations for observance by the journalists.

4.4.3.17. Privacy of Family Courts Proceedings : The Family Courts Act, 1984

The Family Courts Act, 1984 is another matrimonial statute in India and like other matrimonial statutes, it also requires the provision for in camera or closed door proceedings in matrimonial matters. In this respect, the Act has incorporated *Section 11*, which deals with the *proceedings to be held in camera*. According to this section, in every suit or proceedings to which this Act applies, the proceedings to be held in camera if the Family Court so desires and shall be so held if either party so desires. Therefore, this provision is not similar with the *Section 22 of the Hindu Marriage Act, 1955* or *Section 33 of the Special Marriage Act, 1954*. Those provisions are more stringent than this provision, because both of them are mandatory provisions and have prescribed punishments for violating these provisions. But, this provision is optional and depends upon the desire of the Family Court as well as the parties. It has also not prescribed any punishment for violating this provision. In this sense, this section is not a full-proof provision for protection of Privacy in matrimonial proceedings. It has only limited application in this respect.

4.4.3.18. Privacy of Women : The Indecent Representation of Women (Prohibition) Act, 1986

This Act is enacted for the prohibition of indecent representation of women in India. Indecent representation of women is defined in *Section 2(c) of the Act* to mean, the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt, or injure the public morality or morals. *Section 3 of the Act* provides that, no person shall publish, or cause to be published or arrange or arrange or take part in the publication or

exhibition of, any advertisement which contains indecent representation of women in any form. *Section 4 of the Act* says that, no person shall produce or cause to be produced, sell, let for hire, distribute, circulate, or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form, except if the said book etc. is in the interest of science, literature, art or learning or other objects of general concern or for religious purposes. The penalty for the first conviction under the Act is imprisonment of either description for a term which may extend to two years and with fine which may extend to 2,000 rupees and for second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine of not less than 10,000 rupees but which may extend to one lakh rupees.¹⁸³

If it is a matter of indecent representation of women, which injures public morality, then nobody is permitted to do that, even the woman concerned herself also. Hence, the Act is meant for the protection of Privacy of Women from indecent representation. The Act has also prescribed punishment for commission of indecent representation of women. In this sense, it is a good attempt not only for the protection of Privacy of Women, but also for the prevention of indecent representation of women.

4.4.3.19. Privacy of Public Records : The Public Records Act, 1993

The Public Records Act, 1993 is meant for the protection, management and preservation of public records under the control of Central Government, Union Territories and public sector undertakings. The Act has defined public records and has provided rules and regulations for the maintenance, preservation and destruction of the public records under the Act. Public records under the Act mean documentary records as well as electronic records. According to the Act, no public record shall be discharged to anyone nor shall be disposed of without the prior approval of the Central Government. The Act has also prescribed punishment for violating provisions of the Act. In this sense, the Act is meant for the protection of Privacy, Secrecy and Security of the public records, so that, any unauthorized disclosure of the public records shall be prevented for the protection of public interest. Hence, the

¹⁸³ *Id at pp.237-238.*

Act is good enough for the protection of Data or Information Privacy of the Public Records. Prescribing punishment for violating provisions of the Act has provided it certain added advantage.

4.4.3.20. Privacy of Motherhood : The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994

The Indian legislature has enacted the *Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994* in order to prevent the heinous crime of female foeticide in India, which has increased at an alarming rate in the present day India. However, the Act has been amended the year 2003, due to certain inadequacies and practical difficulties found in the implementation of the Act. After the said amendment, the legislation is now known as the *Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994*.

The Act is meant for the prevention of female foeticide by way of prohibiting the sex selection test with the help of modern pre-conception and pre-natal diagnostic techniques. In this respect, few provisions of the Act are noteworthy. *Section 3A* prohibits sex-selection by any person including specialists in the field of infertility. *Sections 4 and 6* prohibit the misuse of pre-natal diagnostic techniques for determination of the sex of foetus leading to female foeticide. *Section 5* deals with written consent of the pregnant woman and prohibition of communication of the sex of foetus. *Section 22* prohibits advertisement of pre-natal diagnostic techniques for detection or determination of sex. Finally, *Section 23* provides the punishment for violation of the provisions of the Act. In this sense, the Act has taken every measure for prevention of female foeticide and prohibition of sex selection.

Female Foeticide is also associated with the Right to Privacy of a woman. It is a serious crime which is increasing rapidly in our society. This is the killing of a girl child in the mother's womb and that is nothing but another name for murder. That obviously violates the Right to Life including the right to take birth of an unborn child. Apart from that, it is a gross violation of the Right to Privacy of would be mother, who, in most of the cases is forced to abort her girl child at the pre-natal stage due to the family or outside pressure. In our country, even after the 70 years of passing of the Indian Constitution, the Right to Life and Personal Liberty of a

woman is not protected absolutely and she cannot take independent decision of giving birth to a girl child. This goes against the respect and dignity of a woman. It also violates the Right to live with Human Dignity and lowers down the status of a woman into a mere animal existence. Thus, it is found that, female foeticide is not only the violation of Right to Privacy, but also the violation of other fundamental Human Rights under *Article 21 of the Indian Constitution*.

4.4.3.21. Privacy vs. Information Technology : The Information Technology Act, 2000

The Information Technology Act, 2000 has spoken about the protection of Privacy in the electronic medium along with other provisions. In this respect, the Act has incorporated *Section 66-E*, which runs as follows:-

Section 66 – E

Punishment for violation of Privacy

“Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both ... (e) ‘Under circumstances violating privacy’ means circumstances in which a person can have a reasonable expectation that –

(i) He or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or

(ii) Any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.”

Therefore, the Act has expressly tried to protect Right to Privacy in the electronic medium and has declared the violation of privacy as an offence under the Act. It has prescribed punishment for violation of privacy under the Act, wherein the amount of fine can be extended upto two lakh rupees. It has clearly specified the concept of Privacy as well as the circumstances amounting to violation of Privacy. Intention of the Act is very clear in this respect that, it has tried to cover both physical as well as electronic privacy, because taking of photographs by means of unauthorized intrusion into the private area amounts to violation of Physical Privacy. But, when those photographs are transmitted through electronic medium, then it amounts to violation of Electronic Privacy. Again, committing unauthorized interference with the electronic records would amount to violation of Electronic Privacy.

4.4.3.22. Privacy vs. Right to Information : The Right to Information Act, 2005

The Right to Information Act, 2005 is enacted to provide for establishment of the practical regime of Right to Information for citizens of India. It has replaced the previous *Freedom of Information Act, 2002*. According to the provisions of this Act, any citizen of India may request to get information from a “public authority” or a body of Government or “Instrumentality of State” and the authority concerned is bound to reply expeditiously or within 30 days. Every democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to control corruption and to hold Governments and their instrumentalities accountable to the governed. But, revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information. As such, it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal. Due to these reasons, it is expedient to provide for furnishing certain information to citizens who desire to have it. For this purpose, this Act has been passed.

In this respect, it is necessary to understand the true nature of Right to Information. The Constitution of India does not explicitly guarantee Right to Information. The Supreme Court of India by way of judicial interpretation has incorporated the Right to Information into *Article 14, Article 19 and Article 21*, which guarantee Right to Equality, Right to Freedom of Speech and Expression and Right to Life and Personal Liberty respectively. The Right to Freedom of Opinion and Expression under *Article 19* also includes Freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.¹⁸⁴

The *Freedom of Information Act, 2002* was passed in India in order to provide free circulation of information, but after much criticism, it has been replaced by the *Right to Information Act, 2005*. It is true that, Right to Information is a pre-requisite for the very existence of every democracy and as such, enactment of the *Right to Information Act, 2005* is the urgent need of the hour. But, the guarantee of

¹⁸⁴ Prerna, *Right to Information (RTI) and Right to Privacy : Need for Harmony*, Constitutional Law, Miscellaneous, Nov 28th, 2015, www.legalparley.com/rti-and-right-to-privacy.html, visited on 6.7.2017.

Right to Information brings certain controversial issues with respect to the protection of Right to Privacy.¹⁸⁵

Right to Privacy is not explicitly mentioned under the Indian Constitution like the Right to Information, but it has been recognised as being implicit under *Article 21 of the Indian Constitution*.¹⁸⁶ Often, government stores huge information concerning individuals, such as their licenses, income tax returns or census data. Naturally, when there is an application for disclosure of information concerning an identifiable individual, it gives rise to a clash between Right to Information and Right to Privacy, because these are the two most ambiguous areas of law. The information can be denied, if it interferes with one's Privacy. This is an exemption in every Right to Information statute and the Indian *Right to Information Act, 2005* is not an exception to it.¹⁸⁷

In India, *Section 8(1)(j) of the Right to Information Act, 2005* deals with the protection of Privacy. *Section 8 of the Act* deals with *Exemption from disclosure of information* and *Section 8(1)(j)* provides that, information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

According to *Section 8(1)(j) of the Act*, if the information is personal causing unwarranted invasion of Privacy and serves no public interest, then the information cannot be disclosed unless the Central Public Information Officer (CPIO) or State Public Information Officer (SPIO) or the appellate authority is of the opinion that the disclosure of information serves a larger public interest.¹⁸⁸ When this section is read as a whole, it is clear that, 'personal information' means information regarding 'third party'. It does not apply if the information seeker wants information about himself or his case, as the question privacy does not arise in such cases. Therefore,

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

information can be denied only if the information seeker is seeking information about a third party and such information involves the Privacy of the individual. It is also to be noted that the Public Information Officer (PIO) and not the individual whose information is asked to be disclosed can deny information. Also, this section is specifically concerned with Individual Privacy and does not consider any other body.¹⁸⁹

Moreover, another interesting point about *Section 8(1)(j)* is that, this exception itself has an exception in the form of a *Proviso*. According to the *Proviso*, any information that cannot be denied to the central and state legislature shall not be denied to any person as well.¹⁹⁰ The question that arose in everyone's mind regarding the *Proviso* is whether it applies to entire *Section 8(1)* or just *Section 8(1)(j)*. The Bombay High Court put this doubt to rest when it held that since the *Proviso* was mentioned only after *Section 8(1)(j)* and not after every clause, it applies only to *Section 8(1)(j)*.¹⁹¹

Another important section with respect to *Privacy* under *Right to Information Act, 2005* is *Section 11*. Three conditions have to be fulfilled for the application of this section. They are:

- (i) *If PIO is considering disclosing the information;*
- (ii) *If the information relates to a third party or was given by a third party in confidence;*
- (iii) *Third party considers the information to be confidential.*¹⁹²

In order to fulfil the third condition, the PIO has to send a notice to the third party within 5 days of the request made to him requesting the third party to reply within 10 days as to whether the information should be disclosed or not. *Section 11* has to be read keeping in mind the exceptions mentioned in *Section 8 of the Act*.¹⁹³ Again the Privacy exception under the Act also faces some level of obscurity, because the Act does not define 'personal information' or 'larger public interest'.¹⁹⁴ As such, for the interpretation of these terms, help of the judicial decisions is needed. Therefore, the Act is suffering from huge vagueness and is not a

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

complete code for protection of Right to Privacy in India. In fact, it has laid stress on the protection of Right to Information and not the protection of Right to Privacy. Due to this reason, though the Act has prevented circulation of information on the ground of protection of Individual Privacy, but by providing exception to the Privacy exception, it has ultimately permitted the circulation of information under the Act. Hence, the Act is not a full-proof legislation regarding the protection of Individual and Information Privacy in India.

4.4.3.23. Privacy vs. The Press Council of India Norms of Journalistic Conduct, 2010

In order to prescribe rules and regulations for the journalists, the *Press Council of India* has enacted the *Norms of Journalistic Conduct*, the latest version of which is *Edition 2010*. According to these norms, the fundamental objective of journalism is to serve the people with news, views, comments and information on matters of public interest in a fair, accurate, unbiased and decent manner and language. The media today does not remain satisfied as the Fourth Estate; it has assumed the foremost importance in society and governance. Such is the influence of media that it can make or unmake any individual, institution or any thought. So all-pervasive and all-powerful is today its impact on the society. With so much power and strength, the media cannot lose sight of its privileges, duties and obligations.¹⁹⁵

The mandate of the *Press Council of India*, as well as similar bodies across the world is to specifically promote the standards of the media by building up for it a code of conduct. Compiled in a Compendium titled “*Norms of Journalistic Conduct*”, they act as a reference guide in varying circumstances for the journalists. The *Press Council of India* has played a key role in maintaining public trust and confidence in the news media by promoting professional ethics, fairness, accuracy and balance¹⁹⁶ with the help of these norms. In this sense, these norms are playing vital role for balancing the Individual Right to Privacy and Freedom of the Press in India.

¹⁹⁵ *Press Council of India, Norms of Journalistic Conduct, Edition 2010*, p.5, www.presscouncil.nic.in/NORMS-2010.pdf, visited on 1.7.2017.

¹⁹⁶ *Id* at pp.5-6.

These norms have included a number of principles for the protection of Individual Privacy against the unauthorised intrusion by the Press. In this respect, it is to be remembered that, the intrusion should be unauthorised; otherwise protection is not available under these principles. *Principle 6* of these norms expressly deals with *Right to Privacy*. It protects Individual Privacy from the intrusion by the Press, except on the ground of public interest, clearly defines the concept of Privacy and provides caution against identification of women victims of different crimes, minor children or infant victims of sexual abuse and various personal moments of individuals. The purpose of this principle is to protect the Privacy of women and children also, especially when the chastity or personal character of the women are concerned during the reporting of criminal cases. *Principle 7* deals with *Privacy of Public figures*. It distinguishes between private and public life as well as clearly specifies the need for protection of Privacy of public figures. It also specifies the situations where, when and how much protection should be provided to the Privacy of Public figures while reporting, interviewing or writing articles about Public figures. *Principle 8* provides for the maintenance of Privacy at the time of *Recording interviewers and phone conversation*. Those recordings and conversations should not be made or published without the knowledge or consent of the persons concerned. *Principle 26* speaks about the *Investigative journalism, its norms and parameters*. It clearly specifies about the protection of Individual Privacy and Privacy of Public figures while conducting Investigative journalism. *Principle 27* says that, *Confidence to be respected* to the persons providing confidential information. This principle is meant for the protection of the persons providing Confidential Information. The Press should never disclose the names of those persons, except on the ground of public interest. As such, this principle is meant for the protection of Privacy of the Informers.

Part A of the *Press Council of India Norms of Journalistic Conduct, 2010* deals with the above-stated *Principles and Ethics*. Apart from that, *Part B* of these *Norms* provides *Guidelines on specific issues*, wherein *Guideline (h)* titled *Right to Privacy – Public Figures and the Press, 1998*, specifically deals with the protection of Privacy of the Public figures. According to this *Guideline*, the issue has been under heated debate at both national and international level. It appears certain that

right to privacy cannot be absolute, yet the media itself has to show self-restraint, and respect the privacy of public figures. Where, there is clash between the public person's privacy and public right to know about his personal conduct, activities, habits and traits of character, impinging upon or having a bearing on public interest, the former must yield to the latter. It will, however, be necessary to bear that what is of 'interest to the public' is not synonymous with 'public interest' and that must be the ultimate test that journalists must themselves apply in the circumstances of each individual case. Drawing Out of the above, the Council draws up the guidelines in the same words as are written in *Principle 7(i) of Part A*, which deals with *Privacy of Public Figures*. Finally, it says that, the above broad guidelines emulated in true spirit are certain to strike a balance between the right of the press to have access to information and the public person's right to privacy.¹⁹⁷ In this sense, these norms, principles and guidelines have laid emphasis on the protection of privacy of Public Figures from the unauthorised intrusion by the Press. Though the norms have spoken about various types of privacy, but have specially emphasized on the protection of Privacy of Public Figures, because maximum interaction occurs generally between Press and Public Figures, wherein Press tries to publish everything about the Public Figures and morefully, tries to interfere with their private lives also. Hence, providing such protection is the need of the hour, for the fulfilment of which, the norms have been made in this manner.

Though the norms have spoken about the protection of different components of Right to Privacy and as such, have tried to protect the Privacy of individual persons from the unauthorized intrusion of the Press, in full-fledged manner, but the norms are not full proof. There is certain incompleteness in these norms, because these norms are not legally enforceable and there are no sanctions behind the enforcement of these norms. If the norms are not strictly complied with, no such punishment is prescribed in the norms. Due to this reason, enforcement of the norms is not possible. The sanction behind this code of ethics is moral; the source of their motive-force is within the conscience of the media person concerned. The pronouncement and directions of the Council activate that conscience, and the principles articulated by it, act as lights that lead and guide the journalist along the

¹⁹⁷ *Id at p.85.*

path of ethical rectitude. They only act as a reference guide in varying circumstances for the journalists.¹⁹⁸ Hence, the attempts taken by the *Press Council of India* for protection of Right to Privacy by enacting these norms are beneficial in limited manner, because the norms are lacking sanctions behind them and their enforceability lies only on the principle of ethics. They serve only as an ethical guide to the journalists and as such, the journalists are not legally bound to obey them.

4.4.3.24. Privacy of Juveniles : The Juvenile Justice (Care and Protection of Children) Act, 2015

The Juvenile Justice Act, 1986 was passed in India for providing justice to juvenile offenders, so that, they can be treated with liberal attitude and to give them further opportunity to lead a healthy life. The Act was replaced later on by the *Juvenile Justice (Care and Protection of Children) Act, 2000* in order to establish Juvenile Homes for children, wherein proper care and protection should be given to children, so that they can grow up in a healthy atmosphere. All these measures have been taken to prevent the transformation of a juvenile offender into a heinous criminal and to build a responsible future citizen of the nation. The legislature is regularly working towards this direction and framing various rules and regulations to provide more care and protection to the juvenile offenders. In this respect, when the legislature has felt that, the *Juvenile Justice (Care and Protection of Children) Act, 2000* has become inadequate to fulfil its cherished goals, the Act has been replaced by the new Act, called the *Juvenile Justice (Care and Protection of Children) Act, 2015*.

Section 3 of the Act provides for the *General Principles of Care and Protection of Children*. According to this section, the Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by a number of fundamental principles mentioned therein. Among those principles, **Principle (xi)** deals with the protection of Privacy of Juveniles, which is stated below:-

Principle (xi)

Principle of Right to Privacy and Confidentiality

Every child shall have a right to protection of his Privacy and Confidentiality, by all means and throughout the judicial process.

¹⁹⁸ *Id at p.6.*

Therefore, this section is meant for the protection of right to Privacy and Confidentiality of the juveniles throughout the judicial process and in all other situations under the Act. This right is utmost important for the care and protection of juveniles in the juvenile homes and otherwise. Protection of Right to Privacy of children is the urgent need of the hour as is expressed in the *United Nations Convention on the Rights of the Child, 1989*, which has recognised this right along with the other human rights of children. U.S.A. and U.K. have enacted separate legislations for the protection of Privacy of children in different situations. In this sense, by incorporation of this section, India has complied with the international laws as well as created a law at par with the laws of the other countries. Hence, it is a good attempt for protection of Privacy and Confidentiality of Juveniles in India.

Apart from *Section 3*, there are also other provisions relating to the protection of privacy of Juveniles under the Act. *Section 74* deals with *Prohibition on disclosure of identity of children* relating to any proceedings under the Act. The section also declares such disclosure as an offence under the Act, which *shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both*. This section is meant for the protection of Privacy and Confidentiality of the identity of the children under the Act. *Section 99* is also noteworthy in this respect, which deals with the provision of *Reports to be treated as Confidential*. According to this section, all reports related to the child and considered by the committee or the Board shall be treated as confidential, but the victim shall not be denied access to their case record, orders and relevant papers. In this sense, this section is meant for the protection of Privacy and Confidentiality of the reports of any proceedings relating to the child under the Act.

4.5. National Legal Scenario of U.S.A., U.K. and India : A Comparative Analysis of the Privacy Protection Laws

After discussing the national legal scenario of U.S.A., U.K. and India, it is found that, each and every country is not equally strong regarding the Privacy protection laws. Moreover, each and every country has not protected every component of Right to Privacy. Right to Privacy being a multidimensional right, full-fledged protection of this right means the complete protection of all components of this right. But, practically it is impossible for every country to provide protection

to every component of Right to Privacy. In this sense, legal protection of this right is found incomplete in the countries U.S.A., U.K. and India. Though U.S.A. is much enriched with Privacy protection laws in the present social scenario, but it does not have any ancient history of these laws. On the contrary, India is not much enriched with these laws in the present social scenario, whereas, it has a rich ancient history of these laws. Comparing to these countries, U.K. is presently in totally different situation, because it has neither a rich privacy protection law today, nor it has any such laws in any of the historical periods. But, U.K. has always a strong law of confidence under the Common Law, which is the basis of privacy torts, as a part and parcel of law of torts. From this perspective, these three countries are in three different positions regarding the privacy protection laws.

In U.S.A., there is no legislative history of Privacy protection laws, because the country itself is born in the modern period, but the traces of Right to Privacy have been found in the American continents in the uncivilized tribal societies during the primitive era. In fact, practices of Privacy have been found among the Native Americans of the two continents, but the inmates of U.S.A. are not native Americans, rather Englishmen, because U.S.A. is formed with them by defeating the native Americans. In this sense, the history of Right to Privacy in U.S.A. is the history of that right in U.K. As there has been no such laws in U.K. in the old period, those laws have also been absent in U.S.A. but, with the passage of time, the Englishmen of U.S.A. have become city-dwellers and have felt the need for privacy in their city-lives. Gradually, they have been mentally free from the thinkings of the Britishers and have created their own Privacy protection system. In this manner, U.S.A. has started to develop its own laws of privacy with the help of its legislative and judicial process. On the contrary, U.K. has remained with its traditional orthodox beliefs and has shown reluctance to develop Privacy protection laws through its legislative and judicial process. In this respect, India is in a different situation, because its legal system is enriched with both the U.S. and English laws, it has its own ancient legal history also. As such, it has created a patchwork of statutory, judge-made and customary laws on Privacy protection in the post-constitutional era. However, inadequacy of these laws is a basic characteristic in India.

In order to understand the true nature of Privacy protection laws in U.S.A., U.K. and India, it is necessary to conduct a comparative analysis of those laws of the three countries. The Comparative Analysis is presented hereunder:-

(i) Privacy has been recognised as a Customary Right in India since the ancient period, whereas, no such recognition of Customary Right to Privacy has been found in U.S.A. or in U.K. since the ancient period.

(ii) The Customary Right to Privacy has got statutory recognition in India under the *Indian Easements Act, 1882*. Though the said law is enacted by the British Government, but the same law has been absent in U.K. and U.S.A.

(iii) In India, Privacy has been developed as a Customary Right in the principles of construction of houses, but in U.S.A., it has been developed as the principle of ancient light. The U.K. law is silent in this respect.

(iv) In India, Customary Right to Privacy has been established as a statutory right under the *Indian Easements Act, 1882*, whereas, in U.S.A., it is established by way of judicial development. U.K. has always been reluctant to recognise this right.

(v) In U.K., Privacy has been recognised as a tort under the law of confidence. In U.S.A., it has also been recognised as a tort, but not under the law of confidence. *William Prosser* has created a separate *Privacy Tort* by way of judicial development. In India, there is also the existence of Privacy Torts, but in implied manner.

(vi) U.K. has never considered Right to Privacy and has always tried to provide remedy on the ground of breach of confidence in the cases of violation of Privacy. U.S.A. has also been reluctant to consider Right to Privacy at the very beginning, but has never recognised the ground of breach of confidence. In India, there has been the existence of Customary Right to Privacy and not the breach of confidence.

(vii) In U.S.A. the originator of Right to Privacy has been the *Warren-Brandeis Article of 1890*. In U.K., the originator of Privacy has been the *Prince Albert v. Strange Case of 1849* and in India, the originator of Privacy has been the *Nuth Mull v. Zuka-Oollah Beg case of 1855*.

(viii) In U.S.A., Right to Privacy has got constitutional protection under various amendments of the *U.S. Constitution*. In U.K., in the absence of written constitution, constitutional protection of Right to Privacy is totally absent. In India, constitutional

protection of Right to Privacy is also available in limited manner under the *Indian Constitution*.

(ix) Constitutional protection of Right to Privacy is similar in U.S.A. and India, because in both the countries, express constitutional guarantee of Right to Privacy is unavailable and it is the sole creation of judiciary. But, in U.K., absence of written constitution has created the reluctance of judiciary to recognise this right.

(x) At the time of making the Indian Constitution, the Constituent Assembly has tried to incorporate Right to Privacy directly within the Indian Constitution in line with the *Fourth Amendment of the U.S. Constitution*. But, due to absence of unanimity, this right has not been incorporated directly. No such initiatives have been found in U.K. due to the absence of written constitution.

(xi) But, the right similar to *Fifth Amendment of the U.S. Constitution* has been incorporated under *Clause (3) of Article 20 of the Indian Constitution*, which provides protection to the Privacy of Personal Liberty. Again, U.K. laws are silent in this respect.

(xii) In U.S.A., the root of constitutional protection of Right to Privacy has been the '*Right to Literary Property*', which is unavailable in U.K. and India.

(xiii) The *Warren-Brandeis* concept of '*Right to Inviolate Personality*' of U.S.A. has been incorporated under *Article 23 of the Indian Constitution* to protect personal autonomy and individual personality. Both the provisions are guarantors of Individual Privacy, which are absent in U.K.

(xiv) *William Prosser's Privacy Tort of 'appropriation of one's name or likeness'* available in U.S.A. has been incorporated under *Section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950* in India, which provides protection to Right to Individual Privacy and Privacy of Personality by prohibiting the improper use of one's name or identity. Similar provision is also available under the *Nordic Conference of Jurists, 1967*, by mentioning the heads '*use of one's name, identity or likeness.*' In this respect, Indian laws are far better than the Western laws, because what the *Nordic Conference* has incorporated in 1967, *India* has incorporated in 1950. U.K. has also the similar provisions available under the Common Law Tort of Breach of Confidence and Trespass to Person.

(xv) U.S.A. has enacted a comprehensive law on Privacy by making the *Privacy Act, 1974*, whereas both U.K. and India have not enacted any such comprehensive legislation. Their Privacy protection laws are scattered in a number of legislations enacted therein.

(xvi) Both U.S.A. and U.K. have enacted laws for protection of *Health and Medical Privacy*, which India is lacking.

(xvii) But, both U.K. and India have enacted *Official Secrets Acts, Telecommunications Privacy Laws, Press Complaints Commission or Press Council Codes of Conduct* as well as *Protection of Freedoms Act, 2012* in U.K. and *Right to Information Act, 2005* in India. On the contrary, U.S.A. has enacted the *Freedom of Information Act, 1966* to provide a comprehensive protection covering all these aspects.

(xviii) When U.S.A. has enacted the *Privacy Act, 1974*, U.K. has been reluctant to do so as evidenced from the *Younger Committee Report, 1972*. India has been lagging far behind them at that point of time.

(xix) U.K. has started its Privacy protection initiatives in 1998 by enacting the *Data Protection Act and Human Rights Act*. Such initiative has been taken by U.S.A. long before by enacting the *Privacy Act, 1974*. India has just started these initiatives by drafting the *Privacy Bill, 2014* and the *Personal Data Protection Bill, 2014*.

(xx) *Maintenance of Privacy and Secrecy in Matrimonial proceedings* by conducting *in camera proceedings* has been established as a legal principle in U.S.A. and U.K. by way of judicial development. India has incorporated this provision under all the matrimonial statutes, like the *Hindu Marriage Act, 1955, the Special Marriage Act, 1954 and the Divorce Act, 1869*.

The Comparative Analysis of Privacy protection laws cannot be limited to any particular number. There are innumerable components of Right to Privacy and are also increasing with the passage of time. Therefore, need for legal protection of Right to Privacy is also increasing consequently. In this sense, any component-wise comparative analysis cannot be enough to provide a concluding remark. But, it is noteworthy that, Indian laws have been far better than the Western laws in the ancient period, whereas, U.S.A. has become the number one country enriched with these laws in the recent period. U.K. is still in the developing stage regarding the

protection of these laws. Finally, India is lagging far behind these two countries in the present social scenario, because what U.S.A. has done in 1974, U.K. has done in 1998; India has started to do in 2014. Awareness regarding the Privacy protection laws is still in the primitive stage in India and the government is still shaky for enactment of these laws.

4.6. Sum – Up

Privacy has both positive and negative aspects. When the Right to Privacy is used for the benefit or betterment of the mankind as a whole, it is called Positive Right to Privacy. It means, one should lead a secluded life for the development of one's physical or mental integrity or intellectual quality. But, when the Right to Privacy is used for the destruction of mankind as a whole, like the leading of a secluded life for making a bomb or for the commission of suicide, it is called Negative Right to Privacy. Right to Privacy is a part and parcel of Right to live with Human Dignity. As such, it would always be used for the beneficial perspectives and not for the destructive perspectives. Human beings are social beings, they cannot live alone. In this sense, leading a social life is the very basis of social nature. Though Right to Privacy gives us the freedom to enjoy a secluded life, but that does not mean that, a human being should be left alone by the society to lead a destructive life. It is the duty of the society to look after a person remained secluded for a long time. In this sense, Right to Privacy is a limited Right and can always be curtailed in the public interest as well as for the larger benefit of the mankind as a whole. This is the bottom line of Right to Privacy and the States should follow this bottom line while enacting legislations on Right to Privacy. The three important countries, whose Privacy protection laws are the matters of discussion hereunder, are U.S.A., U.K. and India; all of whom have tried to legislate on Right to Privacy keeping in mind the above-stated bottom line.

In the light of the above projection, discussion of this chapter can be summed-up as follows:-

- (1) Privacy is a component of Freedom, without the protection of which, guarantee of Freedom remains incomplete.
- (2) Freedom or Privacy should not be absolute and in this respect, the question of dichotomy between privacy and public interest comes into picture.

- (3) Protection of both Individual right to Privacy and State's Right to Information is the urgent need of the hour.
- (4) Total freedom is a utopian concept, the achievement of which is practically impossible.
- (5) Absolute solitude or seclusion is called the negative aspect of privacy, which may lead to disastrous effects.
- (6) When Privacy brings good to all human beings in general and does not become deadly or futile for anyone, then it is called positive aspect of Privacy and it is permissible.
- (7) Positive aspects of Privacy are welcomed in a civilized society, where stress is given only on the prevention of unwanted publicity of one's private life.
- (8) True spirit of the Privacy should be to protect oneself from unwanted publicity and consequential harassments.
- (9) This Chapter has mainly focussed on the Privacy Protection laws of U.S.A., U.K. and India.
- (10) Right to Privacy, although neither guaranteed in the United States as a Constitutional Right, but had been judicially examined.
- (11) With the progress and development of the new American nation, called U.S.A., the growth of Privacy protection laws have been occurred concurrently.
- (12) There have been six phasic or periodic developments of Right to Privacy in U.S.A.
- (13) The present Privacy laws in U.S.A. can be categorized as the *U.S. Constitution, 1787, the Federal Privacy Laws and the State Privacy Laws.*
- (14) The U.S. Federal and State Legislatures have enacted various legislations covering various aspects of Right to Privacy, so that, each and every component of this right would be protected.
- (15) At the very beginning, English laws were very slow and unwilling to develop Laws of Privacy.
- (16) Gradually with the passage of time, recognition of this right came into being with the hands of the judiciary.
- (17) In comparison to U.S.A., Privacy laws are not much enriched in U.K.

(18) In fact, there has been no existence of Privacy Laws in U.K. before the passing of the *Human Rights Act, 1998 and Data Protection Act, 1998*.

(19) Apart from the Common Law protection of Privacy in U.K., there are various statutory provisions enacted in the present era, few portions of which are directly applicable for the protection of Right to Privacy.

(20) Right to Privacy in India is not of recent origin, it is an age-old concept and can be traced back from ancient Indian society.

(21) In fact, there are several customary rules prevailing in India which protect Privacy interest of an individual.

(22) Apart from that, constitutional provisions have provided protective umbrella to this right in indirect manner.

(23) Besides customary rules and constitutional provisions, several other statutes recognise Right to Privacy directly or indirectly in India.

(24) Privacy as a Customary Easement right was recognized in India since the very beginning in the *Indian Easements Act, 1882*.

(25) The main articles relating to protection of Privacy under the Indian Constitution are *Articles 19 and 21*.

(26) The important statutory enactments in this respect are *the Indian penal Code, 1860, The Indian Evidence Act, 1872, the Indian Post Office Act, 1898, the Official Secrets Act, 1923, the Special Marriage Act, 1954, the Children Act, 1960, the Medical Termination of Pregnancy Act, 1971, the Press council Act, 1978, the Indecent Representation of Women (Prohibition) Act, 1986, the Information Technology Act, 2000, the Right to Information Act, 2005 and the Juvenile Justice (Care and Protection of Children) Act, 2015*.

(27) The components which have been attracted in this respect are Privacy and the insult on the modesty of women, Privacy of matrimonial proceedings, Privacy and Law of Evidence, Privacy of Correspondence under Indian Postal System, Privacy of Governmental Secrets, Privacy of Children, Privacy of Women, Privacy of the Press vs. Privacy of Public Figures, Privacy vs. Information Technology, Privacy vs. Right to Information and Privacy of the Juveniles.

(28) A Comparative Analysis of the Privacy protection laws of U.S.A., U.K. and India projects the idea that, though India has started protecting Right to Privacy prior

to U.S.A. and U.K., but in the present social scenario, it is lagging far behind the other two countries, inspite of having strong Customary Laws of Privacy since the ancient period.

The most important point about all these legislations is that, all the three countries have highlighted the aspects of Data Protection, because in the midst of the era of Information and Communication Technology, none of the countries can go far without the storing and processing of huge computerised personal data. At this juncture, a serious threat lies with the protection of Privacy of those personal data or information. Another important issue is the over-encroaching press and media into human lives. Today, Press is gaining so much freedom that, Press freedom becomes a cause for violation of Privacy of the Public figures. As such, Press freedom should necessarily be curtailed in the interest of the general public. In this respect, all the countries are adopting Code of Conduct for the journalists and the electronic media and India is not an exception to it. Again, another important issue prevails and that is the dichotomy between Right to Privacy and Right to Information. Countries are adopting Right to Information Acts to end this dichotomy. India has also enacted such legislation to determine the line of control between the information to be communicated in the general public interest and the information to be kept secret to maintain the Individual Privacy. In fact, creation of a perfect balance among all these interests of the society is the root of a democratic civilized society and the countries concerned are striving towards reaching such excellence in their respective fields by way of enacting the Privacy protection legislations.

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 or 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 or 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

¹Dr. 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

⁶A. 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.

¹⁰Arthur 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 free 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, an 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 Arthashastra* 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

¹⁵Kiran 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

²¹Dilbir 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 inalienable 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

²⁹277 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.

³⁰232 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 follows³¹:-

(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.*

³⁸389 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,

³⁹338 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:-

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 crime⁷⁴ . . . 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 thoughts⁷⁵ . . . 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, sitting 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

⁷⁸388 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

⁸⁰316 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

⁸²321 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

⁸³262 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.

⁸⁵297 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

⁸⁷Justice 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 words⁹⁹:-

*“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

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 hereunder¹⁰²:-

"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.

In spite 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 become 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

In spite 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

¹¹¹David Calcutt, *Report of the Committee on Privacy and Related Matters*, QC, 1990, Cmnd. 1102, London, HMSO, p.7.

¹¹²Lord 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, *Prince 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 of 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

¹²⁰Supra 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

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 more fully 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 more fully 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 unability 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

¹⁴⁶ECtHR 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 a 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 than 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 found¹⁵⁸ . . . 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,

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.

¹⁶³Kiran 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, 1stEdn., 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 public, 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.

¹⁷¹Kiran 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*

¹⁷³AIR 1954 SC 300.

¹⁷⁴Shrinivas 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 Jagannadhas**, 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 Jagannadhas** 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 Court of 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.

¹⁷⁵1954 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

¹⁷⁶AIR 1963 SC 1295.

¹⁷⁷338 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 he 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, nothing 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

¹⁷⁹1964 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,

¹⁸³1975 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

¹⁸⁵www.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

¹⁸⁶AIR 1991 SC 207.

¹⁸⁷www.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

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 –

In spite 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 State 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 but, 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 the said case, the opinion of the court has been delivered by *Justice Kuldeep 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 Kuldeep 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/supremecourtofindia.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 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 parallelly 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. In spite 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.

CHAPTER 6

OUTSTANDING FACETS, DIMENSIONS AND CURRENT TRENDS OF RIGHT TO PRIVACY IN U.S.A., U.K. AND INDIA : A COMPARATIVE ANALYSIS

6.1. Prologue

The idea of Privacy is culminated into the concept of Freedom. Various jurists have opined that, Privacy means freedom from unauthorised interference into one's private life. It means, everyone has and should have the freedom to enjoy his or her private life according to his or her wishes. In this sense, everyone's private life is free from outside interference or outside control. Again, this idea projects the views that, Privacy is freedom from outside control, which idea also relates the term 'Privacy' with the term 'Control'. 'Control' is something, which is opposite to freedom or independence. It means that, if an individual's life is controlled by other individuals or by the society, then that individual cannot be called a free or independent individual. As such, if an individual is not free or independent, then the individual cannot achieve the fundamental rights, which he or she is entitled to achieve. In that situation, it is not possible for that particular individual to enjoy his or her Right to Privacy also. In this sense, all these situations are interrelated and dependent on one another. Therefore, enjoyment of Privacy is impossible in the environment of absence of individual freedom.

Again, the freedom from outside control or interference does not exist alone; it is and should always be coupled with the term 'Unauthorised Interference'. It means that, everyone should enjoy freedom in his or her private or personal life from any unauthorised outside interference. It is also necessary that, interference or control should always be coupled with the term 'unauthorised' and any interference, which is unauthorised, is prohibited. As such, unauthorised interference is not allowed in the individual life, but the interference, which is authorised, is allowed. Here, 'authorised' obviously means, 'authorised by law' and these terms project towards the idea of established legal principles or the procedure established by law.

In the ultimate analysis, it is found that, the individual life is free from unauthorised interference only and such freedom can be taken away by way of authorised interference made by any established legal system or procedure established by law. Therefore, individual freedom is not absolute and always subjected to law and legal control.

A further analysis in this respect, provides the idea that, though every individual is entitled to enjoy his or her Right to Privacy, but it is not an absolute right and it can be curtailed by authorised legal principles or procedure established by law. As such, Right to Privacy is not an absolute right and legal control can be imposed on it. But, one thing should be remembered here that, the procedure for taking away Right to Privacy or any other freedom should be an established legal procedure and nothing else. In this sense, it can be curtailed only by the established legal procedure and not otherwise. Now, the term 'established legal procedure' also needs some explanation. As such, 'established legal procedure' means, not only any procedure established by law, but also a just, fair and reasonable procedure. More specifically, it can be said that, any written or customary law does not have the power to take away individual freedom and as such to do so, the law must be just, fair and reasonable, which again means, the law should act according to the principles of natural justice only. Therefore, the ultimate analysis provides the idea that, individual freedom or Right to Privacy can be curtailed by just, fair and reasonable legal procedure acted in accordance with the principles of natural justice.

Hence, limitations or restrictions can be imposed on this right only by following just, fair and reasonable procedure. As such, the limitations or restrictions imposed in this respect should be reasonable restrictions and unreasonable restrictions are not permitted by law. It means that, there should be some specific reasons owing to which the restrictions can be imposed and not otherwise. More specifically, these reasons should include the interests of other individuals and the interests of the society or the general public interest. Therefore, individual freedom or Right to Privacy can be curtailed only in the larger public interest or for the public benefit, which is also a social interest. The main reason for imposing restrictions on Right to Privacy should be the reason of social interest. Social interest is above all and for the protection of social interest, any individual freedom or right or even a

liberty can be curtailed. Therefore, individual Right to Privacy can also be curtailed for the protection of social interest.

Right to Privacy is an individual freedom and also a part of individual liberty, because it is coupled with the Right to live with Human Dignity, which is also a basic human right. Due to this importance imposed on Right to Privacy, it is not easy to restrict or limit this right. The main reason behind this is that, no human being can exist without human dignity, which is must for their existence and absence of it means, mere animal existence. Therefore, guarantee of individual Right to Privacy is obvious in a civilized human society, without which the very structure of a civilized society will be broken. But, the protection of social interest should also be upheld; otherwise a civil society would suffer from oppression, tyranny and injustice. As such, it is most important to create a balance between the Individual Privacy or individual freedom and social interests in every civilized human society. In fact, Creation of such balance is the core of every civil society, which each and every civil society should strive to establish. The very basis of a civilized human society lies in this balance. Therefore, every civil society should try to create a balance between Individual Privacy and larger social interest for the peaceful co-existence of each and every individual in the civil society.

In a modern and complex social life, various threats to Privacy have been emerged due to the advancement of Information and Communication Technology. Along with that, two new essential attributes of democratic civil society have come into being - Freedom of Information and Publicity. Publicity and Freedom of Information, both are having equal importance in human lives like the Right to Privacy. As Privacy is necessary to enjoy individual freedom, Freedom of Information is necessary to enjoy social freedom. If Freedom of Information is not guaranteed in a civilized society, individuals cannot raise objection against unreasonable government actions. Therefore, every individual is entitled to the Freedom of Information as a Fundamental Right in a democratic civil society to keep check upon immoral and unreasonable executive and administrative actions. In this sense, Freedom of Information should be made available to criticise the executive decisions, parliamentary debates and government records. If this right is not available, then it is not possible for the citizens of a country to adjudge any

government action running detrimental to the society. As such, Right to Freedom of Information should be available for the protection of larger social interest.

Again, Right to Freedom of Information gives birth to another aspect of Right to Privacy, called 'Data Privacy' or 'Information Privacy'. It means the secrecy of Personal Data or Information. A huge amount of personal data are kept in the form of Government records, like the call records of telephone users in the Telephone Department, personal details and tax records of the property holders in the Municipal Corporation, personal and land revenue details of the land owners in the Land Revenue Department, consumer details of the electricity users in the Electric Supply Corporation of State Electricity Boards etc. Similarly, a huge amount of personal data are also stored in the databases of various private organisations, like call records and personal details of the mobile users with the Mobile Service Providers, personal details of the internet users with the Internet Service Providers, Consumer details after purchasing different products etc. Moreover, a huge amount of database is also maintained by the Banks, Insurance Companies, Credit Card Companies and other Non-Banking Financial Institutions. These personal databases of the individual human beings should be kept secret and any information therefrom should not be shared with anyone without lawful justification, otherwise there is a chance of loss of Data Privacy of the individual persons.

Protection of Data Privacy of the individual persons is utmost important, because it comes in conflict directly with the Right to Freedom of Information. Information regarding the personal data is sought in many cases, during the judicial or administrative proceedings, which should be provided in the larger public interest. But, in this respect, it should be kept in mind that, those information should be provided on reasonable grounds only and should not be provided to anyone at anytime. As such, unreasonable and unregulated flow of information should be prohibited for the sake of the individual right to Data Privacy. In this sense, Right to Information and Right to Data Privacy come into conflict with one another, which should be resolved by creating a balance between the two. Though Right to Information should be upheld over the Right to Privacy in the public interest, but it should always be remembered that, the personal data of individuals should not be

disclosed without public interest. For this purpose, it should be determined first, what is public interest and what kind of information could be disclosed in the public interest.

In this atmosphere, another right comes into picture, the Right to Publicity. Right to Publicity over the print and electronic media is part and parcel of the fundamental right to freedom of speech and expression. Publicity of the public activities of the celebrities and political leaders is necessary in the general public interest, which is also required to comply with the Right to Information of the general public. Publicity of the court proceedings before the print and electronic media is also another important aspect. But, in this respect, it should be remembered that, publicity of the private lives of the celebrities and political leaders does not come under the Right to Information of the general public. In the present day society, those practices have been increased by way of investigative and yellow journalism including long lens photography. These practices would amount to the violation of Right to Privacy of celebrities and political leaders. Not only may that, in many cases, these activities cause loss of life or property of those persons. Death of Lady Diana by accident is the biggest example of similar practices. Even the publicity of court proceedings may create loss or destruction of evidences in many cases. Therefore, unreasonable and unregulated publicity about the individuals or incidents should be prohibited for the protection of Right to Privacy of individuals. On the contrary, not only there occurs violation of Right to Privacy, but also the Right to life and human dignity of the individuals are threatened, which ultimately, destroys the peaceful structure of a democratic civil society. Hence, the protection of Privacy should be upheld over the Publicity.

Privacy, Freedom of Information and Publicity, these are the three essential attributes of a modern democratic society and the peaceful co-existence of a modern democracy depends upon the creation of a balance between the three. As such, every modern society has tried to protect these three rights by enacting legislations in this respect. At present, a number of modern countries are engaged in making laws covering these areas and they have either incorporated these provisions in their national Constitutions or they have enacted national legislations in this respect. Moreover, the Countries are trying to provide comprehensive protection to these

rights by way of judicial intervention into the matters. Those aspects have already been discussed in the previous two Chapters with respect to the countries of U.S.A., U.K. and India. These Common Law countries have also dealt with the dichotomy of Privacy and Freedom of Information along with Publicity. This Chapter will morefully concentrate on this issue along with other contemporary issues and comparative analysis of Right to Privacy in these three countries.

6.2. Outstanding Facets and Dimensions of Right to Privacy

In the contemporary social scenario, a number of problems have been cropped up relating to various aspects of Right to Privacy which are closely associated with modern social life. In the present day society, human beings are subjected to various new habits and tastes owing to the social change, which have created either threats on Right to Privacy or on human life and dignity. Such problems have also given birth to many new dimensions of Right to Privacy, which are non-existent in the previous century. Those are generally called the outstanding facets of Right to Privacy, because without addressing to those threats and challenges, any discussion on Right to Privacy would remain incomplete. More specifically, those areas are Privacy vs. Private Life, Privacy of Women, Privacy of Children, Privacy vs. Scientific and Technological Developments as well as Data and Information Privacy. Next part of the study will dwell upon the conceptual perspectives, problem areas, legislative and judicial developments of those issues as well as will try to provide a comparative analysis of the same with respect to U.S.A., U.K. and India.

6.2.1. Privacy versus Private Life

Privacy and Private Life are two different ideas, but there are certain similarities between them. Before distinguishing between them, it is necessary to provide a clear idea of these two concepts.

6.2.1.1. What is Privacy

Privacy is a state of affairs wherein an individual wants to live alone, might be in a place of solitude or seclusion or might be in front of everybody or in a public environment. In this sense, Privacy is a situation, when an individual wants seclusion from others, may be physically or mentally. A person may have Physical Privacy, when he or she lives a secluded life in the Privacy of home. On the

contrary, a person may have Mental Privacy, when he or she enjoys Privacy, while living among others or in a public sphere. In that case, the person may not have the Physical Privacy, but he or she may have the Mental Privacy by not sharing the personal information with others or maintaining reserveness. Privacy may be acquired by meditation or concentration and Privacy is required for physical, mental, environmental, intellectual or spiritual development of a human being. The state of affairs, called Privacy, is required for the development of human brain as well as the human mind.

Right to Privacy means the right to enjoy the state of affairs, called Privacy. Logically and practically, 'Privacy' differs significantly from the 'Right to Privacy'. Privacy is a state of affairs or a condition of life. Consequently, a person may have a large amount of Privacy without having opted for it. In that case he or she may have the right to choose it. On the contrary, a person who needs Privacy or would like to choose it, may not have the right to choose it. Even that person may not be in a position to enjoy the state of affairs called 'Privacy'. Therefore, 'Right to Privacy' is the right to choose and enjoy the 'condition of life', called 'Privacy'. Right to Privacy is the creation of social structure, conventions and legal policy. Therefore, 'Right to Privacy' came into being only after the establishment of civilized society, whereas the state of affairs called 'Privacy' was there since the inception of human kind. 'Right to Privacy' may try to protect the state of affairs called 'Privacy', but it cannot always determine the claims to choose where, when and how one will have Privacy. Most important point of distinction between the two is that, 'Privacy', being a state of affairs, can never be created or destroyed by human being; it is a creation of nature and not of law. On the other hand, 'Right to Privacy' is the creation of established legal system and based on principles of law, which are created by human beings. 'Right to Privacy' is the brain-child of man. Hence, 'Right to Privacy' can be created and destroyed by human beings.

Therefore, Privacy is a state of affairs, the protection and enjoyment of which is determined by the Right to Privacy in a civilized human society. But, the recognition of Privacy as a human right alone cannot determine the peaceful enjoyment of this right; rather something more is required in this respect. The basic postulates of Privacy as well as the functions of Privacy in a civilised human society

are utmost important for the full enjoyment of this right, because these are the social conditions which have the power to create favourable conditions towards the enjoyment of Privacy by an individual human being. Last but not the least, an individual should have the freedom to control the flow of information about oneself in a modern society. If the social situations are favourable in this respect, then only the guarantee of the Right to Privacy becomes fruitful.

6.2.1.2. What is Private Life

Private Life is the personal life of an individual human being as against the Public Life. Private Life is that part of the life of an individual, where he either enjoys total seclusion from others or enjoys small group intimacy or remains anonymous among public or enjoys freedom to maintain reserve in public. In this sense, the basic postulates of Privacy – *Solitude, Intimacy, Anonymity and Reserve*, all are applicable to Private Life. Private life also includes the Family Life or the life with friends and relatives. Private Life may be of any type, but it should not be public or professional life of a person. It may be the life inside or outside the home, but it should be a life, where a person works for his personal gain or pleasure or to serve the family or personal relations and not for any public service or under compulsion of any professional duty. Therefore, Private Life is the personal and family oriented life of an individual outside the public or professional life.

Different authors as well as jurists have tried to define Private Life in different manner. Some of which are discussed hereunder.

6.2.1.2.1. Definition by French Jurists : Absence of Concreteness

Though various jurists have tried to define the ‘Private Life’, but no concise and exhaustive definition has been found. In this respect, the attempts taken by the French jurists are noteworthy. Some of those definitions are stated below:-

(i) Martin

According to *Martin*, Private Life is “*a person’s family and personal life, his intimate, spiritual life, the life he lives at home with the door shut*”.¹

¹ Martin, ‘*Le secret de la vie privée*’, Rec.tr.dr.civ., 1959, p.230.

(ii) Carbonnier

According to Carbonnier, “*this is a moral freedom : it is the individual’s right to ‘a private sphere of life from which he has the power to exclude others . . . the right to respect for the private nature of his person . . . the right to be left in peace’.*”²

(iii) Badinter

When the authors have failed to define the Right to Private Life in concrete sense of the term, they have tried to define it by way of distinguishing it with the Public Life. According to those authors, Private Life is everything which is not the Public Life. Badinter is the supporter of this view. He has defined ‘Private Life’ as follows:-

*“At first sight (observes Badinter) this would appear to be merely shifting the problem, with nothing gained . . . But apart from the fact that the limits of Public Life, which is more restricted, appear easier to determine, this negative definition has the advantage of concentrating attention on the primacy of the private life as something closed to indiscreet intrusion and the common lot of man, whereas the rest, that is to say public life, is open to the curiosity of all and constitutes the exception”.*³

Therefore, these French Jurists have tried to define this right as a private sphere of life excluded from the jurisdiction of others, just opposite to the public life, which is subjected to the curiosity and surveillance by others.

(iv) Lindon

According to Lindon, “*although the concept of private life is clearly relative, depending as it does both on current manners and customs and on the individual’s circumstances, ‘it seems that there is nevertheless an area of private life entitled to special protection, which comprises essentially, in an unusual injunction, the interests of the other members of the family, a person’s own likeness, the privacy of his family life and love life and his personal fortune’.*”⁴

² Carbonnier, *Droit Civil*, Vol. I, 1965, p.239.

³ Badinter, J. C. P., 1968, No.2136, para.12.

⁴ Lindon, J. C. P., 1965, Vol. I, No.1887.

Lindon has also compared this idea with the list suggested by *Vandenbergh*, for whom private life covers a person's love life, marriage, divorce, friendships, illnesses, religion and leisure activities.⁵

Therefore, *Lindon* has considered the private life as a relative concept combining one's personal interests and the interests of the family including the Privacy of family life and love life. The question of relativity comes here, because according to *Lindon*, private life does not mean one's personal interests or likeness only, it also includes the family life and interests of the family members of that person. Sometimes, personal interests of an individual may be sacrificed for the fulfilment of the family interests, but that is not the part of public life, rather a very much part of private life. Selection on the basis of priority of a person's personal interests or family interests brings forth the idea of relativity in the concept of private life. As such, an individual would be the ultimate judge regarding the nature of one's private life. Jurists can only suggest a list of personal activities to be included with the term 'Private Life', but the ultimate selection depends upon the individual oneself. In this sense, *Lindon* and *Vandenbergh* both have suggested a list of personal activities, which may be included within the term 'Private Life'.

Most of the French Jurists have defined Private Life by distinguishing it with the Public Life. While doing so, they have tried to define the term 'Public Life'. In this respect, the definition of Public Life given by *Martin* is noteworthy, which is stated below:-

According to *Martin*, "a person's public life 'is his life in the community, the life which in the normal way brings him into contact with his fellows : his professional and social life, in a word his outside life'."⁶

But, the Jurists are not unanimous in their opinions, while defining the term Public Life. Different Jurists have highlighted different elements to be included within the term Public Life. As such, *Martin* has included professional and social life of an individual within Public Life. But, *Lindon* feels that, professional life of an individual cannot be included within Public Life and it is the part of one's Private Life. Similarly, social life may also be the part of one's personal life, because it

⁵ *Vandenbergh*, *Rechtskundig Weekblad*, 12 April, 1970, Col. 1457-70.

⁶ *Martin*, *Rev.tr.dr.civ.*, 1959, p.230.

includes the maintenance of personal, group and social relations with other persons, which one may choose to maintain according to one's choice or priority. Again, Jurists have specified different activities of life, like recreation, sports, leisure etc., which according to some, are the parts of Private Life, but according to others, are the parts of Public Life. Therefore, Jurists have failed to fix a specific line of demarcation between Private and Public Life. As such, there is overlapping of interests between these two and it is impossible to keep both Public and Private Life in watertight compartments. Hence, drawing distinctions between Public and Private Life in strict sense of the term is impossible.

Due to the above reasons, it has not been possible for the French Jurists to define 'Private Life' in concrete sense of the term. A number of other European Countries have also tried to define this term, but have not been successful due to the above reasons. Consequently, most of the European Countries could not provide adequate protection to Private Life, which is defined in haphazard manner. At this juncture, French Courts have taken initiative to define the term 'Private Life', but have failed to define it in a single word, rather specified a number of activities to be included within it. Those are love life; family position, e.g. marriage or divorce; physical, psychological or mental condition, e.g. an illness; philosophical or religious convictions; carrier; leisure activities.⁷ All these activities have been enlisted by various decisions of the French Courts in different cases relating to Private Life. In this sense, French Courts have also specified a number of activities as Private Life similarly with the French Jurists. Hence, concretisation of the term Private Life has not become possible.

Apart from the French Jurists, the German, English and American Jurists have also tried to define Private Life. Among them, only the German Jurists have defined this term to some extent, but the English and American Jurists have more concentrated on the term 'Privacy', rather than the term 'Private Life'. As such, they have not defined the term 'Private Life'; instead they have defined 'Privacy'. In this respect, the idea of Private Life given by the German Jurists is noteworthy.

⁷ A.H.Robertson (ed.), *Privacy and Human Rights*, Manchester University Press, Manchester, 1973, p.31.

6.2.1.2.2. Definition by German Jurists : Systematized Attempts

In Germany particularly an attempt has been taken by the Jurists to systematize the lists specified by the French Jurists and Courts. In this respect, few German Jurists have distinguished between *Individualsphäre*, the *Geheimsphäre* and the *Privatsphäre*.⁸ The *Individualsphäre* is defined as that which protects the specific characteristics of each individual in society. It includes a person's human dignity, name and person's honour. The *Geheimsphäre* and *Privatesphäre* protect the individual not in society but against society. The *Geheimsphäre* relates to that part of a person's life which no one or only those very close to him, can know about. It covers the confidential nature of all facts connected with intimate relations. The *Privatsphäre* comprises everything relating to an individual's life which can be observed by those in contact with him, i.e. his physical appearance (*Erscheinungsbild*), his private life (*Lebensbild*), and his observed character (*Charakterbild*).⁹ Therefore, by defining these three words, the German Jurists have tried to highlight various aspects of Privacy and Private Life. A deep rooted study projects the idea that, *Individualsphäre* actually denotes Privacy and *Geheimsphäre* and *Privatesphäre* both denote various aspects of Private Life. In this sense, attempts taken by the German Jurists are far better than the French Jurists, because Germans have tried to define both 'Privacy' and 'Private Life'. As such, among the European countries Germany is the only one, which has taken praiseworthy initiatives for protection of Right to Privacy in an all-round manner. In fact, German initiatives are nevertheless inferior in comparison to the initiatives of U.S.A.

However, the definitions of the French and German Jurists are not the only definitions found in this respect. There are also other definitions propounded by the European Commission of Human Rights and various judicial decisions of the European Court of Human Rights, which are discussed below.

⁸ Hubmann, *Das Persönlichkeitsrecht*, 1953, p.217; Vandenberghe, *Rechtskeundig Weekblad*, 12 April 1970, Col.1462-1463.

⁹ *Supra* Note 7 at p.34.

**6.2.1.2.3. Definition by the European Commission of Human Rights :
Development of Human Personality**

The European Commission of Human Rights has defined the ‘*Right to Respect for Private Life*’ as follows:-

*“The scope of the right to respect for private life is such that it secures to the individual a sphere within which he can freely pursue the development of his personality. In principle, whenever the state enacts rules for the behaviour of the individual within this sphere, it interferes with the respect for private life”.*¹⁰

6.2.1.2.4. Definition by the European Court of Human Rights in Niemietz v. Germany Case : Development of Relationships with Others

The European Court of Human Rights has defined the ‘*Private Life*’ in the case of *Niemietz v. Germany*¹¹ as follows:-

*“The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’. However, it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also compromise to a certain degree the right to establish and develop relationships with other human beings”.*¹²

Therefore, the definitions propounded by the *European Commission of Human Rights* and the *European Court of Human Rights* have given importance to the development of human personality and the development of relationships with others as the parts of the private life of an individual human being. As such, various definitions of the ‘*Private Life*’ as well as the ‘*Right to respect for Private and Family Life*’ have highlighted various areas of the ‘*Private Life*’ for consideration as the definition of it. In this sense, none of the definitions is exhaustive and only illustrative in nature. Again, all the definitions have defined ‘*Private Life*’ in broad sense of the term and due to this reason, the scope and ambit of this right have been enlarged with the help of these definitions and various new rights have come within the purview of this right. In this way, by enlarging the scope and ambit of the ‘*Right*

¹⁰ *André Dederck v. Belgium, Application No.8307/78, DR 21, p.116.*

¹¹ (1993) 16 EHRR 97, para 29.

¹² Jemima Stratford, “*Striking the Balance : Privacy V Freedom of Expression under the European Convention on Human Rights*”, in Madeleine Colvin (ed.), *Developing Key Privacy Rights*, Hart Publishing, Oxford and Portland, Oregon, 2002, p.17.

to respect for Private and Family Life’, ultimately this right is equated with the rights described under the *Nordic Conference of Jurists, 1967*. In this sense, it is also connected with the Right to Privacy described under the *Nordic Conference*.

It is found that, Private Life means the personal and family life of an individual as well as various other activities relating to personal and family life. In this sense, the Right to respect for Private Life means the right to enjoy the private and family life freely without any outside interference. Private Life includes both personal and family life, without which private life remains incomplete. Due to this reason, Private Life and Family Life, both are coupled together to constitute one right. It can be called the Right to Private and Family Life, but the term ‘respect’ is added therein to specify the nature of the right. Private and Family lives are equally important like the Public Life and as such, respect should be shown to one’s private and family life by showing no unnecessary curiosity on one’s private life. Showing respect to one’s private life includes no unauthorised interference with one’s Private Life. As such, the European Courts have entertained the cases of violation of Private Life by upholding the Right to respect for Private and Family Life. In this way, the courts have also upheld the sanctity of Private Life. Moreover, the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* has recognised and protected the Right to respect for Private and Family Life as an important human right under *Article 8* of the convention. Private and Family Life sometimes require Privacy for their fullest enjoyment. Again, they sometimes require disclosure of information in the public. Therefore, whether the Private and Family Life require Privacy or not, it ultimately depends upon the person concerned. In this sense, the essence of Privacy is attached with the Private and Family Life. Hence, a discussion of Privacy with Private Life is required along with the comparison between the two.

6.2.1.3. Comparison between Privacy and Private Life

Privacy and Private Life both are not the same things, though there are similarities between the two. Privacy is freedom to enjoy one’s personal life or to maintain anonymity or reserve in public. But, Private Life means the personal and family life of an individual including various other personal or professional activities. The relation between Privacy and Private Life is that, Privacy is required

for enjoyment of Private Life in most of the cases, but in certain circumstances, Privacy may not be required for enjoyment of Private Life. Ultimately it depends upon a particular person to decide whether he or she needs Privacy or not, for the enjoyment of Private Life. Another important point is pertinent to mention in this respect. Private and Family Life is the part and parcel of personal life of an individual, which more or less, every individual has to fulfil. But, Privacy is a state of affairs, which does not always depend upon the choice of a person. A person may need Privacy for the enjoyment of Private Life, but may not have any Privacy due to the family pattern or social condition. Such examples are found in most of the primitive societies. Again, in modern societies, opposite situation is found, where a person may have large amount of Privacy, but may not need Privacy for the enjoyment of Private Life. Therefore, Private Life and Privacy are not the same things as well as Privacy is not a fixed, but variable content.

Privacy is not only related to Private Life and a person may have Privacy in Public Life by maintaining anonymity or reserve in the public sphere. In this sense, also Privacy and Private Life are dissimilar. But, those are having similarities also. When a person enjoys Privacy for the fulfilment of the requirements of Private Life, then Privacy becomes synonymous with Private Life. Again, when social factors are favourable for Privacy and choice of Privacy means having the Privacy, then Privacy becomes synonymous with Private Life. As such, Privacy is a factor for determining the nature of Private Life, whether it is private in strict sense of the term or not. Privacy means freedom and when an individual is free to determine and control his or her private, family and personal life, obviously he or she enjoys Privacy in this respect. In this case, again, Privacy becomes synonymous with Private Life. Hence, both the Privacy and Private Life are interrelated with each other and the relation between them cannot be overlooked.

The European Countries have mostly concentrated in enacting legislations on the Right to respect for Private and Family Life, but U.K. and U.S.A. have made themselves busy in making laws on Right to Privacy. In this respect, a summary of the analysis of a number of legal decisions of U.S.A. is noteworthy. This analysis brings a certain kind of relation between Right to Privacy and Right to respect for

Private Life as well as projects the heterogeneous character of the rules governing the Right to Privacy. The analysis is presented hereunder:-

- (i) Infringement of Right to respect for Private Life does not necessarily involve a violation of the individual's Privacy or secrets except in the case of 'intrusion' into or 'disclosure' of his Private Life; it need not involve such violation where a person is presented to the public in a 'false light' or in case of 'appropriation' of one of the elements of his personality for the sake of gain.
- (ii) The element of publicity is essential only in the case of disclosure of private facts or of presenting a person in a false light, not in the case of intrusion into his Private Life or appropriation of one of the elements of his personality for gain.
- (iii) The motives of the person committing the violation are not taken into account except in the case of appropriation of an element of someone's personality; such appropriation must be inspired by desire for gain.
- (iv) Only in the case of appropriation of an element of a person's personality with a view to gain is the violation required to be 'substantial'.
- (v) In the case of intrusion into or disclosure of Private Life or of presentation of a person in a false light the violation must be 'objectionable' to the average man.
- (vi) The truth of the facts revealed is no defence except where the violation consists in presenting a person in a false light.¹³

Therefore, the analysis has tried to bring out the relation between Right to Privacy and Right to respect for Private life by projecting the cases of violation of Right to respect for Private Life not involving the cases of violation of Right to Privacy or vice-versa. Moreover, it has also specified the cases of placing a person in 'false light' or 'appropriation of one's personality' in public. It has also specified when and how these cases amount to violation of Right to Privacy. The whole analysis shows the case by case development of the law in this respect by projecting the heterogeneous character of Right to Privacy, which has changed its position in each case. However, the analysis is helpful for drawing the relationship between Right to Privacy and Right to respect for Private Life.

¹³ Yang, I.C.L.Q., Vol.15, 1966, p.187.

Ultimately, the comparison between Privacy and Private Life has brought the similarities between the two. Also the European Commission and the European Courts on Human Rights have upheld the necessity of maintaining Privacy for showing respect to Private Life, in their various decisions. Based on the similarities between the two and on these decisions, the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* and various other regional human rights instruments have equated Right to Privacy with Right to respect for Private Life. As such, those have created legal provisions for protection of Right to Privacy under the guise of the Right to respect for Private Life. Those legal instruments have provided more importance to Right to respect for Private Life, ultimately which have become fruitful for the protection to Right to Privacy in implied manner. However, the international legal instruments have given more importance towards Right to Privacy and have created provisions for the protection thereof. As such, those have not highlighted the Right to respect for Private Life. Therefore, only a detailed discussion of the regional legal instruments will give us a clear idea regarding the protection of Right to respect for Private Life, which is presented hereinbelow.

6.2.1.4. An Analysis of the Regional Legal Instruments regarding Protection of Right to respect for Private Life

International legal instruments, like *Universal Declaration of Human Rights, 1948* and *International Covenant on Civil and Political Rights, 1966* specifically deal with Right to Privacy and have not spoken anything about the Right to respect for Private and Family Life. In this respect, *the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950*, *the American Declaration of the Rights and Duties of Man, 1948* and *the American Convention on Human Rights, 1969* are pertinent to mention, because these Regional Legal Instruments have expressly dealt with the protection of Right to respect for Private and Family Life. In this sense, it can be said that, International Law is silent on the issue of this right, but Regional Laws are active on this point. In fact, the Regional Laws have recognised this right and have upheld the sanctity of this right. Various Municipal Laws have been made and the Municipal Courts have given decisions based on these Regional Laws. Those Laws are discussed hereunder.

6.2.1.4.1. An Examination of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 headed for the Protection of Right to respect for Private Life

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 deals with the protection of Right to respect for Private and Family Life along with other human rights. This article has prohibited any interference by the public authority on the exercise of the rights assured therein, except in exceptional circumstances provided under *Article 8(2)*. As such, this article has paid homage to the sanctity of this right by prohibiting any interference with this right. This article has specifically mentioned about the Right to respect for Private Life and has never mentioned about the Right to Privacy at any place. But, due to the similarities between these two rights, as already discussed, this article can be applicable for the protection of Right to Privacy in implied manner. In fact, this article has tried to protect the Right to Privacy under the guise of the Right to respect for Private Life. Though this article has not spoken directly about the Right to Privacy, but by way of protecting the private and family life of individuals, it has tried to protect the Right to Individual and Family Privacy.

For further analysis, the discussion can be divided into the following parts:-

(i) The Criticism of Article 8

Though the *Article 8 of the European Convention* has dealt with the Right to respect for Private and Family Life which has been proved to be advantageous for the protection of Right to Privacy in the European Region, but it has been criticized on the following grounds:-

(a) This article encompasses the Right to respect for Private and Family Life, but this right is divided into four categories under this Article – private life, family life, home and correspondence.

(b) Due to the division of four categories, no exhaustive definition of the ‘private life’ is found, which clearly specifies the ideals of personal autonomy and personality development.¹⁴

¹⁴ Madeleine Colvin (ed.), *op.cit.*, p.3.

- (c) This article is illustrative in nature and not exhaustive, because it is divided into four parts and has tried to give protection to certain kinds of rights specified therein only and not all.
- (d) The scope and extent of this article is limited, because it has dealt with the Right to respect for private life, family life, home and correspondence only.
- (e) It has mentioned nothing about the Right to respect for other rights.
- (f) But, the interpretation of this article by various jurists has tried to incorporate various other rights within its purview.
- (g) The jurists are also not unanimous while defining 'Private Life' and as such various meanings of 'Private Life' have come out, which have broadened its scope and ambit by incorporating various rights within its periphery.
- (h) It has dealt more with the Private Life and not the Right to Privacy, because it has not mentioned the term 'Privacy' anywhere.
- (i) As this article has dealt with the 'Private Life' and not 'Privacy', thereby its scope and ambit is broader.
- (j) Liberal interpretation can be given to the term 'Private Life' and many rights can be included within it. But, strict interpretation should be given to 'Privacy' and many rights cannot be included within it.
- (k) It has prohibited any interference by the public authority on the exercise of this right, but has not spoken anything about the interference by private persons.
- (l) According to various authors, it is not sufficient to protect individual rights against the State action, but the protection should be accorded against the actions of private individuals also.¹⁵ In this sense, this article is again, limited.
- (m) This article is silent about the interference by private persons. In this respect, whether the interference by private persons is permissible under this article or not along with its extent, is not clear.¹⁶
- (n) This article is not clear on the point that, whether the convention imposes any obligation on third parties or not.¹⁷

¹⁵ A. H. Robertson, *op.cit.*, p.ix.

¹⁶ *Ibid.*

¹⁷ *Id at p.x.*

(o) This article has expressly specified the circumstances, when the interference by public authority is permissible, which has again established the illustrative nature of the article.

(p) The article is silent about the existence of any other such circumstance, where interference by public authority is permissible, which again proves that the article is not exhaustive in nature.

(q) At the last point, the article has mentioned that, this right can be curtailed for the protection of rights and freedoms of others. In that point, the rights and freedoms are not expressly specified, this has kept the space open for further interpretation and enlargement of the scope of the article.

(ii) **A Comparative Analysis of Article 8 with Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights**

It is obvious to make a comparative analysis of the above-stated *Article 8, 12 and 17* of the three conventions respectively. All the three articles have dealt with Right to Privacy, but there are certain differences between these three articles in respect of their scope and ambit. Moreover, *Article 8 of the European Convention* has not used the term 'Right to Privacy' at any place, rather it has used the term 'Right to respect for Private and Family Life'. In this sense, it is different, to some extent, from the other two articles. Therefore, there are various reasons due to the existence of which, a comparative analysis of the three articles is essential. Such analysis will bring out the similarities and differences between the three articles.

As a matter of fact, *Article 8 of the European Convention* is greatly inspired and influenced by the *Article 12 of the Universal Declaration*. These two articles are also having various similarities. In spite of the similarities and inspirations, various differences have been found between the two, which are stated below:-

(a) *Article 12* has expressly used the term 'Privacy', but *Article 8* has used the term 'Private Life', these two terms are not similar.

(b) *Article 12* has given protection to Individual Privacy by way of using the term 'Privacy'. But, *Article 8* has used the term 'Private Life' and thereby has given protection to the private lives of individuals and not the Individual Privacy as a whole.

(c) The scope and ambit of *Article 12* is broader than the scope and ambit of *Article 8*.

(d) In *Article 12* more protection is afforded to individuals, but in *Article 8* less protection is offered.¹⁸

(e) *Article 12* is directly applicable to Right to Privacy, but *Article 8* is indirectly applicable to this right by way of broader interpretation of Right to respect for Private Life under this article.

(f) *Article 12 of the Declaration*, unlike *Article 8 of the Convention*, expressly forbids attacks upon 'honour and reputation'.¹⁹

(g) *Article 12 of the Declaration* prohibits 'arbitrary interference' with privacy, family, home and correspondence, which is much less precise than *Article 8 of the Convention*.²⁰

(h) *Article 12 of the Declaration* has not used the term public authority. But, *Article 8 of the Convention* has expressly prohibited any interference by the public authority on the exercise of the right under the article.

Therefore, the comparative analysis between *Article 12 of the Declaration and Article 8 of the Convention* has clearly shown the differences between the two. As the *Article 17 of the International Covenant on Civil and Political Rights* is based on the *Article 12 of the Universal Declaration*, thereby the *Article 17* is also having same differences with the *Article 8 of the Convention*. In this sense, *Article 12 and Article 17* can be kept under one line and *Article 8* is to be kept under different line. This comparative analysis also clearly shows the broader scope and ambit of *Article 12* than the *Article 8*.

Hence, the *Article 8 of the European Convention* has tried to protect the Right to Privacy by way of incorporating it into the Right to respect for Private and Family Life. Though it has suffered from various criticisms and differences with the Universal Declaration, but it is, in no way, inconsistent with the Universal Declaration of Human Rights. Also it has various advantages for the protection of Right to Privacy, because all the criticisms of this article are not negative criticisms

¹⁸ Fawcett, *The Application of the European Convention on Human Rights*, 1969, p.186.

¹⁹ A. H. Robertson, *op.cit.*, p.15.

²⁰ *Ibid.*

and some of those have found positive too. Moreover, Private Life is an important aspect of human life, the protection of which is utmost important. *Article 8* has tried to protect this aspect and as such, it can nevertheless be underestimated. Privacy is a part of Private Life, which is essential for the fullest enjoyment of Private Life. Therefore, protection of Private Life automatically provides protection to Privacy. Here lies the significance of this article. In this sense, the initiatives taken by the *Article 8 of the European Convention* for providing a general Right to Privacy under the guise of Right to respect for Private Life is praiseworthy.

6.2.1.4.2. The American Declaration of the Rights and Duties of Man, 1948 : A Praiseworthy initiative for Protection of Right to respect for Private Life

The American Declaration of the Rights and Duties of Man, 1948 has elaborated a list of rights and duties along with the urgency for the protection of various human rights declared under this Declaration. This Declaration has also created provisions for the protection of Right to Privacy keeping in mind that, it is also an important human right necessary for the upliftment of the human dignity in the international as well as regional periphery. In this respect, the following articles of the *American Declaration* are noteworthy, which deal with the Right to Privacy. Those are listed below:-

- (i) *Article V* – ***Right to Protection of honour, personal reputation and private and family life.***
- (ii) *Article VI* – ***Right to Family and to Protection thereof.***
- (iii) *Article IX* – ***Right to inviolability of the Home.***
- (iv) *Article X* – ***Right to inviolability and transmission of Correspondence.***

Though the *American Declaration* has not expressly used the term Right to Privacy, but it has tried to provide protection to this right in the above-stated articles. All the above-stated articles deal with various components of Privacy and have been made in line with the *Article 12 of the Universal Declaration of Human Rights, 1948*. In this sense, there is no doubt about the fact that, this Declaration has accorded protection to Right to Privacy. But, there are certain differences between *Article V of the American Declaration and Article 12 of the Universal Declaration*. In fact, *Article V* is based on *Article 8 of the European Convention* and not *Article*

12 of the *Universal Declaration*, because the *Article V* deals with the Right to respect for Private and Family Life and not the Right to Privacy. Due to the similarities between these two rights, it can be said that this article is applicable for the protection of Right to Privacy. But, it is beyond doubt that, this article is another initiative for the protection of Right to respect for Private and Family Life. In this respect, *American Declaration* is similar with the *European Convention*.

**6.2.1.4.3. The American Convention on Human Rights, 1969 : A
Conglomeration of Privacy and Private Life**

Article 11 of the American Convention on Human Rights, 1969 has dealt with Right to Privacy. More specifically, the term ‘Right to Privacy’ is used in the heading of the article, but the term ‘Private Life’ is used within the article. In this sense, it has given protection to ‘Private Life’. Particularly, the article has propounded the right to respect for everyone’s honour and dignity. Also it has prohibited arbitrary or abusive interference with everyone’s private life, family, home or correspondence. In gist, *Article 11* of this Convention has tried to protect the honour, reputation, dignity, private life, family, home and/or correspondence of individuals from any kind of invasion by way of arbitrary or abusive interference or unlawful attacks. As such, it has tried to protect various components of Right to Privacy along with the protection of Private Life. Nonetheless, these are all the components of Private Life too. Therefore, this article is another initiative for the protection of Right to respect for Private Life. Due to the similarities of this right with the Right to Privacy, it can be said that, this article is applicable for the protection of Right to Privacy. The use of the term ‘Right to Privacy’ in the heading actually projects towards this idea. As such, this article is a conglomeration ‘Privacy’ and ‘Private Life’, because none of them is found heavier while balancing between the two. From this perspective, *Article 11* is praiseworthy, because it has tried to remove the line of distinction between ‘Privacy’ and ‘Private Life’ by bringing them at the same footing.

For further analysis, the discussion can be divided into the following parts:-

(i) The Criticism of Article 11

Though the *Article 11 of the American Convention* has dealt with the right to respect for honour and reputation and has tried to protect the individual’s private life

and family from arbitrary interference or unlawful attacks, which has been proved to be advantageous for the protection of Right to Privacy in the American region, but it has been criticized on the following grounds:-

- (a) This article has never used the term 'Right to Privacy', except the heading.
- (b) It has given protection to 'honour', 'reputation' and 'dignity' separately, though all these terms are synonymous and can come under one umbrella.
- (c) Again, it has protected one's private life, family, home or correspondence from arbitrary or abusive interference on the one side, and one's honour or reputation from unlawful attacks on the other side. Both are not the same things.
- (d) In this sense, practically it has created a kind of discrimination among various rights declared under this article.
- (e) Basically, this article is divided into two parts, one is giving protection to private life, family, home or correspondence and the other is giving protection to honour or reputation.
- (f) Moreover, this article is of illustrative nature and not exhaustive, because it has given protection to certain kinds of rights mentioned therein and not all.
- (g) In this sense, the scope and ambit of this article is also limited.
- (h) It has mentioned nothing about the similar kinds of other rights.
- (i) Though this article has not used the term 'Right to Privacy', but it has used the terms 'private life, family, home, correspondence, honour, dignity and reputation'. All these terms are inherent within the Right to Privacy.
- (j) In this sense, by way of broader interpretation, this article is made applicable to Right to Privacy.
- (k) The term 'Right to Privacy' used in the heading also has pointed towards the intention of this article to cover Right to Privacy within its scope and ambit.
- (l) The intention behind this article helps it to enlarge its scope and ambit by way of liberal interpretation.

Therefore, the criticism of this article brings out its advantages and disadvantages. Though the terms 'Private Life' and 'Privacy' both are not similar, but the scope of 'Private Life' is much broader than 'Privacy' and in this sense, it can be used to denote 'Privacy' by way of liberal interpretation. Also the heading of

the article as 'Right to Privacy' denotes that, 'Private Life' means 'Privacy' hereunder.

(ii) A Comparative Analysis of Article 11 with Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights

It is necessary to make a comparative analysis of the above-stated *Articles 11, 12 and 17* of three conventions respectively. All the three articles have dealt with Right to Privacy, but there are certain differences between them in their scope and ambit. Therefore, the comparative analysis between the three is essential to bring out the similarities and dissimilarities between them. As a matter of fact, *Article 11 of the American Convention* is greatly influenced by the *Article 12 of the Universal Declaration* and *Article 17 of the International Covenant on Civil and Political Rights*. These three articles are also having various similarities. In spite of the similarities and influences, a number of differences are found between the three, which are stated below:-

(a) *Article 12 and Article 17* have expressly used the term 'Privacy', but *Article 11* has used the term 'Private Life' within the article and used the term 'Right to Privacy' only in the heading. 'Privacy' and 'Private Life', these two terms are not similar.

(b) In this sense, *Article 11* is similar, but not identical to the words of *Article 12 and Article 17*.²¹

(c) *Article 11* has recognised the right to dignity of individuals, which is not expressly recognised by *Article 12 and 17*.

(d) *Article 11* has prohibited abusive interference with the rights mentioned thereunder, whereas the other two articles are silent on this point.

Therefore, the comparative analysis between the three articles has clearly shown the differences between the three. This comparative analysis shows that, *Article 11* has given separate protection to private life, family, home or correspondence on the one side and honour or reputation on the other side, whereas

²¹ James Michael, *Privacy and Human Rights: An International and Comparative Study, with Special Reference to Developments in Information Technology*, UNESCO Publication, France, 1994, p.26.

Article 12 and 17 have given same protection to all the rights. In this sense, the comparative analysis has projected a unique difference between the three articles.

(iii) A Comparative Analysis of Article 11 of the American Convention and Article 8 of the European Convention

A comparative analysis of *Article 11 of the American Convention* and *Article 8 of the European Convention* is obvious to find out the differences between the two. Though these two articles have dealt with Right to Privacy as well as Right to respect for Private Life and are having various similarities, but there are also various differences between the two. The scope and ambit of these two articles are also different. The following similarities and dissimilarities are found by making a comparative analysis between the two:-

- (a) Both *Article 8 and Article 11* have not used the term ‘Privacy’ within the articles, instead they have used the term ‘Private Life’.
- (b) *Article 11* has used the term ‘Right to Privacy’ in the heading only, but *Article 8* has never used the term.
- (c) *Article 8* has protected ‘family life’, but *Article 11* has protected ‘family’.²²
- (d) ‘Honour’ and ‘reputation’ are protected by *Article 11*, but are not protected by *Article 8*.²³
- (e) *Article 11* has spoken about arbitrary or abusive interference or unlawful attacks. But, *Article 8* has not specified the nature of interference.
- (f) *Article 8* has expressly prohibited any interference by the public authority on the exercise of the rights therein. But, *Article 11* is silent on the point of public authority.
- (g) *Article 11* has expressly protected the right to dignity, whereas *Article 8* has not expressed it directly.

Therefore, the comparative analysis has helped to find out the similarities and differences between the two articles, which have become advantageous to understand the nature of the two articles regarding the protection of both Privacy and Private Life under these two articles. In spite of the differences, similarity between

²² Dilbir Kaur Bajwa, “*Right to Privacy – Its Origin and Ramifications*”, *Civil and Military Law Journal*, Vol.26, 1990, pp.48-56 at p.50.

²³ *Ibid.*

the two is that, both these articles have tried to protect Privacy under the clothing of Private Life. This initiative is praiseworthy, because Private Life always includes Privacy and as such, protection of Private Life automatically protects Privacy. In this sense, these two articles have opened a new door of Privacy protection simultaneously with the outlook of Privacy protection of the international legal instruments.

6.2.1.5. The Municipal Laws : A Different Perspective of Private Life

As regards the protection of Right to respect for Private Life, none of the *Common Law Countries* have dealt with this right; instead those have dealt with the Right to Privacy. Among the *Civil Law Countries*, only *France* has dealt with this right and none else. The *Nordic Law Countries* are concerned with Data Privacy only and not any aspect of Individual Privacy.

6.2.1.5.1. France : A Prominent Country dealing with Right to respect for Private Life

The protection of Right to Privacy has been accorded a special status in *France*. The system of human rights protection in *France* is based on the *European Convention for the Protection of Human Rights and Fundamental Rights, 1950* and as such, the ‘Right to Privacy’ is equated therein with the ‘Right to respect for Private Life’. The notion of Private Life has been expanded in *France* since the end of the *19th Century* by way of judicial development of *French Law* for the purpose of combating the increasing number of breaches caused by the publication of photographs.²⁴

In fact, the development of the Right to respect for Private Life in *France* has been made by following a particular chronological order, which is stated below:-

- (i) *The role of case law for defining this right.*
- (ii) *The protection of private life before the Act of 1970.*
- (iii) *The status of private life under the Act, 1970.*
- (iv) *The granting of Constitutional status to the private life by the Conseil Constitutionnel in 1995.*²⁵

²⁴ Catherine Dupré, “*The Protection of Private Life versus Freedom of Expression in French Law,*” in Madeline Colvin (ed.), *op.cit.*, p.45.

²⁵ *Id at pp.49-50.*

The doctrine of Private Life has been developed in the *French Law* along with the development of photography. At the very beginning, in the absence of a special legal provision on Private Life, judges have relied on the principle of *delictual liability* under *Article 1382 of the Code Civil*. This right has been developed to protect certain aspects of the human personality, like honour and reputation, private life and the '*right to one's own image*' (*le droit à l' image*). This right is considered as the first approach of the *French Courts* to protect the Private Life in the *Pre-Act, 1970* era. The *right to one's image* has been used to prevent breach of Privacy, particularly by the tabloid press. It has also been used to protect professional life.²⁶

In the next phase, the *Act of 1970* has been adopted to provide statutory protection to Private Life. At the time of making that Act, more reliance has been given to the *American Conception of Private Life*, rather than the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* or the *International Covenant on Civil and Political Rights, 1966*. This Act has been made to protect the individual citizen's rights. In fact, it provides for the general mechanism with respect to the protection of Private Life, particularly against the media. In this respect, *Article 22 of the Act* is noteworthy, which covers the areas of Private Life in broad sense of the term and also has limited the scope of Private Life by using the term '*intimate private life*' (*intimité de la vie privée*). To make this provision clearer and specific, it has been incorporated in the *Article 9 of the Code Civil*. This article runs as follows:-

*"Everyone has a right to the respect of his private life. Judges can without prejudice to the determination of the harm suffered, order all measures, such as seizures, sequestrations and other provisions, as appropriate to prevent or to stop a breach of intimate private life; in urgent situations these measures can be ordered under emergency interim proceedings".*²⁷

Therefore, under the *Act of 1970*, provisions have been made for the protection of Private Life, the importance of which can be easily assumed from the creation of '*emergency interim proceedings*'.

²⁶ *Id* at pp.50-51.

²⁷ *Id* at pp.45-46, 51-52.

Next period of the protection of Private Life in the *French Law* is the period of constitutional development, which is marked by the *Conseil Constitutionnel of 1995*. Though the *1958 French Constitution* did not recognise the Right to respect for Private Life, but the *1995 Conseil Constitutionnel* has acknowledged the incorporation of this right under *Article 66*, stating as follows:-

*“Every body has a right to the respect of her private life and to the dignity of her person”.*²⁸

As such, the necessity of protection of Private Life of the individuals has been understood in the *French Constitutional Jurisprudence only in 1995*. In this respect, the constitutional judges have opined that, breach of Private Life would amount to the breach of personal freedom. In spite of reliance on the *American Conception of Private Life*, the *French judges* have also kept faith on the *European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950*. It is evident from the fact that, when the *Convention* has been ratified in *1974*, it has been made part of the *French Law* and since then, the status of Private Life has been strengthened in the *French Law*. However, the idea of Private Life includes various aspects of the human life in the *French Law*, like *personal identity, health and maternity, emotional and family life, domicile and address, correspondence and disclosure of wealth etc.* In this sense, it covers a broad range of matters relating to human life. Again, there are certain essential attributes relating to the Private Life in the *French Law*, which are listed below:-

- (i) *Disclosure based on Consent.*
- (ii) *The Private Life of Politicians.*
- (iii) *Protection of Private Life of the Dead.*²⁹

Therefore, in the *French Law*, *Right to Privacy or the Right to respect for Private Life* has occupied a very prominent place since the old period, but it has received statutory recognition only after *1970*. The constitutional status of this right has come in the year *1995*, since then this right is coupled with the right to live with human dignity, which is marked as a new development of the *Right to respect for Private Life* in the light of the Human Rights Jurisprudence. Hence, the scope and

²⁸ *Id at pp.54-55.*

²⁹ *Id at pp.55-56, 57, 61, 63.*

ambit of the protection of this right have been enlarged only in the recent period. In this sense, the *French* initiatives for the protection of Privacy as well as Private Life are noteworthy.

Therefore, the Municipal Laws of different countries for the protection of Right to respect for Private Life are found inadequate, because all the countries have not taken initiatives for the protection of this right. Mostly, all the countries are concerned with the laws on Privacy and have tried to protect it. Hence, it can be said that, it is high time for making exhaustive legislations in this field.

6.2.2. Privacy of Women

Worldwide vulnerability of women is the principal cause for gross violation of human rights of women throughout the world. Right to Privacy as a human right is not an exception to it and as such, Right to Privacy of women is not only an unprotected right, but has become a totally neglected right of which most of the women are not even aware. Privacy means freedom and freedom is must for the existence of a human being in a civilized human society. Freedom is not subjected to any discrimination, it should be equal for everyone, be it men or women. Therefore, women are also entitled to equal freedom with men. If freedom means Privacy or a space to take one's decision on its own or to determine one's life according to one's wishes, then women are also entitled to this freedom by nature. But, the stigmatized social infrastructure has taken away this natural right of women from themselves, the protection of which is utmost important at the present juncture. The protection and enforcement of Right to Privacy of women is the need of the hour. Prior to this, it is necessary to understand the importance of Right to Privacy of women, which is discussed hereinbelow.

6.2.2.1. The Importance of Right to Privacy of Women

Right to Privacy is an important human right necessary for better protection of the lives of every human being in a healthy manner. It is equally applicable to men and women both. It is also necessary to uphold the human dignity of every individual in a civilized society. In this sense, every human being should enjoy the Privacy of Family, Marriage, Home, Correspondence, Honour and Reputation. Apart from these Privacy rights, there are certain Privacy rights, which are specifically applicable to women, like Privacy of Child-birth, Motherhood, use of Contraception,

Right to Abortion, Protection against Female Foeticide including the natural modesty and morality of women. Also there are other types of Privacy rights, like Privacy of Information, Privacy in Cyberspace, Workplace Privacy and Healthcare Privacy. Though these Privacy rights are equally applicable to men and women both, but women are more fully subjected to Workplace Privacy and Healthcare Privacy, because women are suffering from workplace harassment and lack of Workplace Privacy as well as poor health conditions all over the world. Hence, women require special care for the protection and enforcement of these rights.³⁰

The cases of lack of Privacy rights and violations of Privacy are found in large numbers in the developing and underdeveloped countries rather than the developed countries, because in these countries, along with the problem of non-implementation of the Privacy rights, a large number of women are not even aware of their rights. In all the developing countries, there is absence of express legislations on Right to Privacy including Right to Privacy of women. Moreover, due to the importance of Family Privacy and values, Right to Privacy of women is neglected in the developing and underdeveloped countries. Also there is absence of social, legal and regulatory framework for protection and enforcement of Right to Privacy of women.³¹

Therefore, it is found that, Right to Privacy of women is in no manner, less important than the Right to Privacy of men. In fact, it assumes more importance than men, because this right of women is highly neglected throughout the world. Nobody is concerned about giving women their Right to Privacy or a private space to live their lives according to their wishes or to determine their own decisions on their own. This situation is mostly found in the developing and underdeveloped countries due to their peculiar social infrastructure or family pattern. However, situation is not so serious in the developed countries, because the Human Rights of women are more or less recognised therein and women are adequately represented in various sectors

³⁰ Sangeeta Chatterjee, "Awareness and Implementation of Right to Privacy of Women in SAARC Region: Need of the Hour", in Dr. Rathin Bandyopadhyay, Prof. Gangotri Chakraborty and Dr. Sujit Kumar Biswas (eds.), *Human Rights and Duties*, Department of Law, University of North Bengal Publication, 1st Edn., 2015, pp.281-293 at p.286.

³¹ *Id* at pp.287-288.

along with men. Moreover, Right to Privacy as a whole is protected in the developed countries and as such, women are also getting the benefit of such protection.

Considering the necessity of the protection of Human Rights of women, United Nations has taken worldwide initiatives and has prepared a number of Declarations, Covenants and Conventions in this respect. Apart from the general human rights instruments containing provisions for protection of women's rights, separate legal instruments have also been prepared dealing with the women's rights only. Moreover, Four World Conferences have been held on the rights of women under the auspices of the United Nations. Various Commissions have also been established and programmes of action have been taken in order to give effect to the recommendations of the World Conferences. Though these processes have effectuated various human rights of women, but none of these processes have done anything for the protection of Right to Privacy of women. In fact, women are not adequately represented in the education or employment sector throughout the world as well as various problems have been cropped up for the protection of various human rights of women, without the protection of which, the existence of women would be at stake. Due to these reasons, more important human rights have been given priority and Right to Privacy has been neglected. Nobody has understood the seriousness of the violation of Rights to Privacy of women. As such, no separate legal instrument has been made for the protection of Right to Privacy of women. However, the international legal scenario regarding the protection of Right to Privacy of women is discussed hereunder.

6.2.2.2. Privacy of Women : The International Legal Scenario

Women are considered as the vulnerable or weaker sections of the society, because they have been exploited since the beginning of the human civilization. Gradually, various initiatives have been started for the protection of the rights of women and to give them equal status with men. In this respect, the efforts taken by the United Nations are worth mentioning. As such, the United Nations General Assembly has adopted a *Declaration on the Elimination of Discrimination Against Women* vide *Resolution 2263 (XXII) on November 7, 1967*. Thereafter, for the purpose of implementing the principles set forth in the Declaration, a *Convention on the Elimination of All Forms of Discrimination Against Women* has been prepared

by the United Nations in the year 1979. In this sense, international legal scenario of the Right to Privacy of women means, more or less the *Convention on the Elimination of All Forms of Discrimination Against Women, 1979*. The role of this Convention is discussed hereunder.

6.2.2.2.1. The Role of Convention on the Elimination of All Forms of Discrimination Against Women, 1979 regarding the Protection of Privacy of Women

The *Convention on the Elimination of All Forms of Discrimination Against Women* has been adopted by the UN General Assembly on *December 18, 1979*. The Convention has come into force in *1981*. The objective of the Convention is to eliminate all forms of discrimination against women and to adopt measures required for the elimination of such discrimination in all its forms and manifestations. The *Preamble* of the Convention has kept faith on the equal status of men and women without any discrimination. It has also expressed that, the establishment of new international economic order based on equity and justice will be possible only when the equality between men and women will be achieved.

In the light of the above objective, *Article 1* of the Convention has defined the term ‘discrimination against women’ and *Article 2* has enlisted certain duties pertaining to the policy of eliminating discrimination against women, which every State Party should undertake for the fulfilment of the objectives enshrined in the *Preamble* of the Convention. In this background, the Convention has declared various rights of the women along with the provisions for implementation of those rights.

In this atmosphere of equal rights of men and women, the Convention has dealt with the Right to Privacy of women as an important human right. But, this Convention has not expressly created the provision for protection of Right to Privacy like the *Article 12 of the Universal Declaration of Human Rights, 1948* or the *Article 17 of the International Covenant on Civil and Political Rights, 1966*; rather it has supported the view of creating the Right to Privacy of Family and Marriage for the women. In this sense, it has walked in line with the *Article 16 of the Universal Declaration*, the *Article 23 of the International Covenant on Civil and Political Rights* and *Article 10(1) of the International Covenant on Economic, Social*

and Cultural Rights, 1966. In this respect, Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 is noteworthy, which deals with the matters relating to marriage and family relations of women. The text of Article 16(1) runs as follows:-

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- a) The same right to enter into marriage.*
- b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.*
- c) The same rights and responsibilities during marriage and at its dissolution.*
- d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, in all cases the interests of the children shall be paramount.*
- e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.*
- f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation, in all cases the interests of the children shall be paramount.*
- g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.*
- h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration”.*

An analysis of the text of Article 16(1) of this Convention shows that, it does not deal with the Right to Privacy of women; rather it deals with various rights of women relating to family, marriage, motherhood, childbirth, parentage, guardianship and rights of personal laws. In fact, this article expressly deals with the following rights of women:-

- (i) The right to enter into marriage.*
- (ii) The right to free consent of marriage and choice of spouse.*
- (iii) The right to dissolution of marriage.*
- (iv) The right to parentage of the children irrespective of the marital status.*
- (v) The right to freedom of motherhood and childbirth.*
- (vi) The right to take decision freely about the upbringing of children.*

(vii) *The rights of guardianship, trusteeship, adoption and other matters of personal law.*

(viii) *The right to choose a family name, profession and occupation.*

(ix) *The right to property in all its aspects.*

Therefore, *Article 16(1)* of this Convention deals with various rights of women relating to marriage, formation of family, motherhood, childbirth, parentage, guardianship and allied rights. Though all these rights are not directly related to the Right to Privacy, but these rights provide freedom to women for taking decisions on their own, in various aspects of their private and personal lives. This view indirectly projects towards the existence of Right to Privacy of women under this article, because enjoyment of all these rights in respect of personal matters means the enjoyment of private space in personal matters of the women. Private space is nothing but the enjoyment of Privacy and as such, whenever women are getting private space to determine their personal lives or to take decisions freely in their personal lives, without any control by the patriarchal or male-dominated society, then obviously it can be said that, women are enjoying their Right to Privacy. In this sense, *Article 16(1)* of this Convention is a good initiative for protecting Right to Privacy of women in the international legal scenario. But, this attempt is partial, because it has projected the Right to Privacy of Family and Marriage of women and not the Right to Privacy as a whole.

Moreover, this article provides full freedom to women for marriage and for choice of spouse, which projects towards the right to free consent of marriage for women, which in other words, prohibits marriage of women by force. According to *Prof. Alan F. Westin*, Privacy means freedom. Therefore, in the light of the definition of Privacy given by *Prof. Alan F. Westin*, it can be said that, as this article has given freedom of marriage, family and parentage of women, thereby it deals with the Right to Privacy of Family, Marriage and Parentage of women. In this sense, it has the similarities with the *Article 16 of the Universal Declaration of Human Rights, 1948*, the *Article 23 of the International Covenant on Civil and Political Rights, 1966* and the *Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, 1966*. Hence, the incorporation of *Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against*

Women, 1979 is a good initiative for the recognition and protection of Right to Privacy of women in the international field.

But, it is to be remembered in this respect that, international conventions and covenants are merely declaratory in nature and direct enforcement of the rights declared therein is not possible. If the provisions of those legal instruments are incorporated either in the national constitutions or in the national legislations of the Member-States, then only those provisions can be made enforceable and not otherwise. In this sense, mere incorporation of a provision in an international legal instrument cannot make a full-proof law on a particular subject. This is true in case of the *Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979*, because it has merely declared the rights of family and marriage of women amounting to Privacy of Family and Marriage of women. But, enforcement of this right needs the incorporation of this right in the national constitutions and legislations of the Member-States, which has not yet been made. Due to this reason, required numbers of municipal laws are not found on this issue.

6.2.2.3. Absence of Regional Legal Instruments Protecting Privacy of Women

Moreover, supporting regional legal instruments are also absent in this area. Only resort available is this international legal instrument. Hence, it can be said that, this area is still neglected throughout the world and inspite of incorporating this legal provision; women are getting no help in the matters of protection and enforcement of their right to Privacy. Therefore, awareness generation campaign in the grass-root level and enactment of extensive legislations touching the Right to Privacy of women is the need of the hour.

6.2.2.4. Inadequacy of Municipal Laws Regarding Privacy of Women

However, among the municipal laws of different countries, only *Canada and China* have taken certain initiatives for the protection of Right to Privacy of women. In this respect, the attempts of the *Supreme Court of Canada and the Ontario Civil and Criminal Courts* are noteworthy, which have evolved various Privacy rights by way of judicial interpretation. These Privacy rights include certain rights relating to the Privacy of women, which are mentioned hereunder:-

(i) *In Criminal Law, Privacy Rights have been evolved relating to Sexual assault including the protection of privacy of prior sexual and medical history of women.*

(ii) *Privacy rights of women have been recognised, which include the right to abortion of the women.*

Apart from *Canada*, the initiatives taken by *China* are also important, because it has enacted separate laws for protection of separate areas of Right to Privacy, which include the interests of women also. In this respect, *Law on the Protection of Rights and Interests of Women, 1992* is noteworthy. It is the only law in *China* which has tried to protect the Right to Privacy of women to some extent therein. Apart from these two countries, no such noteworthy municipal laws are found for the protection of Right to Privacy of women.

6.2.3. Privacy of Children

Every child is an individual human being and as such, should be entitled to the Right to Privacy. In this sense, the basic postulates of Individual Privacy – *Solitude, Intimacy, Anonymity and Freedom* should be applicable to Children also like a grown up human being. A child may enjoy the benefits of these postulates as and when he or she wishes. Moreover, the four Functions of Individual Privacy as propounded by *Prof. Alan F. Westin*, like *Personal Autonomy, Emotional Release, Self-Evaluation and Limited and Protected Communication*, should also be applicable to a child. A child should get the benefit of these four functions. In fact, an ordinary child discharges these functions of Privacy as and when requires. But, a distressed or an abandoned child has no freedom or Privacy to discharge any of these functions or to enjoy the benefit thereof. A distressed or an abandoned child either works in a cruel and exploitative atmosphere or lives in an orphanage. In both these cases, their livelihood depends upon the mercy of other persons and as such, they do not have any freedom to enjoy their lives according to their wishes. In totality, it amounts to violation of Privacy of a child.

Apart from that, children become victims of various crimes in the developing and underdeveloped countries, which also take away their childhood. A number of those crimes include Child Prostitution, Child Pornography, Immoral Trafficking of Children, Conversion of Children into Beggars, Sexual Harassment of Children and various other forms of cruelty to children. These crimes do not only victimize the

children, but also violates the Privacy of children. More specifically, in cases of Child Pornography, Child Prostitution, Immoral Trafficking of Children, and Sexual Harassment, a child loses his or her physical as well as mental Privacy. In all these cases, a child has no control over his or her body and mind and thereby the child is used without his or her consent. Any exploitation on the child is made by force and in the ultimate effect; the child is in loss of the childhood as well as the gross violation of Right to Privacy of a child.

6.2.3.1. The Importance of Right to Privacy of Children

Guardianship and taking care of the child is appropriate, but owning and controlling a child like a property is unwelcomed. If it happens, then it amounts to violation of Right to Privacy of a child. Again, while considering the matters of custody and guardianship of a child, courts have always upheld the interest and welfare of the child as of paramount consideration. In this sense, interest and welfare of the child are above all and for the protection of these elements, if it is necessary to protect the Right to Privacy of the child, then that should be done. On the contrary, if Right to Privacy of a child is violated, interest and welfare of the child cannot be protected. In this sense also, Right to Privacy of a child gets prominence.

Moreover, the vulnerability of children in general, causes the gross violation of all human rights of children and Right to Privacy is not an exception to it. If parents are suffering from illiteracy, unemployment, poverty and inequality of income, then how can they produce and upbringing healthy children? That is why children are suffering from these serious consequences. Again, if parents are not aware of their Right to Privacy, how can they generate awareness regarding Right to Privacy of their children? In the developing and underdeveloped countries, Right to Privacy is considered as a luxury and no action is taken for the protection of this right. But, this conception is improper and protection of Right to Privacy of children is the urgent need of the hour. If this right of children are not protected, then they would be over-exploited and would not get the benefit of education. Education enlightens a child and an uneducated child is always deprived from such enlightenment. Consequently, all the human rights including Right to Privacy of children are violated.

6.2.3.2. International Concern for the Protection of Privacy of Children

Vulnerability of children, its causes and consequences are not any narrow local issue, rather it is a global issue. In fact, world-wide concern for the prevention of child vulnerability is increasing day by day. Simultaneously, violation of Right to Privacy of children and the protection of this right have become a global issue. In this respect, United Nations and its Specialised Agencies are taking active steps. Though these initiatives are mainly concerned with the violation of all human rights of children, but nonetheless they have rejected the Right to Privacy. In fact, they have taken active steps for the protection of this right, which can be visualised from certain express legal provisions contained in a few United Nations International Legal Instruments. However, among them, *Convention on the Rights of the Child, 1989* and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985* expressly deal with the provision for protection of Right to Privacy of children. Those provisions are discussed hereinbelow.

6.2.3.2.1. The United Nations Convention on the Rights of the Child, 1989 : An Analysis from the Perspective of Privacy of Children

In the international field, United Nations has started to take initiatives for the protection of the children considering the vulnerability of their nature. In this respect, it has incorporated *Article 25 of the Universal Declaration of Human Rights, 1948* and various other articles in the *International Covenant on Civil and Political Rights, 1966* as well as the *International Covenant on Economic, Social and Cultural Rights, 1966*. In furtherance of this objective, the United Nations General Assembly has also adopted the *Declaration on the Rights of the Child on November 20, 1959*. Due to the non-binding nature of all these international legal instruments, adoption of a Convention for Child Care has become necessary. Therefore, the *United Nations Convention on the Rights of the Child* has been adopted by the United Nations General Assembly on *November 20, 1989*. It has come into force on *September 2, 1990*.

The Convention has recognised that, in all countries of the world, huge numbers of children are living in exceptionally difficult conditions and therefore, those children need special consideration. In this backdrop, the objective of the Convention has been to recognize the importance of international co-operation for

improving the living conditions of children in every country and particularly in the developing countries. Taking into account of this objective, the *Preamble* of the Convention has been drafted. The *Preamble* has proclaimed that, childhood is entitled to special care and assistance.

The text of the *Preamble* shows that, the child needs to grow up in the family environment for the full and harmonious development of his or her personality. It also proclaims various ideals, like peace, dignity, tolerance, freedom, equality and solidarity for the achievement of the children. Therefore, the *Preamble* has accepted the necessity of dignity and freedom for the children. As these two ideals are the basic elements of Right to Privacy, thereby the *Preamble* in its language has already created the environment for enacting an article containing the Right to Privacy of children in this Convention.

In this atmosphere of dignity and freedom for children, the Convention has declared the Right to Privacy of children as an important human right. In this context, it is pertinent to mention here that, this Convention has expressly declared the Right to Privacy of family, home, correspondence, honour and reputation of the children under *Article 16 of the Convention like the Article 12 of the Universal Declaration of Human Rights, 1948 or the Article 17 of the International Covenant on Civil and Political Rights, 1966*. In this sense, *Article 16* of this Convention has recognised a general Right to Privacy of children in line with the two above-stated articles. Therefore, this Convention has similarities with the *Universal Declaration and the International Covenant on Civil and Political Rights*. The text of *Article 16* runs as follows:-

*“1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks”.*

If the above-stated article is analysed, the following components are found:-

- (i) It has given protection to the –
 - (a) Individual Privacy of children;
 - (b) Family Privacy of children;
 - (c) Privacy of Home or Correspondence of children;

(d) Privacy of Honour and Reputation of children.

(ii) It has prohibited arbitrary or unlawful interference with the Privacy rights of children mentioned therein.

(iii) It has enjoined legal protection to the Privacy rights of children mentioned therein.

(iv) It has specifically given legal protection to these rights of children against any kind of arbitrary or unlawful attack or interference.

Therefore, *Article 16* of this Convention has tried to protect the Privacy rights of children mentioned therein from any kind of invasion by way of arbitrary or unlawful attack or interference. In this sense, this article is similar with the *Article 12 of the Universal Declaration of Human Rights, 1948* and the *Article 17 of the International Covenant on Civil and Political Rights, 1966*. In a comparative analysis of above-stated *Articles 12, 16 and 17*, the following points may be emerged:-

(i) *Article 16* of this Convention is also illustrative of Privacy rights and not exhaustive like the *Article 12 of the Declaration* or the *Article 17 of the Covenant*.

(ii) The scope and ambit of this article is also limited like the *Article 12 of the Declaration* or the *Article 17 of the Covenant*.

(iii) It has also mentioned nothing about the other Privacy rights apart from those expressly mentioned like the other two articles.

(iv) The interpretation of this article in any manner, does not show the implied coverage of other Privacy rights, which contention is again similar with the above-stated *Articles 12 and 17*.

The comparative analysis of the above-stated three articles shows that, these three articles have walked in the same line with a slight difference that, *Article 16 of the Convention* has spoken about the Right to Privacy of children and the other two *Articles 12 and 17* have spoken about a general Right to Privacy of all. In this sense, this Convention has followed the guidelines framed by the said Declaration and the Covenant. It has also applied those general guidelines carefully to the children. But, there is one difference in this Convention with the Declaration and the Covenant. There has been no article in this Convention like the *Article 16 of the Declaration* or the *Article 23 of the Covenant* dealing with the Right to Privacy of Family and

Marriage. The reason behind this difference is that, child marriage is prohibited by law and as such, there is no necessity to recognise the Right to Privacy of family and marriage of children. Due to this reason, there is also no article like the *Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, 1966* and the *Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979*. In this sense, *Article 16 of this Convention* has not walked in same line with the above-stated *Articles 10(1) and 16(1)*.

Apart from the *Article 16 of this Convention*, there is also another article recognising the Right to Privacy of children and that is *Article 40(2)(b)(vii)*. The text of this article runs as follows:-

“. . . (vii) to have his or her privacy fully respected at all stages of the proceedings . . .”

In fact, this article as a whole does not deal with the Right to Privacy of children. Only the *Article 40(2)(b)(vii)* deals with the Right to Privacy of children at the time of penal proceedings. But, this clause of *Article 40* is very important, because it has tried to protect the Right to Privacy of children at the time of penal proceedings, where the chances of its violations are ample. Furthermore, the incorporation of this article in this Convention is a unique creation, because the other Declaration, Covenants or Conventions have created no such provisions for the protection of the Right to Privacy. Therefore, the steps taken by the *United Nations Convention on the Rights of the Child, 1989* for the recognition and protection of general Right to Privacy of children under *Articles 16 and 40(2)(b)(vii)* is a good initiative on the part of this Convention.

6.2.3.2.2. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 : A New Dimension towards Privacy Protection of Juveniles

Protection of Right to Privacy of children is not the only issue, but the protection of Right to Privacy of Juveniles is also utmost important. Juveniles are standing at the border line of child and adult and as such, they need special care and protection. Juveniles may not be of tender age like children, but are also not matured like the adults. In fact, physically they have grown up to some extent for carrying out physical labours. But, mentally they are not grown up like adults and therefore,

behave like the children. Due to this reason, juvenile age is a very delicate age and if, special care and protection is not provided for the mental development at this age in the positive direction, the mental growth may happen in negative direction. Mental growth in a negative direction is a very serious matter, because it creates many serious consequences. It does not only produce Juvenile Delinquent, but also produce a frustrated, depressed or mentally retarded juvenile. Sometimes, such juveniles may commit suicide also. Therefore, juvenile age is a very delicate age and their problems are very critical problems, which should be handled with proper care.

Problems of Juveniles are global issues and as such, everyone is concerned with these problems at the international level. United Nations is also not dormant in this area. It has enacted the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985* to promote juvenile justice at the international level and to prevent juvenile injustice. Adoption of these rules has been proved to be an active step towards the promotion of juvenile justice. These rules are also known as "*The Beijing Rules*". However, these rules have been recommended for adoption by the *7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26th August to 6th September, 1985* and has been adopted by the *General Assembly Resolution 40/33 of 29th November, 1985*.

In the atmosphere of all pervasive well-being of juveniles, the rules have defined various rights of juveniles and have tried to protect those rights. Along with the other rights of juveniles, the rules have also dealt with the Right to Privacy of juveniles and its protection thereof. In this respect, *Rule 8* is pertinent to mention, the text of which runs as follows:-

“Protection of Privacy

8.1. The juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2. In principle, no information that may lead to the identification of a juvenile offender shall be published”.

If the above-stated *Rule 8* is analysed, the following points may be emerged:-

(i) The Rule deals with the Juvenile offenders and other juveniles, against whom any proceedings are carried on.

- (ii) The Rule recognizes Juvenile's Right to Privacy and provides respect to this right.
- (iii) The Rule prescribes that, the Juvenile's Right to Privacy shall be maintained at all stages of any proceedings carried on against her or him.
- (iv) The underlying objective behind this rule is to prevent any harm caused to the Juvenile –
 - (a) by undue publicity about him during the proceedings; or
 - (b) by the process of labelling the juvenile as a criminal or an offender.
- (v) The rule prohibits publication of any information about the juvenile, which may lead to the identification of her or him as a juvenile offender.
- (vi) The prohibition of publication of information about the juvenile offender shall be maintained as a matter of principle.

Therefore, the *Rule 8* has prescribed protection of Right to Privacy of Juvenile offenders at the time of any proceedings instituted against him or her. In this sense, intention of this rule is to prevent any negative publicity of the juvenile offender or to prevent the juvenile being placed in the false light. The purpose of this rule is also to prevent identification of the juvenile as a permanent criminal as well as to prohibit the publication of any information in this respect in public. The underlying objective behind this rule is to maintain Right to Privacy of the juvenile in full proof manner, so that every possibility of the juvenile becoming a permanent criminal can be prevented. As such, interpretation of this rule provides the idea that, though this rule prescribes a general Right to Privacy for juveniles, but this right is applicable in certain specific area and that is, in case of Court proceedings against the juvenile. In this sense, this rule does not cover every area of Right to Privacy of a juvenile, but this rule is meant for the protection of Right to Privacy of a juvenile during Court proceedings.

Due to the above-stated reasons, certain differences are found between *Rule 8* and the other international legal instruments containing general Right to Privacy, like *Article 12 of the Universal Declaration of Human Rights, 1948*, *Article 17 of the International Covenant on Civil and Political rights, 1966* and *Article 16 of the United Nations Convention on the Rights of the Child, 1989*. The main difference is that, all these articles contain a general Right to Privacy, but *Rule 8* contains Right

to Privacy during court proceedings against a juvenile and does not cover Right to Privacy of juveniles in other matters. In this sense, the scope and ambit of *Rule 8* is narrower than the other above-mentioned articles. It does not provide full-proof protection of Right to Privacy of juveniles. Moreover, this rule is of suggestive nature and not of commanding nature, because no punitive measures have been prescribed for the violation of these rules.

Generally, rules are supplementary and complimentary to the acts or statutes. In the international legal field, rules are supplementary to the declarations, covenants and conventions. Though these instruments are also not directly enforceable and need incorporation of their articles into national constitutions or national legislations of the Member-States for their enforcement, but Member-States are bound to incorporate those in their domestic laws to get the benefit of becoming members of the International Community. But, rules cover only certain specific areas and not general in nature. They generally rest on some parent statutes, in the absence of which they become ineffective. In this particular area, no such parent statute is found. Therefore, rules reflect only suggestive ideas, which Member-States may incorporate and nothing will happen in case of non-incorporation of those rules. Hence, the adoption of these rules is a good initiative for protection of Right to Privacy of juveniles to a limited extent and these are not comprehensive in nature.

The international legal arena regarding the protection of Privacy of children is good enough. But, the initiatives of the international level in this respect have not been reflected in the regional legal scenario. As such, no such regional legal instrument is found in this respect, except the *African Charter on the Rights and Welfare of the Child, 1999*, which is discussed hereinbelow.

6.2.3.3. Regional Concern for Protection of Privacy of Children with special reference to the African Charter on the Rights and Welfare of the Child, 1999

In the regional legal scenario, continent wise development of Right to Privacy of children has not been found so far. As such, separate legal instruments with respect to European and American regions have not been found in this respect. Asian region is more or less concerned with Data Privacy only and not any aspect of Individual Privacy. Therefore, the question of their initiative regarding protection of

Privacy of Children does not arise. What is remaining thereby is the African region. Surprisingly, only the African region has taken special initiatives for the protection of Privacy of Children. Though this region is not concerned with the Right to Privacy as a whole and has not taken any initiative for the protection of this right in general, but has taken initiative for the protection of Privacy of Children in the African region. The main reason behind it is that, Africa is a socially and economically backward continent. Due to its backwardness, its children are suffering from serious vulnerability and its dangerous consequences. As such, they need special care and protection for their progress and development. For this purpose, the *African Charter on the Rights and Welfare of the Child, 1999* has been made, which has tried to protect every right of the African Children including their Right to Privacy.

The initiatives of Africa for the promotion and protection of human rights in the African Continent have not been ended with the adoption of the *African Charter on Human and Peoples' Rights, 1981*; rather those initiatives have been started with this Charter. The next step in this respect has been the adoption of the *African Charter on the Rights and Welfare of the Child, 1999*. This Charter has been adopted by the *Organisation of African Unity* on the basis of the *Declaration on the Rights and Welfare of the African Child, 1979*. For the fulfilment of the objectives of the *Declaration* and to recognise the need to take appropriate measures to promote and protect the rights and welfare of the African Child, the *African Charter on the Rights and Welfare of the Child* has been adopted by the *Organisation of African Unity* in 1990. It has come into force on *November 29, 1999*.

In the background of raising serious concern for the protection of the rights of the children in Africa, the *African Charter on the Rights and Welfare of the Child* has declared various rights and welfare of the child as well as the duties of the State for protection of those rights. This Charter has declared the Right to Privacy of the African Children along with the other human rights. *Article 10 of the Charter* deals with the '*Protection of Privacy*' of African Children, which runs as follows:-

"No child shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision

over the conduct of their children. The child has the right to the protection of the law against such interference or attacks”.

Therefore, *Article 10 of the Charter* guarantees right to Privacy, family, home or correspondence, honour or reputation of the African Children and tries to protect those rights from arbitrary or unlawful interference or attacks. An analysis of this article gives the idea that, this article is drawn in line with *Article 12 of the Universal declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966*. In fact, *Article 10* is the specific application of the generalised principles stated in those above-stated *Articles 12 and 17*. As such, the same elements and rights are present in *Article 10* as are present in *Articles 12 and 17*. Also the scope, ambit and area of coverage of *Article 10* are similar with the *Articles 12 and 17*. The only difference present in *Article 10* is that, it is applicable to the Privacy of children, whereas, the other two articles are applicable to all individual human beings. Therefore, *Article 10* is nothing but the application of similar principles of the other articles on Privacy of children, along with the only exception of exercising reasonable supervision on children by the parents or legal guardians, as stated in *Article 10*.

Moreover, *Article 10* of this *Charter* is also similar with the *Article 16 of the United Nations Convention on the Rights of the Child, 1989*. Both of these articles have dealt with the Privacy Rights of the child along with a difference that, *Article 16* is having universal application, whereas, *Article 10* is having regional application only in Africa. In fact, one article is the reflection of the other, with an exception in *Article 10* that, it contains the provision of exercising reasonable supervision on children by the parents or legal guardians, which provision is absent in *Article 16*. Hence, it can be said that, *Article 10 of the African Charter on the Rights and Welfare of the Child, 1999* is based on various provisions of right to Privacy contained in different International Instruments made under the auspices of the United Nations. In this sense, *Article 10* is a good initiative for the protection of Right to Privacy of the Child in Africa.

As regards the municipal legal framework, no such noteworthy initiatives have been taken like the international or regional legal scenario for the protection of Privacy of children. As regards these countries, no such laws are found therein,

except *China*, which has enacted the *Law on the Protection of Minors, 1991*. This law has been made for the protection of Right to Privacy of minor children in *China*. Therefore, *China* has taken a god initiative in this respect. In the ultimate effect, Right to Privacy of children is not adequately protected throughout the world. Hence, considering the seriousness of the matter, it can be said that, enactment of comprehensive legislation in this field is the need of the hour.

6.2.4. Privacy vs. Scientific and Technological Developments

Science is the ability to produce solutions of any problem, be it natural, social, scientific or cultural, and be it traditional or modern. Science is the new way of thinking. It develops new devices and technologies to give a concrete shape to the new ideas. Science is the method of discovery or invention. Scientific inventions are assets of the society, because those bring together progress and development of the society. Science is an instrument or a medium of social change. Scientific inventions have always led to social change from primitive to ancient society, ancient to medieval, medieval to modern and modern to post-modern society. Every change in society is the gift of science, be it physical science, life science, medical science, social science, moral science or behavioural science. As such, science is an integral part of human society, without which we cannot even think of our existence. In this sense, scientific developments have become boon for human society. But, those scientific and technological developments have brought with themselves various tools and techniques of hidden surveillance on human lives. These can create serious impacts on human lives by producing their loss of Privacy or otherwise. In this sense, scientific and technological developments have become bane for human beings. Hence, it is a matter of discussion, whether science is a boon or bane for human beings.

6.2.4.1. Threats to Privacy owing to advancement of Scientific Technology

With the advancement of science and technology, new devices have been invented; with the help of which private lives of individuals can be kept under 24 hours surveillance and their Right to Privacy can be easily violated. In this manner, new threats have been posed to Right to Privacy in the contemporary society owing to the advancement of scientific technology. New scientific and technological devices are praiseworthy at the threshold of advanced civilized society, because

these are necessary for the progress and development of society at its highest level. Not only that, these are also necessary to prevent terrorism. In fact, terrorism is showing its red-eye to the civilized states and creates devastating effects on these countries in frequent manner. Surveillance in the interest of national security is the urgent need of the hour for identification of the terrorists and prevention of terrorism. For this purpose, the new scientific devices are required, but, that does not mean that, Individual Privacy could be seriously hampered with the help of these devices. Personal Liberty of individual citizens should also be kept in mind in the modern democratic States and for the sake of it, misuse of advanced scientific and technological devices should be prevented first. States should run their administration in this manner, so that, a reconciliation can be made between the use of new devices and protection of Privacy. In this respect, appropriate laws should be made to create a balance between the conflicting interests of surveillance by modern devices and protection of Right to Privacy of individual citizens.

In this respect, a brief idea of different technological devices posing threats to Privacy is presented hereunder.

6.2.4.1.1. Recording Techniques

The characteristic feature of various modern recording techniques is their clandestine nature, which includes long-distance lenses, listening devices, telephone tapping, polarising lenses,³² miniature apparatus capable of checking and controlling from a distance, an individual's behaviour at any time without his knowing it.³³

The most important problem of these devices is that, a person's behaviour can be recorded through these devices from long distance and the person cannot even perceive its existence. As such, surveillance on a person's private life can be easily made with the help of these devices. Though government machineries, do not always use these devices or the recordings made by these devices are not always admitted as evidence, because of the chances of forgery in recordings, but the Privacy of an individual is lost therein, which cannot be reverted back. Moreover,

³² Bishop, 'Privacy v. Protection', *The Bugged Society*, Assembly for Human Rights, Montreal, 1968.

³³ Pierre Juvigny, "Modern Scientific and Technical Developments and their Consequences on the Protection of the Right to Respect for a person's Private and Family Life, his Home and Communications", in A. H. Robertson (ed.), *op.cit.*, pp.129-138 at p.132.

these secret records would lead to various criminal tendencies, like blackmailing the person, whose Privacy is so lost, for earning money.

In fact, these devices are used to conduct modern forms of spying on private individuals, wherein their Right to Privacy is lost totally. The most important part of this spying is that, it is called 'private espionage', because private individuals are prying on other private individuals with the help of these devices to fulfil their personal interests, be that monetary or otherwise. In this respect, a few examples can be cited hereunder:-

- (a) *The spying may take place inside the building where a family lives.*
- (b) *It may be directed by one member of a family against another in case of divorce proceedings.*
- (c) *In commercial, technical or financial circles, it may be practised between rival companies or even within a firm.*
- (d) *In professional relationships, the clandestine recording of conversations between heads of departments can be made by the chairman or managing director.*³⁴

The above-stated examples clearly portray the dangerous nature of loss of Privacy by way of spying committed with the help of clandestine devices. This spying and providing information has become a tempting business, wherein certain firms are engaged to provide information in lieu of money. They are morefully using these secret recording devices to perform in more subtle manner. Moreover, the private detective agencies are also using these secret recording techniques during their investigation or to provide secret information about someone as asked them to provide. Whatever may be the nature of using secret devices, the wrong happens is the same and that is loss of Individual Privacy. The loss of Privacy has become more dangerous in the modern period due to the invention of modern audio-visual recording devices. Now-a-days, we come to know frequently that, secret audio-visual recording devices, called 'spy hidden cameras' are fixed at the trial rooms of the shopping malls. The purpose of fixing those cameras is to take obscene photographs of the persons inside the trial rooms and to sell those in lieu of money. This is a crime of course and attracts the provisions of the penal code, but

³⁴ *Id at p.133.*

simultaneously amounts to gross violation of Individual Privacy of the person inside those rooms. These wrongs are acute examples of the new dangers posed to human beings on account of invention of new recording techniques.

At the threshold of the new era of gross violation of human right to Privacy consequent to the use of new recording techniques, how to solve the problem is an important question. Keeping in mind the conflict between Right to Privacy and Right to Information, it is to be decided first, who is entitled to get the secret information. Everyone is not entitled in this respect and as such, indiscriminate use of secret devices is definitely called violation of law. As such, it should be decided next, who would be entitled to use the secret devices and for what purpose. Next, come to the question of reasonableness of the use of those devices. The government and legal fraternity of the modern democratic States are busy now-a-days in solving these questions. As such, it has been held that, indiscriminate use of secret devices and recording techniques by everyone should be prohibited by law on account of violation of Right to Individual Privacy. Also the reasonable use of those devices should be permitted by law. In this respect, generalised measures have been adopted by the Western democracies, which are stated below:-

- (a) *Prohibition or regulation of the manufacture, import and sale of certain objects.*
- (b) *Enumeration of the persons and authorities entitled to use them.*
- (c) *Modified or increased powers for the courts, e.g. the power to order seizure of an object or the destruction of recordings.*
- (d) *Affirmation of the victims' right to damages etc.*
- (e) *Strengthening of criminal legislation on defamation.*
- (f) *Adaptation of the 'right to rectification' by wireless, television etc.*³⁵

The above-stated measures are no doubt praiseworthy for solving the problems concerning the use of recording techniques and violation of Right to Privacy. But, it should be kept in mind that, the issues in this respect should be solved considering the aspects of public interest and the matters of internal and external security of the States. Defence and Military departments should use these recording techniques in the interest of national security and no question of violation

³⁵ *Ibid.*

of Right to Privacy should arise thereon. But, in other cases, public interest should be the criteria for determining the use of recording techniques and the aspects of violation of Individual Privacy.

6.2.4.1.2. Optical Devices

Apart from the recording techniques, optical devices are also the gift of advanced scientific technologies as well as responsible for the violation of Privacy. The human eye has long been supplemented by the telescope and for more than a century by the Camera. Photographs can thus be taken from long range of human beings, equipments and documents. Modern versions of regular camera is the miniature or Minox type camera, which can be used to obtain close-up photographs of a subject without his knowledge, or it may be installed in some hidden viewpoint and set to take photographs at predetermined intervals or by remote control. Now-a-days, this camera is also called ‘spy hidden camera’. Camera is an acute example of optical device. Other examples of such optical devices are ‘one-way’ mirror, projection of picture through infra-red light which works with the technology of one-way mirror, small television camera or CCTV camera etc.³⁶

All these optical devices have been invented for the purpose of providing easier access to take personal photographs by human beings or to entertain themselves by way of television cameras or otherwise. Spy hidden Camera, CCTV Camera, one-way mirror or techniques of infra-red light have been developed to help security services and governmental machineries to get secret information at the time of internal or external emergency. Defence or military department can also take the help of these optical devices as and when required. But, unfortunately these devices are used by some mean-minded persons and the investigative journalists to gather information about the personal lives of the individuals. With the help of these optical devices, they can easily get the personal information about anyone in clandestine manner. In this sense, though optical devices have been meant for becoming boon for the human beings, but have become bane for themselves. Therefore, proper legal steps should be taken to prevent the misuse of these optical devices.

³⁶ R. V. Jones, “*Some Threats of Technology to Privacy*”, in A. H. Robertson (ed.), *op.cit.*, pp.139-162 at pp.143-144.

6.2.4.1.3. Acoustic Devices

Sound has so far been easily most important medium for obtaining information from an unsuspecting subject. This is due to the fact that he uses his voice to utter his thoughts, and the sound waves that he thereby sets up in the air cause, to a greater or lesser extent, vibrations in any body on which they fall. Even the apparently solid walls of a room are set into vibration, and thinner bodies such as windows or metal sheets react more strongly. In principle, if we have a means of detecting the vibrations of these bodies we can use it to listen to what the subject is saying. The microphone is the logical development of this principle and after its development; it has inevitably increased the power of the eavesdropper. In the first place, if he could tap his subject's telephone line he would be able to listen to the subject's conversations, and over the years this has become a major weapon of espionage and security services, of the private enquiry agent and of industrial agent.³⁷

The easiest way of making sure of tapping a subject's telephone is to gain access to his own terminal and to install the tapping device there. If the would-be eavesdropper can gain access to his subject's telephone he has the choice of several devices which he can install in its base. Most of them include some form of pick-up, and a small frequency modulated transmitter, having a range of some hundreds of meters. Gradually, more advanced transmitters have been made, which could be disguised as desk diaries and which would work up to one metre away from the telephone.³⁸

A still more remarkable device is what is known as the 'harmonica bug'. Once this is installed in the telephone of the victim, the eavesdropper who may be anywhere, even thousands of miles away, provided he is on a direct dialling system – merely dials the victim's number and blows a predetermined musical note on a harmonica. This note is picked up by the device in the victim's telephone, and prevents it from ringing. At the same time it connects the telephone microphone into

³⁷ *Id at pp.145-146.*

³⁸ *Id at pp.146-147.*

the line so that the eavesdropper can listen to any conversations that are taking place within earshot of the victim's telephone.³⁹

The more professional version of the 'harmonica bug' is known as the 'infinity transmitter'. The principle of operation is the same, but the harmonica is replaced by an electronic tone generator, which may generate two or more tones simultaneously, and in a combination which the device in the victim's telephone is set to recognise. It will then not respond to a single tone but only to the pre-set combination, and the system is thus more secure against accidental discovery.⁴⁰

Apart from the telephone tapping, transmitter and microphone system, there are other types of acoustic devices also. Acoustic vibrations of a window may also be observed by radar techniques if the window is made of a glass that is coated with a transparent but electrically conducting film, or if a metal foil strip can be stuck on the window surface. A recent development of the laser for eavesdropping is to observe the movement of a surface that is already in the victim's room and which may be set into vibration by speech. One of the most ingenious of all eavesdropping devices was that developed by the Russians for eavesdropping in the American Embassy in Moscow. The device was concealed in a model of the great seal of the United States, consisted of a short antenna connected to an electronic cavity and used to transmit signals by reflection of radio waves.⁴¹

The above-stated acoustic devices have been invented during the period of Second World War and have been continued upto the period of Cold War between America and Russia. Spying and eavesdropping have reached their highest level during that period, wherein the invention of these devices has brought a revolutionary change. At that period, these devices have been the need of hour, because the internal and external security of the States have been seriously threatened, owing to which every spying and eavesdropping of private conversations have been permissible. Most of the fundamental rights are suspended during the internal and external emergencies and so is the Right to Privacy. Therefore, during that worldwide emergency period, spying and eavesdropping of private

³⁹ *Id at p.147.*

⁴⁰ *Ibid.*

⁴¹ *Id at p.149.*

conversations with the help of acoustic devices have been allowed without question of violation of Right to Privacy. But, in the contemporary society and in the regime of welfare States, such kind of spying and eavesdropping would amount to violation of Individual Privacy and as such, not permissible. Now-a-days, more advanced acoustic devices have been developed than those used in the then period, which are more dangerous to violate Individual Privacy. Therefore, legal control of the acoustic devices is the need of the hour to determine who would be entitled to use these devices, where and when. Definitely, everyone should not be allowed to use these devices for the sake of the protection of Individual Privacy.

6.2.4.1.4. Eavesdropping

Eavesdropping means listen something without the speaker's knowledge and eavesdropping means secretly listening to others conversations. It includes the habit of lurking about the dwelling houses and other places, where persons meet for private intercourse, secretly listening to what is said thereon and then disclose it in public or use it otherwise for the fulfilment of any public, private or personal interest. In short, eavesdropping is secretly listening to the private conversations without the knowledge of the persons doing the conversation. An eavesdropper is a secret listener to private conversations. The practice of eavesdropping at large scale has been started during the Second World War and the Cold War. In this respect, various acoustic devices have been developed, with the help of which eavesdropping is possible smoothly.

But, it is to be remembered that, acoustic devices are not the only medium of eavesdropping; rather it is possible through other means also. In this respect, we must also be alert to the fact that conversations are not the only form of communication between individuals. Teleprinter signals can be tapped and deciphered; computer inputs and outputs are vulnerable; and it is conceivable that electric typewriters could be made to transmit letter by letter as they are operated. Moreover, correspondence can also be opened and read without the recipient being aware that this has been done.⁴²

⁴² *Id at p.150.*

Therefore, eavesdropping is a serious problem, which can be made through other means of communication or with the help of other electrical or electronic devices, apart from the acoustic devices. It is permissible during internal and external emergency as well as to prevent counter spying or counter eavesdropping from the opponent side. But, it is not permissible during ordinary times as violative of the Right to Individual Privacy. All the devices helping eavesdropping and eavesdropping itself is the gift of advanced scientific technology. Hence, science has become a boon to provide national security during emergency, but has become a bane to violate Individual Privacy during normal times.

6.2.4.1.5. Tracking

In building up a picture of a subject's activities, among the most useful items of information are where he goes and the human contacts that he makes. Apart from direct watching, which is tedious, expensive and fairly easy to detect, there is the possibility of tracking by making him emit some identifying signal. This principle has been developed to track a motor car by attaching a small radio transmitter. The device is commonly known in America as a 'bumper beeper', because one of the most convenient points of attachment is inside a bumper. It is simply attached by a magnet and if the tracker has sufficient access to the car, he can wire it to take its power from the car battery. Such a device has an antenna, and this is not easy to conceal. But, some devices are designed to use the antenna of the car itself, if it happens to be fitted with radio.⁴³

The target vehicle can be located by direction-finders from two or three fixed points or it may be followed by a tracking vehicle at a discreet distance out of sight. This vehicle needs a simple direction finding system to indicate when the homing signal is right, ahead or left, of the tracker's heading. Distance can be estimated in various ways. One such way is to electrically fitting attenuators to a single aerial.⁴⁴

Apart from the car tracking, tracking of an individual is also possible. An individual can be tracked, if he can be made unwittingly to carry a radio transmitter. This is easily done by gaining access to his clothing and serving in a miniature transmitter and antenna in some region where he is unlikely to notice them. He can

⁴³ *Id at p.153.*

⁴⁴ *Id at pp.153-154.*

also conceivably be 'marked', if he is in the habit of taking pills, by substituting a radio pill for a genuine one. Such a pill would, however, have a very limited range and useful life. He may also be 'marked' by fluorescent powder, as has long been used by police forces for the detection of thieves, or by radio-active trackers, or by some chemical signal which, without having a perceptible smell, could be recognised as a scent by a suitable electronic 'nose'. In some circumstances, it may be possible to follow individuals by radar, but this probably has more entertainment than detective value. With a Doppler system which records the movement of the subject's body as he or she walks, it is possible to distinguish women from men due to the difference in their walking style.⁴⁵

Therefore, tracking of human beings and cars can be made with the help of various technological devices. It was essential to track enemies of the rival countries and their spies during the Second World War and Cold War. As such, tracking devices have been invented. These devices are also required in the present society for tracking the terrorist activities or the attacking policies of the enemy countries. As such, these devices are helpful for the military, police force and detective agencies. In this respect, modern tracking devices have also been developed. But, the use of these devices by the common people to track the activities of the other common people or to know their personal activities should be highly objectionable. It would amount to gross violation of Individual Right to Privacy. Hence, misuse of tracking devices should be prevented by appropriate laws.

The evil effects of advanced scientific technology on Right to Privacy have already been discussed. It is to be remembered again in this respect, though advanced scientific technologies have become boon for the society as a whole, but have become bane as regards the protection of Right to Privacy. It has already been seen that, how minutely and secretly the newly invented optical and acoustic devices work for getting secret information about someone. The recording techniques are so clandestine, so subtle that, any conversation or picture can be easily recorded secretly without the knowledge of the person, whose information is recorded. Most dangerous optical devices are spyhidden and CCTV cameras, which can be placed

⁴⁵ *Id at p.154.*

anywhere to video-record anything. Acoustic devices, like microphones and transmitters can be shaped in any form and can be kept in any place to get any information about anyone. As such, threats posed by them are serious. Most important cases are the cases of eavesdropping and tracking. These techniques are growing further everyday and new devices are developed for providing further impetus to eavesdropping and tracking. Though all these devices have been proved to be advantageous for security measures, but have become disadvantageous as violative of Right to Privacy. Legal protection in this respect is the urgent need of the hour. Legal control of these devices is required to prevent misuse of these devices for wrongful gain. Who would be allowed to use these devices and for what purpose, that should be decided by law. Otherwise, these devices are not only used for violation of Individual Privacy, but also for commission of serious crimes against humanity.

6.2.4.2. International Legal Scenario at the verge of Privacy vs. Scientific Technology

Wrongful use of advanced scientific technology may cause violation of Right to Privacy as well as may lead to the commission of various crimes. But, the study is concerned with the cases of violation of Right to Privacy and the prevention thereof in this respect. Therefore, the laws which have been made for the protection of Right to Privacy from the evil effects of advanced scientific technology are the matters of discussion hereunder. The Laws in this respect can be divided into international laws, regional laws and municipal laws of different countries. In the international legal scenario, a number of Conventions, Conferences, Declarations and Guidelines have been made under the auspices of the United Nations. A legal analysis of those has been presented hereinbelow.

6.2.4.2.1. The United Nations World Conference on Human Rights Instruments : The Proclamation of Teheran, 1968 : An Instrument for prevention of evil effects of Advanced Scientific Technology on Right to Privacy

The International Conference on Human Rights has been held at *Teheran* known as the *Proclamation of Teheran, 1968*. The main objective of this proclamation has been to review the progress made in the 20 years since the

adoption of the *Universal Declaration of Human Rights* and to formulate a programme for the future. The *Preamble* of this Proclamation has recognised that, peace is the universal aspiration of mankind and that peace and justice are indispensable to the full realization of human rights and fundamental freedoms.

Para 18 of this Proclamation deals with the protection of individual rights and freedoms from the evil effects of advanced scientific technologies, which runs as follows:-

“While recent scientific discoveries and technological advances have opened vast prospects for economic, social and cultural progress, such developments may nevertheless endanger the rights and freedoms of individuals and will require continuing attention”.

If an analysis of this article has been made, then it can be found that, this article has tried to protect the individual Right to Privacy from the evil effects of advanced scientific and technological developments. Though it has not mentioned expressly anything about the Right to Privacy, but it has proclaimed that, the existing human rights and freedoms of the individuals should not be endangered in any manner due to the evil effects of scientific discoveries and technological advances. In the present world order, the individual Right to Privacy is severely threatened due to the rapid scientific and technological advancements. Hence, it can be assumed easily that, this article has tried to protect the individual Right to Privacy without specifically mentioning it. As such, the *Proclamation of Teheran* has taken good initiatives for the protection of Right to Privacy from scientific and technological advancements.

6.2.4.2.2. The General Assembly Resolutions, 1968 : An Attempt to address dangers to Right to Privacy owing to the Technological Advancements

The General Assembly Resolution III by the Second Committee at its 9th meeting on 6th May, 1968 has raised its concerns regarding the evil effects of technological advancements on Right to Privacy. According to this Resolution, the international conference on Human Rights has considered the good as well as evil effects of scientific discoveries and technological advancements, which have vast prospects for economic, social and cultural progress, but simultaneously have certain

dangers in the individual human lives. The basic objective of this Resolution has been to consider the dangers caused due to the technological advancements on the individual right to live with human dignity and the complex ethical and legal problems which have arisen with respect to human rights.

The Resolution has recommended various measures to prevent such dangers.

In this respect, the text of the Resolution runs as follows:-

“ . . .
(ii) *Recommends that the organisations of the United Nations family should undertake a study of the problems with respect to human rights arising from developments in science and technology particularly with regard to –*
(a) *respect for privacy in view of recording techniques;*
(b) *protection of the human personality and its physical and intellectual integrity in view of the progress in biology, medicine and bio-technology;*
(c) *the use of electronics which may affect the rights of the person and the limits which should be placed on its uses in a democratic society;*
(d) *and, more generally, the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity*”.⁴⁶

An analysis of the above-mentioned text of the Resolution portrays the concern of General Assembly of the United Nations for the protection of Right to Privacy of individual human beings as well as their physical and intellectual integrity, which have been severely threatened due to the advancement of modern scientific technology. In this respect, the Resolution has recommended the creation of a balance between scientific and technological progress on the one side and the intellectual, spiritual, cultural and moral advancement of humanity on the other side. Hence, the respect for human right to Privacy is upheld against the technological advancements in this Resolution. The Resolution has described a general Right to Privacy in express manner. In this sense, the initiative taken by the Resolution is a good initiative.

Again, another *General Assembly Resolution* is found in 1968 based on the *Teheran Proclamation*, which has dealt particularly about the effects of technology

⁴⁶ S. K. Sharma, *Privacy Law – A Comparative Study*, Atlantic Publishers and Distributors, New Delhi, 1994, pp.239-240.

on the Right to Privacy. This Resolution has invited the Secretary-General of the United Nations to undertake a study of human rights problems in the perspectives of the scientific and technological developments. The text of the Resolution runs as follows:-

*“Resolution for the privacy of individuals . . . in the light of advances in recording and other techniques; and uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society”.*⁴⁷

Therefore, the second Resolution has also spoken in the same line with the first Resolution and the texts of both the Resolutions are similar. In this respect, both the Resolutions are good initiatives for the protection of individual Right to Privacy in the light of the technological advancements. Hence, the efforts taken by the General Assembly for the protection of Right to Privacy are highly appreciable.

6.2.4.2.3. The Role of Montreal Statement of the Assembly for Human Rights, 1968 for Prevention of Misuse of Technological Advancements on Privacy

The Montreal Statement of the Assembly for Human Rights has been held in March 22-27, 1968. It has again, raised concerns about the threats of misuse of technological advancements on Privacy. The text of the *Montreal Statement* runs as follows:-

“(IX) New Dangers caused by Scientific Developments

The Assembly recognised the debt which the peoples of the world owe to the efforts of scientists and technologists. Nevertheless, the Assembly points out that many aspects of technological advance represent positive threats to human rights and to human dignity and that the world community must be alerted to the nature of these threats.

The Assembly also recognised that protection against such threats must be embodied in convention or other instruments until their nature can be identified, and until there is a general awareness of their implications. The dangers were considered under four heads:

(i) Electronic and other forms of intrusion on the right of privacy.

(ii) Implications of computer-based technology for domestic governments.

(iii) Protection of traditional cultures against the homogenizing influence of technological civilization.

⁴⁷ Resolution 2450 of 19 December, 1968, UN Doc. E/CN.4/1025.

(iv) *New developments in medicine and biology and their impact on human rights*".⁴⁸

The *Montreal Statement* has tried to alert the world community about the new dangers caused by scientific developments. It has pointed out that, though the technological advancements have various advantages, but those advancements also pose threats to the individual Rights to Privacy, human dignity and other human rights. It has categorized those dangers under four heads and has tried to give suggestions to prevent the evil effects of those dangers. In this sense, the Montreal Statement is a good attempt for the protection of Right to Privacy.

6.2.4.2.4. An Assessment of Other International Instruments in the light of Modern Scientific Developments and Violation of Privacy

There are various other International Instruments made under the auspices of the United Nations, which have dealt with various provisions for the protection of the Right to Privacy from the evil effects of modern scientific developments. Some of those provisions are discussed below:-

(a) *Declaration 3348 of 1975* has more specifically discussed about the loss of Privacy in consequent to modern scientific developments and the need for protection thereof. It has called upon the States to take measures for the protection of all strata of the population from the harmful effects of the misuse of scientific and technological developments. Specifically the text of the Declaration runs as follows:-

“ . . . including their misuse to infringe upon the rights of the individual or of the group, particularly with regard to respect for privacy and the protection of the human personality and its physical and intellectual integrity”.⁴⁹

Therefore, this Declaration has discussed about the evil effects of technology on Privacy and has expressed the need for protection of Privacy by showing respect for privacy, human personality and its physical and intellectual integrity and freedom.

(b) *The Report by the United Nations Secretary-General, 1976* has included several recommendations “for possible inclusion in draft international standards concerning

⁴⁸ *Supra Note 46 at p.240.*

⁴⁹ James Michael, *op.cit.*, p.21.

respect for the privacy of the individual in the light of modern recording and other devices”.⁵⁰ Though it has expressed its concern about the protection of Privacy in the field of the technological developments, but all of its proposals are not confined only to evil effects of technology on Privacy and allied rights. In fact, it is not confined only to substantive laws, but has also dealt with the procedural laws. Its proposals have gone far away and have suggested various controlling measures to be imposed on various professionals who are engaged in the activity of dealing with private lives of individuals, like private detectives and journalists. It has suggested licensing of private detectives and establishment of codes of ethics for the journalists. These initiatives are no doubt praiseworthy, because these professionals generally use various scientific technologies for recording information about private individuals, eavesdropping and tracking of private individuals as part of their professional activities. Therefore, controlling their activities should be essential for prevention of misuse of advanced scientific technologies for violation of Individual Privacy. Hence, initiatives taken by the UN Secretary-General is praiseworthy.

In a precise manner, it can be said that, General Assembly Resolutions, Montreal Statement of the Assembly of Human Rights and other Declarations and Reports under the auspices of the United Nations have raised serious concern about the misuse of advanced scientific technology for violation of human right to Privacy. They have also suggested various measures for the prevention of such violation. Moreover, these international instruments have raised concern about the protection of various allied rights to the Privacy, like human dignity, human personality, physical and intellectual integrity and freedom, without the coverage of which protection of Right to Privacy becomes incomplete. In this sense, these international instruments have tried to provide protection to Right of Privacy in full proof manner. Therefore, the initiatives taken in this respect is praiseworthy. But, the main defect of these instruments is that, these are all suggestive in nature and still are in the stage of recommendations, which are yet unenforceable. Therefore, Conventions are required for creating general awareness of everyone regarding the evil effects of advanced scientific technology on Right to Privacy. Again, Conventions can create

⁵⁰ Document E/CN.4/1116.

provisions for incorporation of these recommendations in national constitutions or national legislations of member-States, so that, those become enforceable. Without the enforceability, the instruments would be ineffective and valueless. From this perspective, the concern of the international legal fraternity for protection of Right to Privacy from the evil effects of advanced scientific technology is still in the primitive stage.

After the international legal arena, there comes the question of regional legal framework. But, as regards the violation of Right to Privacy by misuse of advanced scientific technology, no such preventive measures have been found in the regional legal field.

6.2.4.3. An Account of the Municipal Laws at the threshold of Privacy vs. Advanced Scientific Technology

A number of western and eastern countries have tried to prevent violation of Right to Privacy owing to misuse of advanced scientific technology and have enacted legislations in this respect. Most prominent of those legislations enacted in the municipal legal arena at the threshold of Privacy vs. Advanced Scientific Technology have been discussed hereunder.

6.2.4.3.1. Australian Laws on Interception of Information

Australia is the most important Common Law Country dealing with the laws for protection of Privacy. The legal protection of Privacy against intrusion in *Australia* has been divided into *Territorial Privacy and Electronic Privacy*. *Electronic Privacy* is protected by legislation regulating the unlawful interception of the telecommunications by way of enacting the federal *Telecommunications (Interpretation) Act, 1979 (cth)*, which also prohibits unlawful dealing with intercepted information. It is also protected by making legislation regulating the use of listening and surveillance devices and in this respect, each *Australian* jurisdiction has enacted "*Listening Devices*" Legislation.⁵¹

Therefore, *Australia* has understood the seriousness of violation of Privacy owing to the misuse of listening and surveillance devices and has enacted legislations for prevention thereof.

⁵¹ David Lindsay, "*Freedom of Expression, Privacy and the Media in Australia*", in Madeleine Colvin (ed.), *op.cit.*, pp.168, 171-172.

6.2.4.3.2. Canadian Position of Laws on Interception of Communication

Canada is the next important Common Law Country dealing with the Privacy Laws. Statutory recognition of Privacy is found in *Canada* in the *Pre-Charter* era. In that period, certain amount of protection of Privacy has been available under *Criminal Law. Part VI of the Criminal Code titled "Invasion of Privacy" has dealt with the interception of Communication.*⁵² It is the important *Criminal Law in Canada* for the prevention of *Interception of Communication* as violative of Right to Privacy. In the *Post-Charter* era, no such important developments have been made, except certain judicial developments under the auspices of the *Supreme Court of Canada* and the *Ontario Civil and Criminal Courts*. The privacy protection measures taken during that period are the *privacy of medical records & under criminal law police surveillance and electronic surveillance are restricted for the sake of protection of Privacy.*⁵³ Hence, *Canada* is also concerned about the surveillance on Right to Privacy and intercepting devices as violative of Right to Privacy and has taken measures thereof.

Therefore, *Australia and Canada* are the two noteworthy countries, wherein municipal laws have contained provisions to protect Right to Privacy from the harmful effects of the advanced scientific technologies. No such municipal laws are found in the other countries, except those two. In this respect, the attempts taken by these countries are praiseworthy. But, the other countries have not taken any important initiative that is a matter of concern. Hence, it can be said finally that, due to the inadequacy of the municipal laws for protection of Right to Privacy from the harmful effects of advanced scientific technology, the municipal laws have failed to address the challenges arose in this respect. Therefore, enactment of comprehensive laws in this respect is the urgent of the hour.

6.2.5. Data and Information Privacy

Data mean raw facts, which, when converted into meaningful facts, are called Information. Therefore, Data and Information both are different perspectives of the same subject. The raw facts called Data, when processed and provide

⁵² Marguerite Russell, "The Impact of the Charter of Rights on Privacy and Freedom of Expression in Canada", in Madeleine Colvin (ed.), *op.cit.*, pp.105-106.

⁵³ *Id* at pp.108-109.

meaningful output, are considered as Information. In this sense, data and information are closely connected to one another, wherein without the existence of one, the other would have no existence. If data is the input, information is the output, because without the input of raw facts, there would be no question of output of processed facts. Data or Information industry is age-old, but there has been a revolutionary change in this industry after the invention of Computer. Computer is the creation of human brain, but it has the capacity to process data in thousand or more times better than human brain. Due to this reason, gradually every industry has adopted the method of automatic data processing by replacing the manual methods. This transformation from manual to automation has not only saved time, but also has led to cost curtailment. Therefore, invention of computer has brought a revolutionary change in the industrial sector, which has enunciated the growth of human society thousand times better.

Computer based data processing has not only enunciated the growth of industrial sector, but also of the health, social service, consumer, education and all other sectors. In fact, every section of the society has become enriched with the advantages of computer, including the personal lives of human beings. But, any technological advancement has certain good as well as evil effects and the computer technology is not an exception to it. Storing of huge amount of data in a computer has the fear of losing these data in a mistaken click of mouse. But, the more serious consequence of misuse of computerised data files is the loss of Privacy of those data. All those personal files contain huge data regarding private facts of the clients and as such, maintenance of secrecy and confidentiality of those data are utmost important. If any of those information or data is misused by going into wrong hands, it may amount to data theft, which is a crime.

But, the consequences of data theft are not limited to crimes only, but it creates gross violation of human right to Privacy. In this era of storing of computerised personal data, a new Privacy Right has come into being and that is Data or Information Privacy. Data or Information is an important component of Privacy in the present day world. Today, protection of Individual Privacy is incomplete without the protection of Data or Information Privacy, because an individual is incomplete without the huge amount of data stored everywhere about

himself or herself. The main reason behind this incompleteness is that, an individual cannot escape the liability or consequences of data theft relating to his or her private or personal information. Therefore, protection of Data or Information Privacy is the urgent need of the hour.

Personal or Private data can be of two types – Government records and Private records. The records mentioned above are all private records and as such, violation of Data Privacy of those records may create less serious consequences. But, the Government records contain vulnerable information, like data relating to security measures of the State. These are very vital records and violation of Data Privacy of these records may create much serious consequences than the private records. If the security records are leaked and reach in the hands of the enemy state, internal and external security of the concerned state are seriously threatened. Therefore, violation of Data Privacy may cause dangerous consequences. Considering the seriousness of the issue, extensive legislations are required for prevention of violation of Data Privacy. The next part of the study has concentrated on this aspect and has tried to highlight the problems and prospects of the subject.

6.2.5.1. Importance of Data Protection in the Contemporary Society

Data Protection generates deeper concern for everyone in the contemporary society. As such, a broad spectrum of business issues is related to it. However, in most of the cases Data Protection is necessary to serve the following purposes:-

- (i) *Backup and restore.*
- (ii) *Disaster recovery.*
- (iii) *Business continuity.*
- (iv) *High availability.*
- (v) *Compliance.*
- (vi) *Governance.*
- (vii) *Data Privacy.*
- (viii) *Data Security.*
- (ix) *eDiscovery.*⁵⁴

⁵⁴ David G. Hill, *Data Protection: Governance, Risk Management and Compliance*, Anerbach Publications, U.S.A., 2009, p.2.

Though the above-stated list is not exhaustive, but it is inclusive of the purposes of Data Protection. As such, there may be other purposes of Data Protection. But, the most vital issue is that, Data Privacy is one of the aspects of Data Protection and Data Protection should be made to protect Data Privacy. In this respect, it should also be remembered that, Data Protection has to be made in correct perspective, otherwise the following problems may crop up:-

- (i) Failure to protect data adequately, which can lead to negative consequences, like loss of revenue from lost customer orders.*
- (ii) Making the wrong allocation decisions, e.g. spending too much on areas that do not really require that level of protection and too little on areas that require greater protection.*
- (iii) Straining the administrative resources assigned to data protection even further and with less results than necessary.⁵⁵*

Therefore, Data Protection should be made in correct perspective, because such protection in wrong perspective may bring the above-stated negative consequences. However, in the contemporary society, only Data Protection is not enough and there is the necessity of protection of Information and more specifically, the Information Privacy. Data Privacy would be automatically protected by virtue of Data Protection, but Information Privacy should be protected separately. The importance of such protection is discussed hereinbelow.

6.2.5.2. Protection of Information Privacy is the urgent need of the hour : The Reasons

In the modern day world, the society is shaped by technology and fuelled by information. It is called the era of Information Technology, because huge revolution has been occurred in the sector of information technology, wherein, if one hand is technology, then the other hand is information. In fact the revolution has come in the formation and communication system with the help of advanced scientific technology. The main purpose of the advanced technology is to store and process data as well as to generate information consequent to data processing. For this purpose, huge amount of information is generated, which if goes to the wrong hands,

⁵⁵ *Id at p.3.*

there is every chance of misuse and as such, protection of Information Privacy is the urgent need of the hour.

There are various dimensions of Information Privacy, owing to which it has become an important aspect in today's world. Those are discussed hereunder:-

- (i) In today's Information Age, Privacy is an issue of paramount significance for freedom, democracy and security.*
- (ii) One of the central issues of Information Privacy concerns the power of commercial and government entities over individual autonomy and decision making.*
- (iii) Privacy also concerns the drawing of rules for limiting the personal autonomy and decision making by necessarily permitting commercial and government entities access to personal information.*
- (iv) More specifically, Information Privacy plays an important role in the society in today's Information Age.*
- (v) Information Privacy is an issue of growing public concern, legislative agenda of different countries and the problems relating to it, are either become subject of news or the subject of litigation.*
- (vi) There are many new laws and legal developments regarding Information Privacy. It is a growth area in the field of law, because increased litigation, legislation, regulation and public concern over Privacy are giving birth to various new issues in the business sector to address Privacy.*
- (vii) As such, lawyers are drafting Privacy policies, litigating Privacy issues and developing ways for dot-com companies, corporations, hospitals, insurers and banks to conform to Privacy regulations.*
- (viii) A new position has been emerged in most of the corporations, called the Chief Privacy Officer.*
- (ix) An organization has also been created at the international level by these officers, called the International Association of Privacy Professionals (IAPP), which is having thousands of members.*
- (x) The attorneys are increasingly concerned with the Privacy issues, either through litigation of Privacy violations or through measures to comply with Privacy regulations and to prevent litigation.*

(xi) *Information Privacy Law is an engaging and fascinating topic, because the issues relating to it are controversial, complex, relevant and current. Moreover, few areas of that law are closely connected with the new world of rapid technological innovation.*

(xii) *Finally, concerns regarding Information Privacy play an important role in debates regarding security in the post 9/11 era in America.*⁵⁶

Therefore, Information Privacy is not an only issue. It has many dimensions, owing to which it has become an umbrella of multifarious issues. All those are prime concern in the contemporary social scenario, because without data processing and information generating, our technology-based modern society would be stagnant. In this sense, Information Privacy is a new dimension in the law of Privacy, protection of which is the urgent need of the hour.

6.2.5.3. Impact of Advanced Scientific Technology on Data and Information Privacy : Emergence of New Threats and Safeguards thereof

Advancement of scientific technology and the use of computer have increased the maintenance of computerised data files. As such, government departments have started the collection and interpretation of information in computer on various subjects, like registration of births, marriages and deaths, police records, information about employees of different sectors or the staff records, equipment or stock records of the store, book records of the library etc. In this sense, a new task has been developed, that is the task of computerised record-keeping. Such record-keeping is helpful for the programming, decision-making, conscription, policy-framing, administration of various departments and planning of the future propositions. Therefore, the computerised record-keeping has become advantageous for the running of public services economically and effectively.⁵⁷

The introduction of data processing and computerised record-keeping in government departments have raised many problems affecting the private life of the individuals or violating of the Individual Right to Privacy. One of such danger on private life is the violation of professional secrecy. In all cases, if the information

⁵⁶ Daniel J. Solove and Paul M. Schwartz, *Privacy and the Media*, Aspen Publishers, New York, 2008, p.2.

⁵⁷ A. H. Robertson, *op.cit.*, p.135.

kept in the machine is obtained by clandestine and illicit methods, then the dangers of violation of Privacy should be considered as serious.⁵⁸ Another danger in the use of data processing is that, it increases the risk of technocracy. Once an individual relies on a machine to 'rationalise' options in expenditure, planning, development, military policy, education and the like, with all the rigidity that machine-made choices involve, then the very concept of democracy may be jeopardised. But, technology with computers as its command may become so powerful that private life will be restricted within narrow bounds and the life of the individual and his family will be conditioned by computers as soon as it begins to have any economic or social relevance.⁵⁹ Therefore, over dependency on computer or technology may not directly violate the Right to Privacy, but can narrow down the private life of individuals, consequent to which the very existence of Right to Privacy would be threatened. Such a system of technology directs towards the future society based on total computer control, wherein an individual would not have any private life owing to the absence of social and psychological factors in society.

The above stated dangers are known dangers to human beings or at least, these are the dangers which human beings can perceive or forecast. But, there are certain other dangers to private life or threats to Privacy, which individuals cannot perceive and in those cases, violation of Privacy occurs unknowingly. One such example is the spread of surveys for ascertaining the attitudes and tendencies of public opinion or certain groups. In these surveys, the questions asked often carry private information and people give answer to those questions without knowing about the violation of Privacy caused in these cases. More specifically, the technical requirements of political, social and economic surveys result in the putting of questions to which the persons questioned reply spontaneously without being aware of the intrusion into their Privacy. As such, these surveys constitute the risk of violation of Privacy as well as the risk of improper use of such information. Some more examples can be cited in this respect. Apart from the surveys, questionnaires to be filled in by prospective borrowers frequently go beyond matters relevant to their solvency. The questionnaires and tests taken on workers at the time of giving

⁵⁸ *Ibid.*

⁵⁹ *Id at pp.135-136.*

employment, often constitute intrusions into Privacy, because many questions are asked therein, which are not really required for assessing professional capacity, like the questions relating to religion, political opinions, feeding habits, married life, reading matter etc.⁶⁰

The dangers or threats on private life as well as on the Right to Privacy owing to the use of data processing has led us to create certain safeguards for protection of Privacy. Some of those safeguards are discussed hereunder:-

(i) Appropriate legislations should be enacted for prevention of violation of Privacy owing to data processing.

(ii) The persons, who should have the access to various computers in which the information is stored and to the central computer, should be specified in the legislation.

(iii) The obligations of professional secrecy should be strengthened by legislation.

(iv) Legislation should also be made for prevention of accumulation of information obtained in clandestine manner regarding a person's private life. In those cases, everyone's right should be recognised to inspect the particulars held therein.

(v) Legislations should also be enacted stipulating exhaustively the kinds of information, which can be stored.

(vi) A board of persons or 'Ombudsman' can also be established for protection of Information Privacy as well as for prevention of data processing in the subjects, which do not have the considerations of public interest.

(vii) The Legislations should specifically mention the persons who could lawfully obtain the information, what information could be obtained, to whom it could be lawfully communicated and for what purpose that could be used.

(viii) Therefore, total regulation of data or information is required by legislation in the interests of the public.⁶¹

Therefore, in the atmosphere of computerised huge data files, Data and Information Privacy are in danger of violation at every moment. The main problem in this respect is that, the information and communication technology is still a new facet of advanced scientific technology and as such, common people are not well

⁶⁰ *Id at pp.136-137.*

⁶¹ *Id at p.136.*

versed with its technical dimensions as well as its every pros and cons. Consequent to this problem, common people are also not aware of their Right to Privacy in the environment of computerised data processing. As such, information or data theft and violation of Data or Information Privacy is a very common phenomenon, which occurs even without the knowledge of the person whose Privacy is so lost. More surprisingly, individual persons are contributing towards the violation of their Information Privacy by providing information about them in any survey or in any form fill-up, wherein many questions are asked without having the relevancy with the subject or purpose concerned. Individual persons are willingly providing information in these cases without knowing that their Privacy is violated in these cases. As such, above-stated safeguards are the thinking of the need of the hour to prevent the violation of Data or Information Privacy. These safeguards can project towards the enactment of appropriate legislations for prevention of Data or Information Privacy.

6.2.5.4. Threats to Data or Information Privacy : Specific Instances

In the contemporary social scenario, certain specific threats have occurred on Data or Information Privacy in various sectors, owing to the maintenance of computerised data files. Those are specifically discussed hereunder:-

6.2.5.4.1. Police Records

Once a person is convicted, his or her computerised data files are maintained as Police records. Improper use of that data may create serious consequences and may have impact on producing justice. Prior publication of that data may violate the secrecy of evidenciary values, which ultimately hampers pronouncing judgement in favour of the person concerned. Such an improper use or prior publication of that data amounts to violation of Data or Information Privacy of that person. If that data is going to wrong hands, then that can be misused to blackmail of the person in future for monetary gain. Misuse of that data can be made by media by way of any defamatory publication about the person in future, which may create disturbances in his or her future peaceful life, if the person is released from conviction. A number of instances are found in forms of leading cases on this subject. Therefore, police records should be kept in confidential manner and restriction on dissemination of

information should be imposed prior to conviction, so that the Data or Information Privacy of the person concerned should not be violated.

6.2.5.4.2. Medical Records

Apart from the Police Records, Medical Records have also acquired prominent place in Data or Information protection. Each and every hospital or nursing home is maintaining huge amount of computerised data files containing the medical history of their patients in the form of medical records. These are kept for future reference of the doctors, in case of complication of the same patient or for future reference of the same treatment to another patient. As such, these should not be misused by outsiders. Disclosure of medical records to media is serious, because there may be unauthorised publication of the same amounting to defamation and violation of Privacy of Reputation of the person concerned. Misuse of medical records may also occur by going into wrong hands, like wrong treatment of the patient in lieu of money. Again, the medical records contain confidential information about the patients, which is subject to the fiduciary relation between the doctor and the patient. This is the subject of Professional Privacy also. Professionally doctors are bound to maintain the secrecy of the confidential information about the patients and as such, the Privacy of medical records should be maintained. In case of breach of the Privacy, many serious consequences may follow, e.g. breaking of marriage of a former HIV positive patient or a former lady patient of gynaecological disease, even if cured, loss of job of a person owing to any venereal or communicable disease and disturbance in the peaceful living of a person, who has suffered from any of the above-mentioned diseases previously. Therefore, maintenance of Data Privacy of the medical records is obvious; otherwise there would be the violation of Privacy of the patient causing serious consequences.⁶²

6.2.5.4.3. Debt Collection

There is one class of facts which never lacks attention and that is Debt Collection. What a person owes is always the concern of the person to whom it is owed, and it is sometimes brought to the attention of others. Who these others are and what the circumstances of the disclosure are, would be the determinant question

⁶² Hyman Gross, *Privacy – Its Legal Protection*, Oceana Publications, New York, Revised Edn., 1976, p.21.

of whether such communications are violations of Privacy entitled to legal redress.⁶³ In a number of cases, courts have found violation of Right to Privacy, wherein the collection of debt is communicated by the creditor to a third person. In general, the collection of debt is communicated between the debtor and creditor. As such, communication of debt by the creditor to a third person may amount to violation of Right to Privacy of the debtor. Sometimes the creditor communicates the news of debt collection to a third person or to the debtor in front of a third person to pressurise the debtor for collecting the debt. In such cases, the debtor takes the plea of violation of Privacy but the court does not think that, all the like cases of disclosure of debt collection amount to violation of Privacy.

Whether a particular case of disclosure of debt collection amounts to violation of Privacy or not, depends upon the nature and circumstances of each case. If the intention of the creditor is to pressurise the debtor to collect the debt, then it amounts to reasonable disclosure not amounting to violation of Privacy, but if it is to harass the debtor only, then it is the violation of Privacy. Violation of Privacy owing to communication of debt collection would come under Data or Information Privacy, when the record of debt collection is maintained in the form of computerised data files and the secrecy of that record is lost by going into the wrong hands and the misuse of that record. Therefore, maintenance of debt collection record in the form of computerised data is not a problem, but the loss and misuse of that data in the hands of third person may amount to violation of Data or Information Privacy of the debtor.

6.2.5.4.4. Computers, Data Banks and Dossiers

In the contemporary social scenario, there is an increasingly insistent problem of man's ability to store data about people and its implications for Individual Privacy. The ramification of computer-stored data reaches into almost every aspect of modern democratic society. Record files accumulate from the moment of birth and absorb information about what an individual does or is for the rest of his life. School, employment, health, military service, financial data, arrest records, credit ratings are all examples of such record keeping. The compiling of

⁶³ *Id at p.22.*

dossiers is made about individual's functions in both the public and the private sectors. The government maintains massive dossiers through military service records, social security, FBI and departmental files as well as of different other areas.⁶⁴

This expansion of data gathering has been paralleled and perhaps even surpassed in the private sector. Business organisations and credit bureaus maintain extensive files of personal information which can be exchanged or purchased without the individual's knowledge that such a file even exists. Investigative organisations wield enormous power over the lives of individuals by storing information that can determine whether they will be hired, allowed to obtain passports, get mortgages or borrow money. Since these informational judgements inevitably become moral judgements, the right of a person to be sick or cantankerous or to have once committed a forgivable antisocial act becomes sharply circumscribed.⁶⁵

Therefore, maintenance of computerised data banks and dossiers are the need of the hour for the sake of rapid growth of information and communication technology. These are also essential for the progress and development of human society in the present era, because in the age of information technology, Right to Information is a new human right, which can be achieved only by way of easy access to huge amount of information and that can be possible only by maintaining computerised data banks and dossiers. But, that does not mean that, age-old human right to Privacy should be compromised with. If that is compromised, personal liberty of the human beings is curtailed, which is never expected in a civilized human society. Hence, the protection of Right to Privacy is utmost important for the protection of personal liberty and human dignity, which is in great danger owing to the maintenance of computerised data banks and dossiers.

6.2.5.4.5. Credit Bureaus and Inspection Agencies

Outside of the federal government the largest information gathering systems are the credit bureaus. The credit bureau performs a necessary function in a highly fluid society and enables prospective employers, merchants and mortgage lenders to

⁶⁴ *Id at p.25.*

⁶⁵ *Ibid.*

make judgements based on factual information about people whose personal life they know nothing. The problems arise not in the honest, factual information that is dispensed by the credit bureaus, but in the publication of facts that may be irrelevant to the particular investigation, may be misleading or even erroneous. Violation of the Right to Privacy is at the heart of the question of how much information is known about a person and how freely it is circulated to people who have no legitimate interest in knowing everything in a given file.⁶⁶

Therefore, credit bureaus and inspection agencies, through essential parts of modern lives of individuals, but constantly are violating Right to Privacy of themselves. In the modern day society, credit bureaus perform important function by maintaining credit report of individuals and inspection agencies inspect and acquire information about individuals necessary for any future proposition for the individuals. Both of these organizations contain information more than that required for the particular purpose. When the credit bureaus portray private information, except the credit reports, then the question of violation of Information Privacy arises. The question lies here is that, what information should be communicated and upto what extent. If the information communicated is relevant and upto the permissible limit, then no question of Privacy violation arises, otherwise Privacy is violated. In this sense, any information other than credit report, if portrayed by the credit bureaus, then that would be sure case of violation of Information Privacy. Similarly, inspection agencies usually save all data, both relevant and irrelevant, without sorting, in their computers. Consequently, inaccuracy and misleading reports are produced by them about individuals based on those data. Consequent to such inaccurate reports, individuals have to suffer in most of the cases and their employment opportunities, grant of credit or insurance facilities are lost. These are the serious consequences in these cases apart from the violation of Information Privacy. Hence, the matter should be considered as of urgent attention.

6.2.5.4.6. Arrest Records

Arrest records can provide a classic example of the balancing between the need of society to protect itself and the Right to Privacy of an individual who has

⁶⁶ *Id at p.26.*

been arrested, but may have been arrested without probable cause, released without a conviction or finding, acquitted, or first convicted and subsequently acquitted. These records are not only maintained by police departments and the FBI, but also find their way into private, non-governmental dossiers where there is little likelihood that the fact of an arrest, regardless of its eventual outcome, will ever be expunged. Thus the impact of an arrest, however misguided it may have been, can have a destructive effect on a person's later social and employment opportunities.⁶⁷

Therefore, arrest records are valuable documents, which should be preserved in secrecy, otherwise there may occur negative consequences. These are all private records containing information about private individuals. As such, misuse of them by wrong hands not only amounts to violation of Information Privacy, but also creates many serious consequences. Apart from misuse, disclosure of those records in public causes harm to the reputation of the person concerned, even if the arrest have been proved to be mistaken and keeps permanent impression in the future life of the person by denying employment and social opportunities. Hence, legal protection of the issue is the urgent need of the hour.

6.2.5.4.7. Direct Mail Industry

Among the purchasers of computerised personal information from whatever source they can get it most noteworthy are the Direct Mail Companies. These organisations, heavily computerised themselves, manipulate millions of pieces of personal information about individuals and families to produce selective lists for sale to advertisers who have a product or service to sell and organisations that have a cause or philosophy to promote. While most people either simply discard unsolicited mail unopened and others scan it before throwing it out, a number of people respond positively to direct mail solicitation to produce a profitable industry in terms of nationwide sales. There are some people, however, who fine the receipt of unsolicited mail an intrusion upon their personal Privacy. The issue is often framed in terms of annoyance and dismay that information about oneself. The reason is that, often information that a citizen is obligated to furnish to satisfy a government requirement, would have been sold to business organisations for frank commercial

⁶⁷ *Id at p.28.*

gain. Sometimes the complaints centred on the nature of the material that has been received into the household that may have been personally offensive. Other people felt that the simple fact that unwanted mail is being delivered to their homes, which is an invasion of Privacy. A number of persons felt that, the sale of government lists to commercial firms has taken unfair advantage of the private citizen. At this point, court challenges to the propriety of the sale of government lists to direct mail advertisers have failed to achieve any constitutional significance. There has also been some activity on the legislative level but no action has yet been taken.⁶⁸

Therefore, direct mail industries are the creation of advanced scientific technology and maintenance of computerised data banks. These are the violators of Information Privacy of the individuals in two ways – one is the unauthorised purchase of data stored in data banks of different organizations and other is the sending of unsolicited mails to individuals. These are the most unexpected and embarrassed cases of violation of Privacy, of which no legislative prevention is invented yet.

6.2.5.4.8. Computerised Banking Files

The system of banking automation, though has enunciated the financial transactions faster and easier, but has seriously threatened the Right to Information Privacy of the individual customers. The records so kept in the form of computerised data files with the banks, can be easily leaked by the banking officers to any third person in lieu of money. When they have the control over the computerized banking accounts of the customers, then there is every chance of misuse of that access. Leak of the computerised banking accounts of the customers does not only amount to violation of their secrecy and Information Privacy, but may cause many serious consequences. These wrongful activities attract the provision of criminal breach of trust by the banker as well as the criminal misappropriation of property by the persons who have got the account information. Moreover, there is another disadvantage of banking through cyberspace or internet banking. In these cases, the details of customer data, like username, password etc. are stored in system of the computer without the knowledge of the person concerned and can easily be retrieved

⁶⁸ *Id at pp.29-30.*

therefrom by the hackers. In all these cases, Information Privacy and secrecy of the customers are seriously jeopardised and along with that, the offences, like unauthorised fund transfer is committed resulting into the total monetary loss of the customer. Hence, computerised banking system has generated many serious problems.

Moreover, in some countries Bank Secrecy Acts have been passed to maintain the secrecy of the banking records and to have the government access of those records, as and when required. In such cases, banks have to maintain the records for long time and the chances of misuse or violation of Privacy of those records increase. Again, the government control and access of all the private banking records are considered as violation of Information Privacy and encroachment on personal liberty of individual citizens, by the constitutional jurists. Accordingly, these are the clear cases of search and seizure on the part of the government, which are prohibited by law in most of the democratic countries. But, in exceptional circumstances such control and access should be allowed in the national interest, which is also valid legally. Therefore, whether a government access of private banking records would amount to invasion of individual Information Privacy or not, that is a matter of question, which should be decided depending upon the nature and circumstances of each case. However, there is no doubt that, Right to Information Privacy is seriously threatened in the era of maintenance of computerised banking files, which requires extensive legal protection.

6.2.5.4.9. Overseas Outsourcing

Overseas outsourcing is quickly becoming a very popular way for companies to realize cost savings. The obvious reason is that, the salaries in countries like India and Pakistan are generally a fraction of those for workers with comparable skills in countries like the United States and Great Britain. When conducting an outsourcing, cost-benefit analysis and figuring out how much money would be saved, are generally the considerable aspects. But, there are a number of many other issues relating to it. As for example, from a logistical perspective, managing operations

located in a foreign country can be very complicated. There are many issues to consider just by the nature of having operations located overseas.⁶⁹

Overseas outsourcing, though a very popular technique using nowadays due to cost-saving, but it involves many serious complications, both from technological perspectives and the data security issues. The data security issues, in this respect, are serious, because these are having the issue of violation of Data or Information Privacy. The data security issues require special attention. While many companies are sending a wide range of work involving very sensitive data overseas, in most cases they are keeping such activity rather quiet. For example, few companies will openly admit to the public that, they send your personal data overseas. It is a very common practice. Many companies will send data overseas due to the reduced cost of processing it. For example, a number of tax preparation companies send your tax records overseas. The actual tax returns are prepared off-shore, with the domestic company merely checking the work. The companies generally do not openly disclose these matters, because of the fear of losing customers or if they mention it at all, it is mentioned in the form of a disclosure statement written in very small type. The reason is that, the companies are keenly aware of the public's growing awareness of Data Privacy issues and know that their decisions to send their data overseas might not be well received.⁷⁰

Therefore, a huge amount of personal data is sent overseas for processing by way of outsourcing. Here, the companies are sending the data overseas, but the liability of misuse of data is not sent overseas, it is remained with the parent company, because the company is the signing authority and the guardian of all data-records and as such, would be liable for any loss or misuse of data. If the matter of data theft is considered as a tort, then the originating company would be liable as the principal tort-feaser, because the overseas company is a mere agent of the originating company. Apart from that, a serious question of violation of Data or Information Privacy is associated with it. As the data are sent at a long distance, wherein there is the mismatch of timing, technology, social and political

⁶⁹ Philip Alexander, *Information Security: A Manager's Guide to thwarting Data Thieves and Hackers*, Praeger Security International, London, 1st Indian Edn., 2008, p.133.

⁷⁰ *Id* at p.134.

considerations as well as the security considerations and general awareness of the people, therefore, there is every chance of loss of secrecy of the private data. Sometimes, the secrecy of data is lost without the knowledge of the persons processing the data. In these cases, misuse of data may create many serious consequences as have already been stated previously. Hence, violation of Data or Information Privacy is a serious issue in the overseas outsourcing, which should be prevented through adequate legislative measures.

6.2.5.4.10. Confidentiality of Data or Information

Confidentiality is also an essential goal of data security. Confidentiality is the prevention of unauthorized disclosure of sensitive information. However, whereas data preservation focuses on the intrinsic value of information to those authorized to use it; confidentiality focuses on the extrinsic value of that information to unauthorized persons. Confidentiality concerns can be divided into private and public concerns. Private concerns are those that only affect a business itself. The unauthorized disclosure of proprietary information, like trade secrets or non-consumer customer lists, is a private matter in the sense that it is not subject to public regulation. If the owners of proprietary information fail to protect the confidentiality of that information adequately, then that business alone suffers the consequences.⁷¹

Therefore, the loss of confidentiality of information is a serious problem in the perspective of Information Privacy. In fact, confidentiality and Privacy are the two sides of the same coin. Privacy means confidentiality and vice versa. As such, loss of confidentiality means loss of Privacy and nothing else. Due to this reason, confidentiality of information has taken a prominent place in the field of Information Privacy. In this respect, it is pertinent to mention that, governments continue to create legislation that attempts to correct the risk imbalance between the possessor of an individual's private information and the individual. Possessors of private individual information now have to contend with laws and with threats of litigation. One of the consequences is public exposure of the failure to protect the confidentiality of private individual information. That can result not only in public

⁷¹ David G. Hill, *op.cit.*, pp.121-122.

embarrassment, but also in a possible negative impact on the brand or market value of a firm. Consequently, organizations are giving much more considerations to confidentiality policies and practices.⁷² Hence, extensive legislations are required in this field to protect confidentiality of information for the sake of protection of Information Privacy.

In the foregoing paragraphs, discussions have been made regarding the idea of Data and Information Privacy, the urgent need of protection of Data or Information Privacy at the verge of advanced scientific and technological developments as well as the problems and threats on Data or Information Privacy in the contemporary social scenario. Now, it is necessary to provide an idea of the existing legal instruments on the subject and to find out whether those are adequate for the protection of the Privacy Rights concerned herein. Next part of the study will concentrate on this issue.

6.2.5.5. Legal Protection of Data and Information Privacy

Data and Information Privacy are seriously threatened at the verge of the era of advanced scientific technology and as such, legal protection of these rights is the urgent need of the hour. A number of legal instruments, in this respect, have been made in the international, regional and municipal legal field. A discussion of those legal instruments will produce a clear idea about the present legal scenario. The discussion is presented hereunder.

6.2.5.5.1. Data and Information Privacy : International Legal Scenario

In the international legal scenario, United Nations has taken important initiatives for the protection of Data and Information Privacy. In this respect, it has prepared the *United Nations Recommended Guidelines for Protection of Computerized Personal Data Files*. The role of those guidelines is discussed hereinbelow.

6.2.5.5.1.1. The Role of United Nations Recommended Guidelines for Protection of Data and Information Privacy

United Nations has played a very important role for the protection of the Right to Data and Information Privacy. In this respect, it has prepared various

⁷² *Ibid.*

International Guidelines, which prove that, the scope of United Nations is not limited to the protection of Individual Privacy only, but it extends to Data Privacy also. The Guidelines recommended by the United Nations contain principles relating to protection of Data Privacy. Various norms of Data Protection Laws are found in these Guidelines. Some of those Guidelines are mentioned below:-

(i) Guidelines for the Regulation of Computerized Personal Data Files, 1990

Guidelines for the Regulation of Computerized Personal Data Files have been prepared by the United Nations General Assembly for the purpose of protection of various human rights including the Right to Privacy in the era of Scientific and Technological Developments. Due to the evil effects of these developments, various human rights have been endangered. Hence, these Guidelines are framed.

A set of draft Guidelines for the regulation of computerized personal data files has been submitted to the United Nations General Assembly in the year 1989. These guidelines have been adopted by the General Assembly on *December 14, 1990 vide Resolution 45/95* and have been called as the *United Nations Guidelines for the Regulation of Computerized Personal Data Files, 1990*. These Guidelines have propounded various principles as minimum guarantees which should be incorporated into the national legislations. These principles are listed hereunder:-

- a) Lawfulness and fairness.*
- b) Accuracy.*
- c) Specification of the purpose of the file.*
- d) Access by the concerned individual.*
- e) Non-discrimination.*
- f) Authority that can decide on exceptions.*
- g) Protection of files from destruction and misuse.*
- h) Supervision and sanctions.*
- i) Transborder data flows.⁷³*

Apart from the above-mentioned principles, those guidelines have also specified the field of its application and have made provisions relating to the

⁷³ James Michael, *op.cit.*, p.26.

personal data files maintained by the governmental and non-governmental international organisations. In this sense, these Guidelines have played a very important role for the protection of Data Privacy in the international field under the auspices of the United Nations, which in other words, also have become fruitful for the protection of Information Privacy.

In fact, UN Guidelines are strong enough to propound principles fixing the direction for Data Protection. It also propounds the guidelines for framing Data Protection laws in the domestic field. But, it is to be remembered that, UN Guidelines are mere persuasive in nature and as such, they do not have the binding force. Guidelines are mere guiding instruments, which show the direction towards which one can proceed. But, in the absence of binding force, they are incapable of enforcement of any right. In this sense, these UN Guidelines are unenforceable. Due to this reason, UN International Laws for Data Protection are incomplete, because there is no Covenant or Convention, which produces better propositions for enforcement of rights in the domestic field. Therefore, International Laws for protection of Data or Information Privacy under the auspices of the United Nations are incomplete and need further elaboration.

6.2.5.5.2. Data and Information Privacy : Regional Legal Framework

In the regional legal field much more initiatives have been taken for the protection of Data and Information Privacy than the international legal scenario. In this respect, *OECD Guidelines, Council of Europe Convention, Asia-Pacific Privacy Charter and ASEAN Human Rights Declaration* are noteworthy. Those have been discussed hereunder.

6.2.5.5.2.1. The OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, 1980

In the international scenario, the rapid growth of automatic data processing and the transborder flows of personal data have been started with the development of information and communication technology, computers and internet, during the 1960s. Consequent to this development, threats to Privacy have also been increased, which raised the concern of everybody on the subject in the late 1960s and early 1970s. Though it is a global problem, but unfortunately efforts have not been made by the international institutions, especially by the big countries for the protection of

Privacy of personal data from the evil effects of automatic data processing. Therefore, measures have been taken entirely by the regional institutions, mostly by the European ones. In this respect, efforts have been made largely by three co-operating institutions of Europe:-

(i) *The Council of Europe.*

(ii) *The Organisation for Economic Co-operation and Development (OECD).*

(iii) *The European Economic Community (EEC).*⁷⁴

In this respect, the *Organisation for Economic Co-operation and Development (OECD)* has played a very important role. The *OECD* has framed certain *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, which have been recommended and adopted by the *Council of Europe* on September 23, 1980. The objectives of these *Guidelines* have been to protect Privacy and individual liberties by way of reconciling fundamental but competing values such as Privacy and the free flow of information. In this respect, it has suggested that, automatic processing and transborder flows of personal data create new forms of relationship among countries and require the development of compatible rules and practices.⁷⁵ Therefore, it has determined to advance the free flow of information between member countries and to avoid the creation of unjustified obstacles to the development of economic and social relations among member countries.⁷⁶

The *OECD Guidelines* issued in 1980 contain a list of guidelines for the protection of Privacy of personal records in the era of automatic data processing and transborder flows of personal data. Though the guidelines have no legally binding force and implementation of them is voluntary, but almost half of the *OECD* members have either already passed or proposed Privacy protection laws based on these guidelines.⁷⁷

The *Basic Principles of the OECD Guidelines* are discussed below:-

⁷⁴ *Id* at p.32.

⁷⁵ Preamble, *OECD Guidelines*, 1980.

⁷⁶ *Ibid.*

⁷⁷ Faizan Mustafa, "Emerging Jurisprudence of Right to Privacy in the Age of Internet, Collection and Transfer of Personal Data – A Comparative Study", *Kashmir University Law Review*, Vol. XI (II), 2004, pp.13-67 at p.52.

(i) Collection Limitation Principle

There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject. (*Guideline – 7*)

(ii) Data Quality Principle

Personal data should be relevant to the purposes for which they are to be used, and, to the extent for those purposes, should be accurate, complete and kept up-to-date. (*Guideline – 8*)

(iii) Purpose Specification Principle

The purposes for which personal data are collected, should be specified at the time of data collection and the subsequent use of such data should not be incompatible with the purposes specified therein. (*Guideline – 9*)

(iv) Use Limitation Principle

Personal data should not be disclosed, made available or otherwise used, except for the purposes specified therein and with the consent of the data subject or by the authority of law. (*Guideline – 10*)

(v) Security Safeguards Principle

Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data. (*Guideline – 11*)

(vi) Individual Participation Principle

An individual should have the right to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him and the right to have communicated to him, the data relating to him within a reasonable time, at a reasonable charge, in a reasonable manner and in a form readily intelligible to him. Also the individual should have the right to challenge the data relating to him and if the challenge is successful, to have the data erased, rectified, completed or amended. (*Guideline – 13*)

The above-stated principles show that, the *OECD Guidelines* have become fruitful for the protection of Privacy of personal data at the time of automatic data processing and transborder flows of personal data. Again, these are proved to be advantageous, because irrespective of its applicability within the member-states, it

has created provisions for the application of the guidelines among the non-member states. In this sense, it has the following *Advantages*:-

(i) *Though the guidelines are in the form of recommendations, rather than obligations, but have special provisions recognising the special problems of federations, like Canada, U.S.A. and Australia.*

(ii) *It has taken a sectoral approach, unlike a Convention, which has become easier for its application.*⁷⁸

In spite of the above advantages, it has the following *Disadvantages*:-

(i) *These guidelines are called 'soft law' instrument and have no legally binding effect.*⁷⁹

(ii) *These guidelines are not provided by any Convention and as such, lacking their enforceability.*⁸⁰

(iii) *The nature of the guidelines is such that, they can be used as a loose framework for the harmonization of national laws.*⁸¹

Hence, it can be said that, *OECD Guidelines* have tried to create a balance between the conflicting interests of protection of Data Privacy and the free flow of information, but due to the non-binding nature of these guidelines, ultimately all the efforts have not become absolutely fruitful.

6.2.5.5.2.2. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981

Apart from the *OECD*, another institution, which is busy with the protection of Privacy in the era of automatic processing of personal data and transborder flows of personal data, in the European region, is the *Council of Europe*. In this respect, the *Council of Europe* has established a committee of experts on Data Protection in 1976, the findings of which are reported in 1979. Based on those findings, the *Council of Europe* has adopted the *Council of Europe Convention for the Protection*

⁷⁸ James Michael, *op.cit.*, p.40.

⁷⁹ *Supra Note 77 at p.52.*

⁸⁰ Christopher Millard, "Communications Privacy", in Walden and John Angel (eds.), *Telecommunication Law*, Blackstone Press, London, 1st Edn., 2001, p.384.

⁸¹ *Ibid.*

of *Individuals with regard to Automatic Processing of Personal Data* in 1981. This Convention has come into force in *October 1, 1985*.⁸²

The *Preamble* of this Convention has declared the necessity of extending the safeguards for the protection of the right to respect for Privacy, taking into account the increasing flow of personal data across the frontiers undergoing automatic processing. It has also recognised that, it is necessary to reconcile the fundamental values of the respect for Privacy and the free flow of information between peoples. *Article 1 of the Convention* has dealt with the objects and purposes of the Convention, which have been based on the ideals enshrined in the *Preamble of the Convention*.

More specifically, the Convention deals with the following subject-matters:-

- (i) *Basic Principles for Data Protection. (Articles 4 – 11)*
- (ii) *Transborder Data Flows. (Article 12)*
- (iii) *Mutual Assistance and Co-operation between Parties. (Articles 13 – 17)*
- (iv) *Establishment of Consultative Committee. (Articles 18 – 20)*
- (v) *Procedure of Amendment of the Convention. (Article 21)*

Therefore, the Convention has not only provided the basic principles for protection of Privacy of personal data in the era of automatic data processing and transborder flows of personal data, but it has also prescribed the procedure of its enforcement along with the proposition of future amendment of the Convention.

In spite of the prescription of strict rules of procedure for protection of Privacy of personal data, the Convention has provided the following Exceptions:-

- (i) *Each part may derogate from the following of strict rules of transborder data flows, when the second party provides an equivalent protection to those data.*
- (ii) *When the transfer is made from its territory to the territory of a non-contracting State through the intermediary of the territory of another Party, derogation from strict rules is permissible.*

In fact, this Convention has walked in line with the *OECD Guidelines* for creating a balance between the conflicting interests of protection of Data Privacy and the free flow of information. It has tried to complete the incomplete works of the

⁸² *Supra Note 77 at p.53.*

OECD Guidelines and it has become fruitful due to the binding nature of the principles of the Convention as against the non-binding nature of the *OECD Guidelines*. In this sense, the attempts taken by this Convention for the protection of Privacy of personal data can be called the attempts towards the positive direction.

6.2.5.5.2.3. The Asia-Pacific Privacy Charter, 2003 : An Analysis

The concerns relating to Privacy protection in Asia-Pacific region have been started in the mid-1990s. This instance shows that, the necessity of Privacy protection has been understood in the Asia-Pacific region after elapsing long time since the adoption of the United Nations or the regional human rights instruments. During 1990s, the Privacy experts of the Asia-Pacific region have started to consider the making of an Asia-Pacific regional Privacy Agreement, which would assist in both increasing and harmonising the level of Privacy protection in the region by way of creating the basis for free flows of personal data without violating the Individual Privacy.⁸³

In order to deal with the economic and commercial matters, the countries in the Asia-Pacific region have constituted the *Asia-Pacific Economic Co-operation (APEC)* like the *OECD* in Europe. The *APEC* countries are ranging from Canada to China in the North and Australia to New Zealand in the South. The *APEC* countries have started thinking about the problems of invasions of Privacy of personal data due to the automatic data processing and transborder flows of data. Such concern has been raised only since 1995 – 2000, which means that *APEC* is at least 20 years lagging behind the *OECD*. However, under the auspices of the *APEC*, various declarations have been made to generate awareness in this respect and to adopt policy measures therein. Some of them are as follows:-

(i) *The Seoul Declaration on Privacy and the Asia-Pacific Information Infrastructure, 1995.*

(ii) *The Singapore Declaration on Privacy and E-commerce, 1998.*

Based on the above declarations and to some extent on the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 1980*, the

⁸³ Graham Greenleaf, Nigel Waters, Roger Clarke and David Vaile on behalf of the Baker & McKenzie Cyberspace Law and Policy Centre at UNSW, “*Announcement : Asia-Pacific Privacy Charter Initiative*”, www.cyberlawcentre.org/appcc/announce.htm, visited on 11.3.2015.

APEC has started to take initiatives for the Privacy protection in the Asia-Pacific region. In this respect, the first step has been the formation of the *Asia-Pacific Privacy Charter Council* in 2003. The principal functions of the *Asia-Pacific Privacy Charter Council* are as follows:-

- (i) *The Charter Council has been constituted to prepare a draft of the Asia-Pacific Privacy Charter and to recommend the implementation and compliance measures thereof.*
- (ii) *The objective of the Asia-Pacific Privacy Charter has been to set out substantive principles of Privacy protection covering fair information practices, regulation of surveillance, and limitation of intrusions suitable for jurisdictions in the Asia-Pacific.*
- (iii) *The Recommended Implementation and Compliance Measures framed by the Charter Council should contain minimum and desirable measures suitable for jurisdictions in the Asia-Pacific.*⁸⁴

It has been decided that, the functioning of the *Asia-Pacific Privacy Charter Council* would be based on the principles framed in the various previous Privacy documents and the *Asia-Pacific Privacy Charter* would be based on those Privacy documents. Some of those documents are as follows:-

- (i) *The International Covenant on Civil and Political rights, 1966.*
- (ii) *The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 1980.*
- (iii) *The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981.*
- (iv) *The European Union Privacy Directive.*
- (v) *The Australian Privacy Charter, 1993.*
- (vi) *The Canadian Privacy Standard.*
- (vii) *The work of Regional Law Reform Commissions, like New South Wales Surveillance Principles and Hong Kong Privacy Torts.*
- (viii) *The Regional Privacy Laws of –*
 - (a) *Australia;*

⁸⁴ *Ibid.*

- (b) *Canada;*
 - (c) *Chinese Taipei;*
 - (d) *Hong Kong;*
 - (e) *New Zealand;*
 - (f) *South Korea;*
 - (g) *Proposed laws in Malaysia, Macau and elsewhere;*
 - (h) *'Privacy Torts' in the U.S.A., Canada and New Zealand;*
 - (i) *Constitutional Privacy Protection in the U.S.A. and elsewhere.*
- (ix) *Major Sectoral Privacy Principles, like -*
- (a) *The OECD Guidelines concerning Cryptography;*
 - (b) *The European Union Electronic Communications Privacy Directive;*
 - (c) *The International Privacy Commissioner's Working Group Guidelines on Interception of Communications.*⁸⁵

The first meeting of the *Charter Council* has been held in *September 12, 2003*. In the mean time, the *Working Draft 1.0* of the *Asia-Pacific Privacy Charter* has been prepared on *September 3, 2003*, which has been the first discussion draft of the *Asia-Pacific Privacy Charter*. The *Working Draft* has been placed in the first meeting of the *Charter Council* for consideration.⁸⁶

Therefore, the preparation of the first working draft of the *Asia-Pacific Privacy Charter* is an important initiative for the protection of Right to Privacy in the Asia-Pacific region. Practically, this draft is considered as the *Asia-Pacific Privacy Charter*. Though it has been decided that, a *Version 2* of this draft would be prepared, but it has not been released yet. However, the first working draft has defined Privacy, expressed its importance, prohibited unjustified interferences with Privacy and framed a number of principles for Privacy protection.

The *Preamble of the Working Draft 1.0 of the Asia-Pacific Privacy Charter, 2003* has defined 'Privacy' as follows:-

". . . 'Privacy' is widely used to refer to a group of related rights which are accepted nationally and internationally. People have rights to the privacy of their own body, private space, freedom from

⁸⁵ *Ibid.*

⁸⁶ G. Greenleaf & N. Waters, *The Asia-Pacific Privacy Charter, Working Draft 1.0*, (2003) Priv L Res 1, Baker & McKenzie Cyberspace Law and Policy Centre, 3 September, 2003, www.worldii.org/int/other/PrivLRes/2003/1.html, visited on 9.3.2015.

surveillance, privacy of communications, and information privacy . . .

An analysis of the definition of 'Privacy' provided in the 'Preamble' of the Charter would provide the following ideas:-

- (i) This Charter has tried to define 'Privacy' in broad sense of the term.*
- (ii) The definition is not specific and has given only generalised views of Privacy.*
- (iii) Instead of creating new dimensions of Privacy, it has relied only on existing national and international principles.*
- (iv) In this sense, there is no uniqueness in this definition.*
- (v) Practically, it has not supplied a new as well as good and complete definition of Privacy.*
- (vi) Moreover, it has covered only certain areas of Privacy, like –*
 - (a) Privacy of one's own body;*
 - (b) Private Space;*
 - (c) Freedom from Surveillance;*
 - (d) Privacy of Communications; and*
 - (e) Information Privacy.*
- (vii) In this sense, it is not an exhaustive definition of Privacy, rather illustrative only, because it has spoken about certain aspects of Right to Privacy and is silent about the others.*

Apart from the definition of 'Privacy', the *Preamble* contains other aspects also, which are stated below:-

(i) Importance of Privacy

The *Preamble* has tried to explain the importance of Privacy and in doing so, it has relied on the Personal Autonomy and Limited and Protected Communication as the basis of Privacy, which are actually the Functions of Individual Privacy described by *Prof. Alan F. Westin*. Moreover, it has considered Right to Privacy as a fundamental human right based on the Right to live with human dignity. It has also expressed its concerns at the verge of newly identified threats to Privacy in consequent to technological advancements.

(ii) Prohibition of unjustified interferences with Privacy

It has prohibited unjustified interferences with Privacy by considering it as a reasonable expectation of everyone and has rejected the necessity of providing justification by a person, who needs Privacy. It has relied on the universal application of the principles of justification against interferences to Privacy with an exception that, it has kept the onus on those who wish to interfere with others Privacy.

In this sense, one defect is found in the *Charter* that, it has not created specific limitations on Privacy; rather it has kept the space open for consideration by the deciding authority, whereas, the burden of proof lies on the intruder of Privacy to justify the intrusion.

(iii) Aims and Objectives of the Principles

The *Preamble* has enumerated the aims and objectives of the Principles of Privacy Protection incorporated in the later part of the *Charter*. It has also expressed that, the principles are only generalised statements for observance, generating awareness and raising concerns for Privacy violations in the Asia-Pacific region. The principles are applicable to all, including both the public and private sectors. But, the minus point of the principles is that, these are having no binding force, because like the other international or regional instruments, the provisions of this *Charter* can be enforced only by way of incorporating the provisions in the national legislations and not otherwise. However, provisions for implementation and compliance have been made under the '*Implementation and Compliance Principles*' of the *Charter*. Apart from that, the other principles of the *Charter* are mere informative in nature.

Apart from the *Preamble*, the *Charter* is divided into five parts and each part contains various principles for protection of Privacy. Those are listed below:-

- (i) *Part I – General Principles.*
- (ii) *Part II – Information Privacy Principles.*
- (iii) *Part III – Surveillance Limitation Principles.*
- (iv) *Part IV – Intrusion Limitation Principles.*
- (v) *Part V – Implementation and Compliance Principles.*

These five parts are the most important provisions of the *Charter*, because these parts actually deal with the Privacy Protection principles. These principles are the guiding factors for deciding the limits of Right to Privacy in the Asia-Pacific region. These principles have opened a new door for protection of Privacy in the era of technological advancements and loss of personal data. Though based on *OECD Guidelines*, these principles contain various other Privacy principles, apart from Data Privacy.

The Privacy Principles of *Asia-Pacific Privacy Charter* can be subjected to various advantages and disadvantages. Those are discussed below:-

Advantages

- (i) These guidelines or principles are newly framed, as such there are the chances that, these will go far by way of various changes and improvements.*
- (ii) The principles are relating to various aspects of Right to Privacy, ranging from bodily privacy to data or information privacy. As such, these are advantageous.*
- (iii) Wide range of areas has been covered by these principles.*
- (iv) These principles have dealt with various new dimensions of Right to Privacy, like Biometrics Limitation, Private Space and Cyberspace Privacy, which are appropriate for contemporary social scenario.*
- (v) The idea of 'Private Space', though age-old, but not previously protected by any statutory principle or guideline. In this sense, it is also a new dimension.*
- (vi) Prescribing the Surveillance Limitation principles, is a special feature of this Charter, which is the need of the hour in this era of advanced Information and Communication Technology.*
- (vii) Incorporation of Implementation and Compliance principles is another advantage of the Charter, which would be helpful for the enforcement of the principles.*

Disadvantages

- (i) The first and foremost disadvantage of the Charter is that, it is still in the stage of first draft. Hence, application and implementation of the principles of the Charter have to pave a long way.*
- (ii) Any positive developments have not been made so far towards the final recognition of Charter.*

(iii) *The Preamble of the Charter has not provided any new and complete definition of 'Privacy', rather has kept faith on the age-old ideas.*

(iv) *In spite of incorporation of various Privacy principles, practically it has become culmination of various rights under one umbrella.*

(v) *It is actually informative in nature, rather executory.*

(vi) *Though provisions have been made for the implementation of these principles, but practically nothing can be done, if States do not follow these principles.*

Hence, it can be said that, this *Charter* is suffering from both advantages and disadvantages. Disadvantages should be removed and advantages should be increased for the purpose of making the *Charter* fruitful and beneficial. Though the drafting of *Asia-Pacific Privacy Charter* is a good initiative for the protection of Data & Information Privacy in the Asia-Pacific region, but at present, there are impediments for the implementation of these principles, because still the *Charter* is in the draft stage and has to pave a long way.

6.2.5.5.2.4. The ASEAN Human Rights Declaration, 2012 : An Impact Analysis on Data and Information Privacy

Article 21 of the ASEAN Human Rights Declaration, 2012 deals with Right to Privacy, which runs as follows:-

“Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person’s honour and reputation. Every person has the right to the protection of the law against such interference or attacks”.

In an analysis of this article, it is found that, it gives protection to various components of Right to Privacy, like Individual, Family, Home, Correspondence, Honour and Reputation. Interesting part of this article is that, it gives protection to Data Privacy also, along with the above-stated components. More specifically, this article gives protection to the Privacy of Personal data from arbitrary interference or attacks in the *ASEAN* region. It is the speciality of this article that, it provides protection to Data Privacy also. As such, this article has two parts:-

(i) *The first part is related to Individual Privacy; and*

(ii) *The second part is related to Data Privacy.*

However, the analysis of *Article 21* has projected the similarities of this article with *Article 12 of the Universal Declaration of Human Rights, 1948* and the *Article 17 of the International Covenant on Civil and Political Rights, 1966*. In this sense, these three articles are not only similar, but also the reflection of one another. Only exception is that, *Article 21* protects Privacy of personal data, which the other two articles do not. Therefore, it can be said that, *Article 21 of the ASEAN Declaration* is based on the *Article 12 of the Universal Declaration* and the *Article 17 of the International Covenant on Civil and Political Rights*. The only difference found in *Article 21* is that, it deals with both Individual and Data Privacy, which the other two articles do not possess. The other two articles have dealt with Individual Privacy only. In this sense, the scope and ambit of *Article 21* is broader than the other two articles. It can also be said that, *Article 21* is the modern application of the other two articles, which has expanded its scope to include within it Data Privacy along with the Individual Privacy, which is utmost important in the contemporary social scenario. As regards the comparison of this *Article 21* with the relevant articles of the *European Convention, American Declaration, American Convention and African Charter*, it can be said that, same difference is found therein with *Article 21*, because none of these articles deals with Data Privacy like the *Article 21*. This article is similar with the *Asia-Pacific Privacy Charter* only, because that deals with the same subject matter.

Therefore, it can be said that, good initiatives have been taken in the regional legal field for the protection of Data and Information Privacy by way of enacting a number of legal instruments. But, it is to be remembered that, except the *Council of Europe Convention*, none of those has any binding force, because those are either guidelines or charter or declaration, like the *OECD Guidelines, Asia-Pacific Privacy Charter and ASEAN Human Rights Declaration*. Moreover, the *Asia-Pacific Privacy Charter* is still in the formation stage and subject to amendments every day. As such, the regional legal field needs enforceable legal instruments, like Convention or Covenant on the subject in each and every region. Hence, at the verge of the increasing data thefts, extensive legal protection is the urgent need of the hour.

6.2.5.5.3. Data and Information Privacy : Municipal legal Arena

In the municipal legal field, Laws relating to Data and Information Privacy have acquired a prominent place. In this sense, the lacuna of the international or regional legal fields has been filled up by the domestic laws of different countries. Most of the western countries have enacted Data Protection Laws assuming the urgency of the protection of computerized personal data files. Modern and developed Eastern Countries, like *China*, has also enacted Data Protection laws. For the purpose of discussion of laws relating to Data and Information Privacy, the municipal countries have been divided into *Common Law Countries*, *Civil Law Countries* and *Nordic Law Countries*. Under each category, few countries have been selected, whose Data Protection Laws are discussed hereunder.

6.2.5.5.3.1. The Australian Agenda of Data Protection

As regards the *Common Law Countries*, *Australia* is most prominent from the perspective of Data Protection Laws. It has been decided by the *High Court in Victoria Park Racing and Recreation Grounds Co. Ltd. vs. Taylor*⁸⁷ that there is no general statutory or Common Law Right to Privacy under *Australian Law*.⁸⁸ However, attempts have been made in *Australia* to codify the law of Privacy since 1970, but achievements have been made only in the area of data protection by way of enacting the *Privacy Act, 1998 (cth)* and the *Privacy Amendment (Private Sector) Act, 2000 (cth)*. As such, in case of violation of Individual Privacy not involving any element of data protection, action cannot be taken under the above-mentioned Acts.⁸⁹ Therefore, these are the prominent laws for protection of Data and Information Privacy in *Australia*. The *Australian* legislature has understood the necessity of Data Protection Laws and has enacted the above-mentioned laws for protection of Data and Information Privacy. *Australia* has understood the urgency of data protection and has upheld Data Privacy over the Individual Privacy. In this sense, *Australian* attempt is a good attempt.

⁸⁷ (1937) 58 CLR 479.

⁸⁸ David Lindsay, *op.cit.*, p.167.

⁸⁹ *Ibid.*

6.2.5.5.3.2. The Canadian Exposition of Data Protection Laws

Canada is the next important *Common Law Country* dealing with the Data Protection Laws. The statutory recognition of Data and Information Privacy in *Canada* in the *Pre-Charter era* can be divided into the following heads:-

(i) *The legislations based on Common Law principles, like –*

(a) *The Federal Privacy Act, 1983 and*

(b) *The Access to Information Act, 1983.*

(ii) *These laws have been enacted to prevent the unnecessary distribution of personal information and guarantee access to unrestricted government information.*⁹⁰

The *Canadian Charter of Rights and Freedoms* has been enacted in 1982, which does not include the Privacy Rights directly. But, it has helped to develop various Privacy Rights therein indirectly by way of judicial interpretation. This effort has raised concern for Data Privacy also and ultimately has resulted into the protection of Data Privacy in formalized manner in the areas of *the Privacy of Medical Records and the cases of taking of Blood Samples*. Therefore, *Canada* has understood the necessity of Data Protection and has raised legislative and judicial concern in this respect, though the Individual Privacy has not much flourished therein.

6.2.5.5.3.3. The South African Strategy of Data Protection

The next important *Common Law Country* regarding Data Protection is *South Africa*. In fact, no express legislation is found in *South Africa* dealing with the specific protection of Right to Privacy. In this respect, incorporation of *Section 14 of the Constitution of the Republic of South Africa, 1996* is a great initiative, because it empowers the Government to take steps for the protection of the so far neglected areas of the Right to Privacy, like *Data Privacy or the Protection of Personal Information*.⁹¹ Moreover, the Constitutional Right to Privacy in *South Africa* does not end with *Section 14*. There is also *Section 32 of the South African Constitution*,

⁹⁰ Marguerite Russell, *op.cit.*, pp.105-106.

⁹¹ C. M. van der Bank, “*The Right to Privacy – South African and Comparative Perspectives*,” *European Journal of Business and Social Sciences*, Vol.1(6), October 2012, pp.77-86 at p.79, www.ejbss.com/Data/Sites/1/octoberissue/ejbss-12-1164-therighttoprivacy.pdf, visited on 15.3.2015.

which provides for the right of access to personal information.⁹² This right has created a new dimension of Right to Privacy in *South Africa*. In order to give effect to this right, various legislations have been enacted in *South Africa*, which are listed hereunder:-

(i) *The Promotion of Access to Information Act, 2002.*

(ii) *The Electronic Communications and Transactions Act, 2002.*

(iii) *The National Credit Act, 2005.*⁹³

Therefore, the *South African* legal system has tried to protect Data Privacy, the final outcome of which is the making of two draft bills therein, *the Protection of Personal Information Bill, 2005 and the Protection of (State) Information Bill, 2008*. Later on, the first draft bill has been passed into concrete enactment, called the *Protection of Personal Information Act, 2013*. But, the second draft bill has not yet passed due to various controversies and still is remaining in the bill stage. After incorporation of various amendments, now it is called *the Protection of State Information Bill, 2013*. Hence, the discussion provides the idea that, *South Africa* has taken good initiatives for the protection of Data and Information Privacy.

6.2.5.5.3.4. Data and Information Protection Laws : A Study of France

France is the most prominent *Civil Law Country* dealing with Privacy Laws. Though *France* is mainly concerned with the laws relating to protection of private life, but it has also enacted Data Protection Laws. *The French* history of Data Protection dates back to 1975, when a public opinion survey was conducted to find out the necessity of Data Protection Laws therein. Based on that survey and other initiatives, *France* has enacted the *French Data Protection Act, 1978*, which has further been revised in 2004. This Act is mainly concerned with the processing of personal data in *France*, wherein data processing is expressed by the word '*l'informatique*'. The Act has established a national regulatory authority for protection of computerized personal data called '*Commission Nationale de l'Informatique et des Libertés (CNIL)*'. It is an independent body for advising on proposed data processing systems, monitoring existing systems and doing research.

⁹² Jonathan Burchell, "The Legal Protection of Privacy in South Africa: A Transplantable Hybrid," *Electronic Journal of Comparative Laws*, Vol.13.1, March 2009, pp.1-26 at p.12, www.ejcl.org/131-2.pdf, visited on 15.3.2015.

⁹³ *Id* at p.14.

This Act is applicable to both public and private sectors. Later on, another body has been constituted in *France* for data protection, called the '*Commission d'Accès aux Documents Administratifs (CADA)*'. It is an advisory body for administrative departments, which advises them at their request and receives complaints from those who have been refused access. The basic distinction between the two is that, *CNIL* is created specifically for Privacy protection, but *CADA* is created to produce administrative openness.⁹⁴ Therefore, the efforts taken by *France* for comprehensive data protection are good enough. Not only is that, these efforts are so strong to continue their application till today in the complex social structure.

6.2.5.5.3.5. Data and Information Privacy Laws : The German Experience

Next important *Civil Law Country* regarding Data Protection is *Germany*. It has comprehensive laws on Privacy on each and every component of Right to Privacy. As such, it has not left Data Protection also. It has tried to protect Data and Information Privacy by enacting the *Federal Data Protection Act, 1977*. This Act covers data processing of personal information in the private and the public sectors, but it is largely limited to regulating the public sector at the federal level. There is also *State Data Protection Laws in Germany*, which primarily regulates the public sector at state levels, but there is a tendency towards special measures to regulate particular activities in the private sector, such as credit reporting. *The new Federal Data Protection Act* has come into force in *Germany in 2001*, which has further been amended in *2009*. However, the Act is having a complex procedure for its enforcement, which considers data theft or infringement of the rights of the data subject as a civil wrong, for which injunction and compensation for loss or damage is available. In addition to that, huge amount of fines may be imposed on the wrong doer as penalty measure.⁹⁵ Therefore, *Germany* has tried to establish a full-proof Data Protection Laws therein for the protection of computerized personal data files. Not only that, *Germany* is busy with enacting a new *Data Protection Regulation* now-a-days. In this sense, *German* efforts of Data Protection are good enough.

⁹⁴ James Michael, *op.cit.*, pp.65-69.

⁹⁵ *Id at pp.*95-97.

6.2.5.5.3.6. Chinese Efforts of Data Protection : An Analysis

The next important *Civil Law Country* in the regime of Data Protection is *China*. Though *China* is a novice in the area of Privacy protection and more specifically in the area of Data Protection, but its contributions cannot be disregarded in this respect. *China* has no *Personal Data Protection Law* in the *European model* yet. But, combination of several relevant documents would produce the effect of Data Protection Laws therein. Those are listed hereunder:-

(i) *The Law on Statistics, 1983.*

(ii) *The Provisional Regulations Relating to Bank Management, 1986.*

(iii) *The Chinese Constitution, 1982.*

(iv) *Article 253 (a) of the General Principles of Criminal Law, 1979.*

(v) *Article 101 of the General Principles of Civil Law, 1986.*

(vi) *Article 2 of the Tort Liability Law.*

(vii) *The Data Protection Framework for Internet and Telecommunications providers: the 2011 MIIT Regulations, the 2013 MIIT Guidelines and the 2013 MIIT Regulations.*

The above list of Data Protection related guidelines in *China* shows the efforts of *China* for Data Protection. It further shows that, *Chinese* laws of Data Protection are inadequate; it is still in primitive stage, which in due course of time will turn in comprehensive laws. Hence, good future is expected in this respect.

6.2.5.5.3.7. Sweden : The Nordic Attitude of Data Protection

After the *Civil Law Countries*, the Data Protection Laws of *Nordic Law Countries* come into picture. The first *Nordic Law Country* in this respect is *Sweden*. In fact, from the very beginning *Sweden* has no general Right to Privacy and the Swedish People has not raised concern about the protection of general Right to Privacy. The *Swedish Constitution, 1766* has provided for public access of government documents, which is regarded as a means for monitoring Information Privacy. Even after the *Nordic Conference in 1967*, *Sweden* has not concentrated on the protection of Personal Privacy; rather it has concentrated on Data Privacy. After the passing of seven years from this *Conference*, *Sweden* has enacted its *Data Protection Law in 1973*, called the *Swedish Datalagen or Data Protection Act, 1973*. In fact, *Sweden* has enacted the first national data protection law in the world

and thereby *Sweden* is the first country of the world having the data protection law. Since then, the subject of data protection has occupied a very prominent place in *Sweden* and it has taken various measures for the protection of Data Privacy.⁹⁶

Sweden has enumerated its laws of data protection by elaborating one of the rights of the *Nordic Conference*, called the right to protection from 'being placed in a false light'. In this respect, *Sweden* has adopted various other laws relating to data protection, like *the Freedom of Press Act, the Secrecy Act, the Credit Information Act, 1974 and the Debt Recovery Act*. The *Swedish* approach of Privacy laws is not based on a general right to Privacy, which is usually infringed by an 'appropriation of likeness', rather it covers the laws of copyright, trademarks, unfair competition and libel. *Sweden* is counted as the specialized country to deal with *Computers and Privacy*. Also it has created laws relating to protection of Privacy in the computers. Moreover, *Sweden* has revised its *data Protection Act* several times and it has enacted a new *Data Protection Act in 1993*.⁹⁷ The attempts taken by *Sweden* for Privacy protection are good regarding the protection of Data Privacy. Hence, the initiatives taken by *Sweden* are unidirectional and comprehensive in this respect.

6.2.5.5.3.8. Denmark : A Special Protection of Data Privacy

Other *Scandinavian or Nordic Law Countries* have also taken initiative for the protection of Privacy. In this respect, they have, more or less followed the legal approach taken by *Sweden* for the protection of Privacy. Later on, they have also adopted the principle of publicity initiated by *Sweden*. *Denmark* is the next important *Nordic Law Country* after *Sweden*, which has taken measures for the protection of Privacy. For this purpose, *Denmark* has followed the rules established by *Sweden* and has enacted the *Access to Information Act, 1970 and the Data Protection Act, 1978*.⁹⁸

Furthermore, *Danish Law* has not gone far to protect Individual Privacy and has remained concerned with Data Privacy only like *Sweden*. In this sense, *Danish Law* has recognized the rights of both natural and legal persons as well as has enacted separate laws for data protection in the public and private sectors. Last but

⁹⁶ *Id* at p.14.

⁹⁷ *Id* at pp.54-56.

⁹⁸ *Id* at p.15.

not the least; *Denmark* has enacted the *Public Authorities Registers Act, 1991* for the protection of Data Privacy in the personal computers. This initiative is also similar to *Sweden*.⁹⁹ Hence, *Denmark* has taken good initiatives for the protection of Privacy therein and inspite of its over-dependency on *Swedish Law*, it has also enacted its own laws protecting various areas of Data Privacy separately, unlike *Sweden*.

6.2.5.5.3.9. The Attitude of Data Protection in Norway

Among the *Scandinavian Countries*, *Norway* is another important country having the Data Protection laws. Like *Sweden*, *Norway* has enacted the *Access to Information Act, 1970 and the Data Protection Act, 1978*.¹⁰⁰ However, the data protection laws of *Norway* are based on the *Swedish Law* and provide a right of access to records.¹⁰¹ Furthermore, the *Norwegian* data protection laws are similar to *Swedish* laws and are not applicable for protection of Personal Privacy. This law is applicable to Privacy of natural and legal persons. It has separate laws for both public and private sectors. From this perspective, the laws of *Sweden, Denmark and Norway* are similar. *Norway* also has certain special laws relating to sensitive personal information as well as laws for certain sectors of information industry, like credit reference bureau, opinion pollsters and direct mail businesses. *Norway* has laws for protection of Privacy in the computer network, just like *Sweden and Denmark*.¹⁰²

Hence, *Norway* has tried to protect the Data Privacy in its own way. Though it has certain similarities with the laws of *Sweden and Denmark*, but it has its specialities also in making the laws of Data Privacy. Therefore, the initiatives of *Norway* for protection of Data Privacy can be called good initiatives in an all round manner. Finally, it can be said that, all the countries are not equally strong regarding the municipal laws of protection of Data Privacy, but the initiatives taken in this respect are praiseworthy keeping in view the contemporary social scenario, wherein processing of huge amount of data is the daily need and hence, Data Privacy of the individuals persons are seriously threatened.

⁹⁹ *Id at pp.56-58.*

¹⁰⁰ *Id at p.15.*

¹⁰¹ *Id at p.58.*

¹⁰² *Id at p.59.*

6.3. Legal Position of U.S.A., U.K. and India regarding the Outstanding Facets and Dimensions of Right to Privacy

Protection of outstanding facets and dimensions of Right to Privacy is the urgent need of the hour, because in the present social scenario, human civilization has undergone a complete social change wherein it cannot proceed further without taking recourse of solving various human problems associated with the protection of Privacy. The dichotomy between Privacy and Private Life is age-old, but the concern for its end is the urge of today, without which the four corners of Privacy cannot get full-proof protection. Privacy of Women and Children is most important at the verge of their vulnerability, because without the guarantee of their human rights, such vulnerability could not be prevented and Right to Privacy is a part of their human rights. Next come to the question of protection of Individual Privacy at the threshold of advancement of science and technology as well as the protection of Data Privacy in the present era of storage and processing of huge amount of personal data. In all these cases, protection of Right to Privacy is the urgent need of the hour for the sake of further advancement of human civilization. In this respect, the steps taken by U.S.A., U.K. and India as well as their legal standpoint are required to be analyzed.

6.3.1. Outstanding Facets of Privacy : The Legal Scenario in U.S.A.

Though U.S.A. is much strong in Privacy protection laws, but that does not mean that, every component of Right to Privacy is equally protected therein. Moreover, U.S.A. recognizes Right to Privacy and not the Right to respect for Private Life. In this sense, in the dichotomy between Privacy and Private Life, Privacy has won in U.S.A. and as such, there has been no existence of Private Life in U.S.A. The components which have been considered as the aspects of Private Life in Europe, have been considered as parts of Right to Privacy in U.S.A. and therefore, the legislative and judicial protection have been provided accordingly. Next come to the question of Privacy of Women. This right has again, not been protected in U.S.A. by any express statute, but various statutory enactments have been made therein for protection of a number of human rights of women. When all those human rights would be protected, Right to Privacy of Women would also be protected automatically. But, the U.S. Supreme Court has taken active steps in this

respect. It has pronounced a number of judgments, wherein Right to Privacy of Women has got good amount of protection. Noteworthy among those are *Griswold v. Connecticut*, which has provided *Right to Privacy of married women to use contraceptives*, *Eisenstadt v. Baird*, which has established the *Right to Privacy of unmarried women to use Birth Control Measures*, *Roe v. Wade*, which has provided the *Right to Privacy of Abortion to women*, *Loving v. Virginia*, which has protected the *Right to Privacy of Marriage of women*, *Skinner v. Oklahoma*, Which has established the *Right to Privacy of Procreation of women* and so on. Therefore, in the absence of express legislations, U.S. judiciary has taken active steps for protection of Right to Privacy of women, which is no doubt praiseworthy.

Next come to the question of Privacy of Children, which has been protected in U.S.A. far better than women. In this respect, two important U.S. legislations are noteworthy, *Children's Online Privacy Protection Act, 2000* and *Neighborhood Children's Internet Protection Act, 2001*. Both are newly enacted legislations and have specifically meant for the protection of Privacy of Children in the internet, which shows the concern for U.S. legislature to protect children over the internet. U.S. judiciary has also taken active part in this respect, by pronouncing judgments in the cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, wherein Right to Privacy of the parents regarding child rearing and education of the child have been established. Though these cases have not given Privacy to Children, but have been good enough for giving Privacy to parents for considering the welfare of children as paramount. There has also been the case of *Prince v. Massachusetts*, which has upheld the Privacy of Children against the Family Relationship in order to protect the welfare of children against unnecessary abusive family environment.

Next point is the protection of Right to Privacy at the verge of advanced scientific technology in U.S.A. In this respect, two important U.S. Federal legislations are noteworthy, *Electronic Communications Privacy Act, 1986* and *the USA PATRIOT Act, 2001*. Both these legislations have meant for the protection of Privacy in the technological field and *the USA PATRIOT Act* is more vital, because it has tried to protect the Individual Privacy against terrorism with the help of misuse of advanced scientific technology. U.S. judiciary has also taken initiatives in this respect by pronouncing judgments on *Computer and Privacy*. One important case on

the issue is *United States v. Simons*, 206 F.3d 392 (4th Cir., 28 February, 2000), where a Government employee has been charged with violating Federal laws when the employing agency has identified incriminating documents on his computer. The Court has held that, the employee did not have a reasonable expectation of Privacy as to the fruits of his internet use, where the agency had notified employees of limitations on their internet use and a policy of periodic audits to ensure compliance.¹⁰³ Hence, both U.S. legislature and judiciary have been active to protect Right to Privacy in the environment of advanced scientific technology.

Next issue is the issue of Data Privacy, which has been protected by U.S.A. in well-advanced manner since long, prior to all other countries by enacting the *Privacy Act, 1974* in order to provide protection to Privacy of Personally Identifiable Information. U.S. judiciary is also concerned with the issue and has provided important judgments in a number of cases in the recent period protecting the Data or Information Privacy of individual persons. In this respect, a noteworthy case is *Suzlon Energy Ltd. and Rajagopalan Sridhar v. Microsoft Corporation*,¹⁰⁴ wherein the 9th Circuit Court has held that, the Microsoft Corporation should not produce documents from the Microsoft Hotmail email account of Rajagopalan Sridhar, a foreign prisoner to Suzlon Energy Ltd. As such, the Court has upheld the Data or Information Privacy of Sridhar under the *Electronic Communications Privacy Act, 1986*. Hence, this is an important initiative of U.S. judiciary for protection of Data or Information Privacy. Nevertheless U.S.A. is a forwarding Country in the field of Privacy protection.

6.3.2. Legal Standpoint of U.K. on the Outstanding Facets of Privacy

U.K. has no specific legislation on Right to Privacy and is lagging far behind U.S.A. on the issue. But, it has started legislating in the field sometimes back considering the urgency of the issue. Regarding the Right to respect for Private Life, it should be mentioned that, U.K. has upheld this right and has never recognized Right to Privacy like U.S.A. Two important legislations are noteworthy in this respect – *the European Convention for the protection of Human Rights and*

¹⁰³ Saurabh Awasthi, “Privacy Laws in India – Big Brother is Watching You”, Company Law Journal, Vol.3, 2002, pp.15-23 at p.19.

¹⁰⁴ 671 F.3d 726, 729 (9th Cir. 2011).

Fundamental Freedoms, 1950 as well as *the Human Rights Act, 1998* in U.K. In the absence of express legislations, U.K. judiciary has taken active steps for the protection of Private Life. In this respect, the *Prince Albert v. Strange*, *Pollard v. Photographic Co.*, *A v. B* and *Theakston v. MGN* cases are important. In all these cases, the Right to respect for Private Life has been upheld in U.K.

Next come to the question of Privacy of Women, which has not been protected in U.K. by any express legislation, but a number of legislations have provided it partial protection. Among them, *the Protection from Harassment Act, 1997* and *the Human Rights Act, 1998* are noteworthy. But, the role of judiciary is not mentionable in this respect, because it has not taken any good initiative for the protection of this right. Next come to the question of protection of Privacy of Children in U.K., which is again neglected therein like the Privacy of Women and no such legislative or judicial initiatives have been found on the issue.

Next important issue is the protection of Privacy at the verge of advanced scientific technology, which is also neglected in U.K. However, a few legislations have been found therein, which have provided partial protection to this right. Among those, *the Wireless Telegraphy Act, 1949*, *the Interception of Communications Act, 1985*, *the Telecommunications (Data Protection and Privacy) Regulations, 1999* and *the Regulation of Investigatory Powers Act, 2000* are noteworthy. Few instances have also been found, wherein the U.K. judiciary has taken initiatives for such protection, among which the *Peck v. U.K.* case is noteworthy. This case has provided protection to Privacy against the unreasonable publication of CCTV footage, which is the result of advanced scientific technology. *AMP v. Persons Unknown* is another case, pertinent to mention in this respect, wherein protection of Individual Privacy has been threatened in the environment of information technology and the Court has provided protection thereof.

Next issue is the issue of protection of Data or Information Privacy. U.K. has taken good initiatives for the protection of this right in the present social scenario by enacting the *Data Protection Act, 1998*, which is an express legislation on the subject. Apart from that, there are other legislations providing partial protection to this right, like *the Financial Services Act, 1986*, *the Access to Medical Reports Act, 1988*, *the Official Secrets Act, 1989*, *the Telecommunications (Data Protection and*

Privacy) Regulations, 1999, the Regulation of Investigatory Powers Act, 2000 and the Protection of Freedoms Act, 2012. The U.K. judiciary has taken active steps in this respect by protecting the Privacy of Personal Data or Information in the environment of information technology with the help of *AMP v. Persons Unknown* case. Therefore, this has been an important issue, where U.K. has taken legislative and judicial initiatives for protection of Right to Privacy. But, it should be remembered that, the whole Right to Privacy is neglected in U.K., because it has never recognized Right to Privacy in express manner; rather it has recognized the Right to respect for Private Life.

6.3.3. India and the Outstanding Facets of Privacy : Legislative and Judicial initiatives

India has been enriched with Privacy Protection Laws in the ancient and medieval periods, but has been suffering from lack of those laws in the modern period. But, in the post-independent era, Indian legislature and judiciary have taken active steps for the protection of Right to Privacy. In this respect, it is important to note that, India has never recognized Right to respect for Private Life in line with U.K., but it has recognized Right to Privacy similar to U.S.A. As such, no legislative or judicial initiative has been found in India for the protection of Right to respect for Private Life and it is neglected herein.

Next come to the question of Right to Privacy of Women, which has got protection in the Customary Laws of Easement since the ancient period, which has included observance of the norms of Privacy in the construction of houses for the female-occupied area and the maintenance of purdah system for Muslim women, which has also been present in the medieval period. Such Customary Laws of Privacy have been recognized in India under *Section 18 of the Indian Easements Act, 1882*. Apart from that, there has been another age-old legislative provision for protection of Privacy of Women under *Section 509 of the Indian Penal Code, 1860*, which has provided protection against the intrusion upon the modesty and Privacy of a woman in India. Another important provision is *Article 21 of the Indian Constitution*, which includes the protection of Right to Privacy of Women along with its other components, but by way of judicial interpretation and not in express manner. There has also been other statutes, which provide partial protection to

Privacy of Women, like *the Medical Termination of Pregnancy Act, 1971*, *the Indecent Representation of Women (Prohibition) Act, 1986* and *the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994*.

Indian judiciary has also been concerned with the issue and is still showing its concern thereof. It has started its initiative from the protection of Customary Law of Privacy and as such, the *Nuth Mull v. Zuka-Oollah Beg*, *Gokal Prasad v. Radho*, *Bholan Lal v. Altaf Hussain* etc. cases are noteworthy. Privacy of Purdah System of Women has been protected in the cases of *B. Nihal Chand v. Bhagwan Dei* and *Gulab Chand v. Manickchand*. Thereafter, the Indian judiciary has started to protect the Privacy of Women in the light of *Article 21 of the Indian Constitution*, among which important cases are *In Re : Ratnamala and Another v. Unknown*, *State of Maharashtra v. Madhukar Narayan Mardikar*, *Neera Mathur v. Life Insurance Corporation of India*, *T. Sareetha v. Venkata Subbaiah*, *Saroj Rani v. Sudarshan Kumar* and so on. Therefore, both the Indian legislature and judiciary have taken important measures for the protection of Privacy of Women.

Next come to the question of protection of Privacy of Children. Indian legislature has also taken good initiatives in this respect by enacting the *Children Act, 1960* and *Juvenile Justice (Care and Protection of Children) Act, 2015*. But, Indian judiciary has not taken active steps in this respect and no such noteworthy cases are found. It is pertinent to mention here that, Indian legislature and judiciary have not been concerned enough like U.S.A. regarding the protection of Privacy of Children. Moreover, India is also not adequately updated like U.S.A. for protection of Online Privacy of Children, which is a new subject in India and initiatives have just been started thereof. In this respect, *Section 67B of the Information Technology Act, 2000 as amended in 2008* is noteworthy, which protects the Online Privacy of Children and provides punishment for violation thereof. In this sense, this area is still neglected in India owing to the absence of awareness.

Next come to the question of protection of Privacy at the verge of advanced scientific technology. Though India is not much concerned about the issue and lacks any express legislation, but a number of legislations are found providing partial protection to this issue. Those are *the Indian Evidence Act, 1872*, *the Indian Telegraph Act, 1885*, *the Indian Post Office Act, 1898* and *the Information*

Technology Act, 2000. Section 66E of the Information Technology Act, 2000 expressly provides protection to Right to Privacy, which is a good initiative. But, Indian judiciary is still a novice on the subject; so far it has not pronounced any important judgment on the subject. Though it has pronounced various decisions on the violation of various provisions of the said Act, but has shown reluctance to consider a case as violation of *Section 66E*. Therefore, Indian judiciary has still not become matured enough to consider these cases.

Next issue is the issue of Data or Information Privacy, which is again in the primitive stage in India, because what the U.S.A. has done in *1970s*; U.K. has done in *1990s*; India is doing now in *2014 – 2017*. U.S.A. has enacted its *Privacy Act* in *1974*, U.K. has enacted its *Data Protection Act* in *1998* and till now, almost all the Western Countries have enacted their data protection laws, which is inevitable in the present social infrastructure of processing of huge amount of computerized data. But, India does not have a single complete statute on the subject. However, a number of legislations provide partial protection to Data or Information Privacy, those are, *the Official Secrets Act, 1923*, *the Public Records Act, 1993*, *the Information Technology Act, 2000* and *the Right to Information Act, 2005*. At present, India has started initiatives for the protection of Data or Information Privacy by drafting two important bills, *the Privacy Bill, 2014* and *the Personal Data Protection Bill, 2014*. Drafting of these two bills shows that, India is lagging far behind U.S.A. and U.K. regarding the protection of this right, because these two countries have enacted laws on the issue long ago and India has just drafted the bills. In this respect, these two bills require specific elaboration.

6.3.3.1. Data or Information Privacy in India : The Right to Privacy Bill, 2011, presently called the Privacy Bill, 2014

Right to Privacy is a private right, whereas, Right to Information is a public right. In a democratic social order, both the rights co-exist and as such, the peaceful existence of a democratic society depends upon the balancing between these two rights. Therefore, every civil society needs to enact legislations guaranteeing these two rights and should try to create a balance between the two. Individual Right to Privacy should be protected from unauthorized state or private encroachment, on the contrary, government is answerable to the general public for its activities owing to

its public accountability and the public should have the Right to Information in this respect. While imparting the Right to Information about the public records, there is every chance of violation of Individual Privacy of the common citizens, because public records generally contain data about the private individuals. This is the main problem behind the enforcement of these two rights and as such, balancing of these two rights is the urgent need of the hour. To create such balance, every democratic country requires legislations covering these two aspects. In this respect, India has enacted the *Right to Information Act, 2005* and now it needs an appropriate comprehensive legislation on Right to Privacy. India still does not have such legislation, but has started the process in this regard. As such, it has drafted the *Right to Privacy Bill, 2011*, which is now known as the *Privacy Bill, 2014*.

In fact, *Right to Privacy Bill, 2011* has been drafted to provide for the Right to Privacy to citizens of India and regulate the collection, maintenance, use and dissemination of their personal information and provide for penal action for violation of such right and for matters connected therewith or incidental thereto. It has defined various terms relating to personal data and information, discussed about the concept of Right to Privacy and infringement of Privacy under the Act as well as prescribed rules and procedure relating to the protection of this right and penal provisions for violation of Privacy under the Act. In this sense, Indian Parliament has tried to enact a comprehensive legislation on Right to Privacy and has prepared the draft bill of *2011* for this purpose. But due to absence of unanimity among the members of Parliament and for other reasons, the *Right to Privacy Bill, 2011* has not been passed into an Act. Moreover, the Bill has been suffering from various discrepancies, inadequacies and incompleteness, owing to which, it is felt that, it would not become a comprehensive legislation on Privacy, if it would be passed into an Act. It is also felt that, it would not meet the existing challenges relating to the protection of Privacy and as such, requires certain amendments. Hence, the *Right to Privacy Bill, 2011* has been amended accordingly and a new Bill has been drafted, called the *Privacy Bill, 2014*.

Presently, the Indian law relating to Privacy in comprehensive form means the *Privacy Bill, 2014*. It means, at present there is no comprehensive legislation in India on the protection of Right to Privacy as a whole, only this Bill is available. The

Privacy Bill, 2014 extends the Right to Privacy to all residents of India and recognises the Right to Privacy as a part of *Article 21 of the Indian Constitution* and extends to the whole of India. The *Privacy Bill, 2014* newly defines the following terms:-

- (a) *Personal Identification.*
- (b) *Legitimate purpose.*
- (c) *Competent authority.*
- (d) *Notification*
- (e) *Control.*
- (f) *Telecommunications system.*
- (g) *Privacy standards.*¹⁰⁵

The *Privacy Bill, 2014* has re-defined the following terms:-

- (a) *Communication data.*
- (b) *Data subject.*
- (c) *Interception.*
- (d) *Person.*
- (e) *Sensitive personal data.*
- (f) *Individual.*
- (g) *Covert Surveillance.*
- (h) *Re-identify.*
- (i) *Process.*
- (j) *Direct marketing.*
- (k) *Data Controller.*
- (l) *Government.*¹⁰⁶

The *2014 Bill* defines *Personal Data* as any data which relates to a data subject, if that data subject can be identified from that data, either directly or indirectly, in conjunction with other data that the data controller has or is likely to have and includes any expression of opinion about such data subject. It also provides for the following *Exceptions to the Right to Privacy*:-

¹⁰⁵ Elonnai Hickok, *Leaked Privacy Bill: 2014 vs. 2011, Featured, Internet Governance, Privacy*, 31 March, 2014, www.cis-india.org/internet-governance/blog/leaked-privacy-bill-2014-2011.html, visited on 7.7.17.

¹⁰⁶ *Ibid.*

(a) Sovereignty, integrity and security of India, strategic, scientific or economic interest of the state.

(b) Preventing incitement to the commission of any offence.

(c) Prevention of public disorder.

(d) Protection of Rights and freedoms of others.

(e) In the interest of friendly relations with foreign state.

(f) Any other purpose specifically mentioned in the Act.¹⁰⁷

The 2014 Bill also qualifies that the application of each exception must be *adequate, relevant and not excessive to the objective it aims to achieve and must be imposed on the manner prescribed.* According to the Bill, the following Acts should not be considered as deprivations of Privacy:-

(a) The processing of data purely for personal or household purposes.

(b) Disclosure of information under the Right to Information Act, 2005.

(c) And any other action specifically exempted under the Act.¹⁰⁸

The 2014 Bill defines nine specific *Privacy Principles*, like *notice, choice and consent, collection limitation, purposes limitation, access and correction, disclosure of information, security, openness and accountability.* The *Privacy Principles* will apply to all existing and evolving practices. The *Bill* has provisions relating to the *processing of personal data and sensitive personal data* addressing the following aspects:-

(a) Collection of personal data.

(b) Processing of personal data.

(c) Access to personal data.

(d) Updating personal data.

(e) Retention of personal data.

(f) Data quality.

(g) Openness and accountability.

(h) Choice.

(i) Consent.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

(j) *Exceptions for personal identifiers.*¹⁰⁹

The *Bill* has made changes to the following provisions addressing:-

(a) *Provisions relating to sensitive personal data.*

(b) *Sharing (disclosure of personal data).*

(c) *Notification of breach of security.*

(d) *Mandatory processing of data.*

(e) *Security of personal data.*

(f) *Trans border flows of personal data.*¹¹⁰

Therefore, *the Bill* has prescribed detail norms and procedure for the protection of Privacy of personal data. It has prescribed for the establishment of *Data Protection Authority*. Most important part of the *Bill* is that, it has imposed *Penalties* for violation of Privacy in India. As such, *Penalty for obtaining personal information on false pretences or Penalty for disclosure of other personal information* shall be punishable with fine which may extend to *five lakh rupees*. *Penalties for Data Theft* shall be punishable with fine which may extend to *ten lakh rupees*. *Penalties for unauthorised collection, processing and disclosure of Personal Data* shall be punishable with fine which may extend to *five lakh rupees*. Therefore, the *Bill* has introduced huge amount of fine for violating the Privacy of Personal Data or Personal Information under the *Bill*. This provision is good enough for protection of Privacy in India.

But, it is to be remembered that, the main defect of the *Bill* is that, it protects Data or Information Privacy only and it has nothing to do with Individual Privacy. In this sense, its application is limited and it cannot redress the cases of violation of Individual Privacy. Moreover, it is in the *Bill* stage since long time, which shows the negative intention of the legislature for passing a comprehensive Privacy protection legislation in India. Again, the *Bill* has provided wide exceptions to violation of Privacy for the actions of law enforcement and intelligence agencies. As such, their activities are exempted from being called as violation of Privacy under the *Bill*. Hence, finally it can be said that, when the *Bill* would be passed into an Act, it would be very doubtful, whether it would ultimately protect Privacy or would

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

become an instrument of suppression of citizens' Privacy in the hands of the Government.

6.3.3.2. Privacy of Personal Data : The Personal Data Protection Bill, 2014

Protection of Personal Data is another important issue in a computer-oriented democratic civilized society in the midst of the age of Information and Communication Technology. The rapid growth of information and communication technology has forced the developing countries to create data banks and maintain Computerised records of personal files of the individual human beings. Storing of huge amount of personal data in the computerised data banks is the result of automation, wherein daily processing of huge data is the urgent need of hour; otherwise it is impossible to cope up with the modern system of information and communication technology. Another important aspect is outsourcing of data of one country into another country, which is made in order to process the data of developed countries with the help of cheap labour of the developing countries. In all these processes, the basic problem is the fear of loss of huge data owing to the occurrence of any unnatural event, technological fault or data theft. Another problem is the growth of direct mail industries, who are purchasing personal data from the data processing industries in lieu of money and direct mails to the customers relating to promotional offers or calling them directly with promotional offers. In all these cases, what is in great danger is the personal data of individual citizens, which loses its Privacy seriously. Hence, it is high time to take measures for protection of Privacy of Personal Data in the developing countries. India is not an exception to it and it has drafted the *Personal Data Protection Bill, 2014* to protect personal data from the loss of its Privacy.

The Personal Data Protection Bill, 2014 has been drafted by the Indian Parliament to enact the *Personal Data Protection Act, 2014*, but still the Bill has not been passed into an Act due to various discrepancies and absence of unanimity among the members of the Parliament as well as the various sections of the society. Specifically, the Bill has been drafted to provide for protection of personal data and information of an individual collected for a particular purpose by one organization, and to prevent its usage by other organization for commercial or other purposes and entitle the individual to claim compensation or damages due to disclosure of

personal data or information of any individual without his consent and for matters connected therewith or incidental thereto. Therefore, the Bill is prepared for the protection of personal data and information of an individual from misuse of commercial purposes by the organizations not entrusted to do that as well as to claim compensation thereof. It would be applicable in case of misuse of personal data or information of individuals without their consent and for providing compensation in cases of such disclosure of personal data or information.

The Bill defines *Personal Data* under *Section 2(c) of the Bill*, according to which “*Personal Data*” means information or data which relate to a living individual who can be identified from that information or data whether collected by any Government or any private organization or agency. Therefore, the section tries to protect the personally identifiable information or data from the misuse by any Government as well as any private organization or agency. According to *Section 3 of the Bill*, the personal data of any person collected for a particular purpose or obtained in connection with any transaction, whether by appropriate Government or by any private organization, shall not be put to proceeding without the consent of the person concerned. According to this section, *the personal data of any person may be processed for any of the following purposes:-*

(a) the prevention or detection of crime;

(b) the prosecution of offenders; and

(c) the assessment or collection of any tax or duty.

It is to be remembered that, Personal Data of any person may be processed under the Bill, only for the above purposes and not otherwise. It is also provided under this section that, no consent of the individual shall be required, if the personal data details of the individual are obtained through sources which have been made public. Therefore, this section only protects the personal data available in private and not the data available in public. In this sense, public record of personal data is available to all and Privacy of those data is not protected under this Bill.

Section 4 of the Bill says that, *the personal data of any person collected by an organization whether government or private, shall not be disclosed to any other organization for the purposes of direct marketing or for any commercial gain: Provided that, personal data of any person may be disclosed to charity and*

voluntary organizations after obtaining the prior consent of the person. Section 5 is related to Section 4 which says that, every person whose personal data or details have been processed or disclosed for direct marketing or for any commercial gain without consent shall be entitled to compensation for damages in such manner as may be prescribed. In this sense, these two sections are the most important sections of the Bill, because these are related to the theme of the Bill. In fact, these two sections portray the basic objective of the Bill and these are meant for enforcement of the basic intention of the Bill or to suppress the mischief concerned, that is to prevent the disclosure of personal data for direct marketing or for use of any commercial gain and to provide for compensation thereof.

The Bill also provides for the *Appointment of Data Controller* under Section 6, *Obligation on Organization collecting personal data* under Section 7, *Appropriate Government to provide money* under Section 8 and *Penalty* under Section 9. In this respect, *Section 9 of the Bill* is most important, because it provides for the imposition of *Penalty* for violation of the provisions of the Bill. According to this section, *whoever contravenes or attempts to contravene or abets the contravention of the provisions of this Act, shall be punishable with imprisonment for a term, which may extend to three years or with fine, which may extend upto ten lakh rupees or with both: Provided that the compensation for damages claimed under Section 5 shall be in addition to the fine imposed under this section.* Hence, the section is good enough for providing penalty as well as compensation for violating the provisions of the Act. In this sense, an attempt has been taken to provide a section to give full-proof protection for violating provisions of the Act. As a whole, the Bill is good enough for protection of Privacy of Personal Data or Information.

The Statement of Objects and Reasons of the Bill provides that, in our country, at present, there is no law on protection of personal information and data of an individual collected by various organizations. As a result many a time, personal information of an individual collected for a particular purpose is misused for other purposes also, primarily for direct marketing without the consent of the individual. The personal data of an individual collected by an organization is at times sold to other organizations for paltry sum in connivance with the employees of the organizations. These organizations with the competition to outdo each other enter

into the Privacy of individual by making direct marketing calls. There has to be some internal confidentiality standard within the system so that personal information of an individual may not be transferred to others, which, at times, causes a lot of distress and embarrassment. In many countries this right of individual has been recognized as basic civil right as an extension of Right to Privacy and laws have been enacted to protect the personal data of individuals. Accordingly, there is a need to have a law in our country also for protection of personal information to ensure that personal information of an individual collected for a particular purpose should be used for that particular purpose only and is not revealed to others for commercial or other purposes. Hence, the Bill is drafted.

Therefore, the *Statement of Objects and Reasons of the Bill* clearly specifies that, the Bill is meant for the protection of Individual Privacy from the unauthorised direct marketing calls without the consent of the individuals. In other countries, such protection is available under Privacy Laws, which is absent in India. As such, the Bill is prepared to establish an internal standard of Privacy and Confidentiality in this respect. Hence, it is a good attempt for protection of Data or Information Privacy in India. Though the Bill is meant for protection of Personal Data or Information and the term 'Privacy' is used nowhere, but the *Statement of Objects and Reasons* has clearly specified that, the intention of the legislature is to protect the Individual data or Information Privacy in this respect, by using the term 'Privacy' therein. It has also expressed its intention to enact a law on Privacy at par with the other democratic civilized countries. In this sense, it is a good attempt beyond doubt. But, it is to be remembered that, this law is having only limited application, because it is related to the protection of Privacy from the unauthorised interference by direct marketing industries only and not otherwise. Hence, it is not a full-proof Privacy protection legislature in India. Due to this reason, India needs a comprehensive legislation on the protection of Privacy. In this respect, drafting of *Privacy Bill, 2014* is an appropriate attempt. Here lies the significance of drafting two Bills covering two different aspects of Privacy in India. But, the situation is still in darkness, because both the Bills are lying dormant in the table of legislature since long time.

6.3.3.3. Role of Judiciary for Protection of Data or Information Privacy in India

Data or Information Privacy is an emerging concept in India and as such, both legislative as well as judicial initiatives are scanty in number. No such mentionable judgments are found in this respect, except a case on Privacy and Right to Information, called the *Vijay Prakash v. Union of India* case. In this case Privacy of Personal Information has been protected by the judiciary against the Right to Information.

Overall analysis of outstanding facets of Right to Privacy in India provides the idea that; India is lagging far behind U.S.A. and U.K. regarding the protection of these components of Right to Privacy.

6.4. Contemporary Debates and Current Trends of Right to Privacy : A Study of U.S.A., U.K. and India

In the contemporary social scenario, various new problems have been cropped up regarding the protection of Right to Privacy in U.S.A., U.K. and India owing to the changing social infrastructure and lifestyle. A number of new laws have been enacted and new rights have come into being. The existence of new rights has given birth to further controversies and debatable issues in the society. It is true that, Right to Privacy is a very important human right in the contemporary social scenario, without the protection of which, further progress and development of human society will be jeopardised. But, simultaneously it should also be remembered that, without the protection of other rights controversial to Right to Privacy, development of human society will also be endangered. In this sense, other human rights should be given equal importance and Right to Privacy should be curtailed as and when required. It should also be kept in mind that, which right should be given priority and when, that would depend upon the nature and circumstances of each case. In this respect, it is necessary to analyse the contemporary debates on Right to Privacy with other rights, in order to ascertain the limitations on Right to Privacy. The debatable issues have been discussed hereunder.

6.4.1. Freedom of Information, Right to Information and Right to Privacy : The Debate

Freedom of Information is an extension of the Freedom of Speech and Expression, which is a basic civil liberty in all the democratic civilized countries and

neither U.S.A. nor U.K. nor India is an exception to it. Freedom of Speech and Expression is the foremost personal liberty, the guarantee of which is utmost important for the guarantee of other personal liberties, because if there is no freedom to speak, providing other freedoms would be fruitless. As such, it is called the fourth pillar of separation of powers or the fourth estate in a democracy. Freedom of Information is considered as a part of Freedom of Speech and Expression, because without gathering information, it would not be possible to provide free expression. In this sense, free information is obvious for free expression. As such, gathering and disseminating information has also become a basic civil liberty. Freedom of Information means, freedom to access information through any media, be it physical or virtual. In this sense, it includes the freedom of information over the internet and in the computer.

Right to Information is nothing but the other name for Freedom of Information. This right enables private individuals to have access to public records and documents as well as in some cases, to private documents also. This right enables the individuals to exercise control over government activities and on the contrary, government becomes accountable to the general public. Any information can be sought with the exercise of this right for the sake of public interest. Here comes the conflict between Freedom of Information, Right to Information and Right to Privacy, because question is raised as to what information should be communicated for the sake of Freedom or Right to Information and what should be kept secret for the protection of Right to Privacy. The main criteria are of private and personal information, the Privacy of which is protected and can never be disclosed for the sake of Freedom or Right to Information. Such information could only be circulated when the public interest is seriously threatened and not otherwise. Right to Privacy of Information or in other words, Data or Information Privacy is seriously endangered in the present social scenario of processing and storing of huge amount of personal data over the computer and internet. Such information can be easily circulated on the ground of Freedom or Right to Information, prevention of which is a tough job.

Freedom or Right to Information and Right to Privacy, both are equally important for the peaceful existence of a democratic civilized society. Due to this

reason, a debate has occurred as to which one will supersede over the other. In fact, no one will supersede the other and the peaceful co-existence of a democratic society would lie on the balance between these two rights. All the modern democratic societies are striving towards the reaching of such balance and U.S.A., U.K. and India are parts of such process. In this respect, it is necessary to analyse the legislative and judicial scenario of these three countries for the protection of both the rights.

6.4.1.1. Freedom of Information and Right to Privacy in U.S.A. : A Legal Analysis

U.S.A. is a prioritised country of civil liberties, which is called the birthplace of civil liberties. Therefore, it has created legislative provisions for the protection of both the rights long before the initiatives of the other countries. It has enacted the *Freedom of Information Act, 1966*, which provides any person the right to request for access to federal agency records or information. Such disclosure can be prevented on the grounds of following nine exemptions contained in the law, where government agencies can withhold information. Those are :-

- (i) Classified information for national defence or foreign policy.*
- (ii) Inter personal rules and practices.*
- (iii) Information that is exempt under other laws.*
- (iv) Trade secrets and confidential business information.*
- (v) Inter-agency or intra-agency memoranda or letters that are protected by legal privileges.*
- (vi) Personal and medical files.*
- (vii) Law enforcement records or information.*
- (viii) Information concerning bank supervision.*
- (ix) Geological and geophysical information.*

Therefore, the U.S. *Freedom of Information Act, 1966* has prevented the free flow of information on the ground of protection of Right to Privacy of national defence and foreign policy, internal personal rules, trade secrets, confidential business information, communication of professional letters, personnel and medical files as well as law enforcement and bank records. In fact, it has protected the Information Privacy of different records, which would not come under the purview

of Freedom of Information. As such, this right is not absolute in U.S.A. and is subjected to Right to Privacy, which can only be curtailed in the serious public interest.

6.4.1.1.1. Snowden Case : The Biggest Ever Scam on Freedom of Information and Right to Privacy in U.S.A.

The greatest ever U.S. case on Right to Privacy and Freedom of Information debate is the case of *Edward Snowden*, an American computer professional, former Central Intelligence Agency employee and former contractor for the U.S. government, who has copied and leaked classified information from the *U.S. National Security Agency* in 2013 without authorization. His disclosures have revealed numerous global surveillance programmes run by *U.S. National Security Agency* as well as the surveillance over the domestic life of private individuals by way of interception of their private telephonic conversations with the help of telecommunication companies. Though U.S. government has pleaded the reasons for such surveillance as national security for prevention of terrorism, but *Snowden's* disclosure has raised the concern for protection of Information Privacy regarding the private information among the U.S. citizens. As such, the Freedom of Information requests have been increased in order to ascertain, whether the private lives of the U.S. citizens are under government surveillance or not.

Therefore, *Snowden's* case has created a debate in U.S.A. between the government right to Freedom of Information and the individual Right to Privacy. The question is raised as to how far the government can interfere into the private lives of individual citizens for the sake of its Freedom of Information in the interest of national security. On the contrary, U.S.A. has also enacted the *Privacy Act, 1974*, which provides the Right to Privacy of Personal Information against the unnecessary state encroachment. Again, there is the existence of Freedom of Information of individual citizens in order to ascertain government surveillance over their private lives. All these rights taken together have created a controversial issue in U.S.A. between the Right to Privacy and Freedom of Information.

6.4.1.2. Freedom of Information versus Right to Privacy : Legal Standpoint of U.K.

U.K. has also enacted its Freedom of Information law long after U.S.A., in the year 2000, called the *Freedom of Information Act, 2000*. It is a statute enacted by the Parliament of U.K. in order to create a public right of access to information held by public authorities. It has also made provision for the disclosure of information held by public authorities or by persons providing services for them and has also amended the *Data Protection Act, 1998* and the *Public Records Act, 1958*. Therefore, this Act has permitted the disclosure of public information and not the private or personal information. In this sense, it has not created any contradiction with the *European Convention for Protection of Human Rights and Fundamental Freedoms, 1950* or the *Human Rights Act, 1998*, which have created provision for the protection of Right to respect for Private Life, a right more or less, similar to Right to Privacy in U.K. Moreover, the *Freedom of Information Act, 2000* has permitted the disclosure of information from the public authorities and in this sense, private authorities are not bound to disclose information under the Act. This is also another provision directing towards the protection of Right to Privacy in implied manner.

However, the *Freedom of Information Act, 2000* has created a statutory right for access to information in relation to bodies that exercise functions of a public nature and three different kinds of such bodies have been covered under the Act – Public Authorities, Public Companies and Designated Bodies Performing Public Functions. The Act has also provided eight exemptions under which disclosure of certain types of information are exempted, which are as follows:-

- (i) *Information accessible by other means.*
- (ii) *Information belonging to security services.*
- (iii) *Information contained in court records.*
- (iv) *Information, disclosure of which would infringe parliamentary privilege.*
- (v) *Information held by the House of Commons or the House of Lords, where disclosure would prejudice the effective conduct of public affairs.*
- (vi) *Information obtainable under the Data Protection Act, 1998 or whose release would breach the data protection principles.*

(vii) *Information provided in confidence.*

(viii) *Information, disclosing of which is prohibited by an enactment, incompatible with European Union obligation or would commit a contempt of court.*

These eight exemptions are called Absolute exemptions, apart from these, there are also Qualified exemptions. Sum-total of all these exemptions provide protection to certain kinds of private and personal information, like information of security services including the national security and defence information, information within the purview of *Data Protection Act, 1998*, trade secrets and confidential information. All these exempted information project the idea towards the protection of private information, which ultimately project towards the protection of Right to Privacy in U.K. Moreover, U.K. has also enacted the *Data Protection Act, 1998* in order to protect Privacy of Personal Data or Data Privacy, which is a good attempt for protection of Right to Privacy in U.K. In this sense, keeping of *Data Protection Act, 1998* as an exemption under *Freedom of Information Act, 2000* is a good initiative for ending the debate between Freedom of Information and Right to Privacy in U.K. In no manner, Private or Personal Data or Information could be claimed under the *Freedom of Information Act, 2000*, which has uplifted the status of Right to Privacy in U.K. U.K. Judiciary is also not silent in the matter and by giving the decision in the *AMP v. Persons Unknown* case, it has upheld the Privacy of Personal Information over the medium of Information Technology and has prevented the unreasonable free flow of information.

6.4.1.3. Right to Information and Right to Privacy : A Representation of Indian Legal Scenario

India has also taken initiative for the protection of Freedom of Information, but it has not used this term; rather it has used the term Right to Information. In this respect, legislative and judicial initiatives of India are noteworthy. It has enacted the *Right to Information Act, 2005* in order to permit free flow of information throughout the territory as well as to enforce the social Right to Information of the general public. But, it has also imposed certain exemptions under which the Right to Information is restricted. Among these, one important restriction is imposed under *Section 8 of the Right to Information Act, 2005*, which has prevented the disclosure of Private or Personal Information. This is the Privacy protection provision under

the Act and it has protected Right to Privacy against the Right to Information. This is a great initiative for statutory protection of Right to Privacy in India, because India has not enacted any Privacy protection legislation till now. It has just drafted two bills in this respect; those are *Privacy Bill, 2014* and *Personal Data Protection Bill, 2014*. As these two laws are in the bill stage, there have been lots of controversies and vagueness regarding the concept and purview of Right to Privacy in India. This vagueness has also given birth to a debate between Right to Privacy and Right to Information regarding which one will supersede the other. Indian judiciary, therefore, come into the forefront to solve the debate by pronouncing various judicial decisions on the point and among those, *Vijay Prakash v. Union of India* is an important decision, which has protected the Right to Privacy of Personal Information against the unreasonable claim of Right to Information.

6.4.2. Privacy and Biometric Enabled National ID Card : Pros and Cons

In the post *September 11, 2001* era, concerns for prevention of terrorism have been raised throughout the world and simultaneously, the proposals for establishment of nationwide unique identity system have also been generated as an effective counter-terrorism measure in order to prevent illegal immigration along with other fraudulent activities. In this respect ‘Smart Card’ based technologies have been introduced in different countries throughout the world. Telephone Cards, Employee Cards, ATM Cards, SIM Cards of mobile phones etc. are examples of ‘Smart Cards’. After the success of these ‘Smart Cards’, countries have started to launch the ‘Biometric Enabled National ID Cards’ in order to prevent terrorism and related activities.

At present, several countries like *Belgium, Greece, Luxemburg, Germany, France, Portugal and Spain* have official compulsory national ID cards, but the *Nordic Law Countries* including *Sweden* and *Common Law Countries* like *U.S.A., Canada, New Zealand, Australia and Ireland* do not have such cards as well as they have historically rejected attempts to create National ID Cards.¹¹¹ U.K. has established a system of National ID Cards by enacting the *Identity Cards Act, 2006*,

¹¹¹ Sheetal Asrani-Dann, “*The Right to Privacy in the Era of Smart Governance : Concerns raised by the Introduction of Biometric-Enabled National ID Cards in India*”, *Journal of the Indian Law Institute*, Vol.47(3), July-September 2005, pp.53-94 at p.69.

but due to opposite remarks and criticisms owing to the adverse effects of that system including the loss of Privacy of the Personal Information of individual Card Holders, the Act has been repealed and the system has been destroyed in 2011. These activities show the worldwide negative attitude towards the establishment of a system of National ID Cards.

6.4.2.1. Problems of National ID Systems : An Estimation

The existing National ID Systems throughout the world have suffered from various problems and thereby have been objected from different sections of the society. In this respect, Six specific problems associated with the National ID Schemes are listed below:-

- (i) National ID Systems have failed to meet stated objectives.*
- (ii) National ID Systems create more problems.*
- (iii) National ID Systems conceal hidden agendas.*
- (iv) National ID Systems lead to function creep and discrimination.*
- (v) Privacy risks surrounding National ID Systems.*
- (vi) National ID Systems shift the balance of power from the individual to the state.¹¹²*

6.4.2.2. Threats to Privacy with the Introduction of National ID Systems : The Practical Implication

Introduction of National ID Systems may create various threats to Individual Right to Privacy. It has various reasons. Every identity system is made up of a support register containing personal information parallel to that on the ID Card. When this information is maintained on a central database, the ID number acts as a common identifier for multiple government agencies. The risks that this poses for Individual Privacy are monumental. Centralized information is centralized power. A national identifier contained in an ID card enables disparate information about a person scattered in different databanks to be easily linked and analysed through data mining techniques. This would allow the entries in one set of data to influence other unrelated parameters. Moreover, multiple-agency access to sensitive data or multiple-use of the ID card greatly increases the potential for misuse of personal

¹¹² *Id at pp.71-73.*

information either through corrupt disclosure or lapses in security.¹¹³ Hence, the Right to Privacy of personal information of the individual citizens is seriously threatened.

6.4.2.3. Effects of Biometric Enabled National ID Cards on Right to Privacy

The main problem of Biometric Enabled National ID Card System is that, the use of this technology amounts to a wholesale violation of the Right to Privacy which cannot be justified even on the grounds of compelling state interest. Even if one buys into the need for sacrifice Individual Privacy for an overwhelming national interest, the claims made by the industry and government that biometric technology is an effective means of achieving stated goals in clearly unsustainable, unsubstantiated and at best questionable.¹¹⁴

6.4.2.4. Disadvantages of Biometric Enabled National ID Card System

A number of studies have pointed out the following disadvantages of Biometric Enabled National ID Card System:-

- (i) Not everyone can necessarily be enrolled in a given biometric system.*
- (ii) Not every legitimate user is necessarily recognised by a biometric system.*
- (iii) Not every illegitimate user is necessarily barred by the biometric system.¹¹⁵*

6.4.2.5. Indian Scenario of Biometric Enabled National ID Card System : A Serious Concern for Right to Privacy

In spite of the above-stated disadvantages of Biometric Enabled National ID Card System and the threats it poses to Right to Privacy, India has launched a project for establishment of this system in India. The western countries, especially U.S.A. and U.K. feel that, this system seriously infringes the civil and personal liberties of the citizens by creating threats to Right to Privacy, because ultimately it leads to the establishment of surveillance society as existed during the era of totalitarian states and is not expected in the present day world. Knowing fully about all these adverse effects of this system, India has introduced this system herein.

¹¹³ *Id at p.73.*

¹¹⁴ *Id at p.74.*

¹¹⁵ *Id at p.81.*

6.4.2.6. Aadhaar Card : Biometric Enabled National ID Card of India

The Biometric Enabled National ID Card System in India is denoted by a unique identification number, called the *Aadhaar Number*, printed in the National ID Card, called the *Aadhaar Card*. In order to provide legal support to the *Aadhaar Unique Identification Number System*, Indian Parliament has enacted the *Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016*. The basic objective of the Act is to provide for, as good governance, efficient, transparent and targeted delivery of subsidies, benefits and services, the expenditure of which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals. The Act has established the *Unique Identification Authority of India (UIDAI)*, which has the power to specify the demographic and biometric information that must be collected for registration. It also has the power to issue Aadhaar numbers to residents, perform verifications and to specify the subsidies and services for which Aadhaar will be required.

6.4.2.7. Aadhaar and Privacy Violation : An Examination of Indian Condition

The *Aadhaar Act, 2016* has created provisions for the protection of personal information kept with the *UIDAI* and accordingly, *UIDAI* must ensure the security of identity information including the authentication records. Such information should not be revealed to anyone, even to the Court in totality and can be revealed to the Joint Secretary only in the interest of national security by an order issued from the Central Government. Though the *Aadhaar Act* has created provisions for protection of personal information of the individual citizens and has prescribed strict punishments for violation of the provisions thereof, but it has created serious impact on Individual Right to Privacy and has generated nationwide concern thereof. In the absence of any express statute on Right to Privacy, the four corners of this right are not specifically defined in India. As such, there is every chance of loss of Personal information of the individual citizens by going into the wrong hands.

6.4.2.8. Role of Indian Judiciary to Reconcile Aadhaar and Privacy Violation : Declaration of Right to Privacy as a Fundamental Right

Since the launching of the *Aadhaar Scheme* in India, it has been criticized by various sections of the society, especially owing to the violation of Information

Privacy of the individual citizens. Concerns have been raised throughout India in this respect and a number of cases have been filed in the Supreme Court of India regarding the violation of Fundamental Right to Privacy due to the establishment of *Aadhaar System*. The Supreme Court of India has tied all the cases together and has heard accordingly. First and foremost among them is the *Justice K. S. Puttaswamy v. Union of India*¹¹⁶ case, wherein a Nine-Judge Bench of the Supreme Court of India has unanimously declared Right to Privacy as a Fundamental Right under *Article 21 of the Indian Constitution*.

The Nine-Judge Constitutional Bench of the Supreme Court of India in the instant case has overruled its previous decisions in the *M.P.Sharma v. Satish Chandra* and *Kharak Singh v. State of U.P.* cases. The opinion of the Court has been pronounced by *Justice D. Y. Chandrachud*. Finally, the Bench has observed as follows:-

“ . . . 3(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is Court embarking on a Constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the Constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the presentation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being . . .

¹¹⁶ Writ Petition (Civil) No.494 of 2012, Supreme Court of India, 35071_2012_Judgment_24-Aug-2017.pdf, www.supremecourtindia.nic.in/supremecourt, visited on 21.10.2017.

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights . . .

5 Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creating of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data . . .¹¹⁷

Therefore, the decision of Supreme Court of India in the instant case has created a landmark in the field of Privacy protection in India. The Court has expressly declared Right to Privacy as a Fundamental Right under *Article 21 of the Indian Constitution*, established it as a part of Right to Life and Personal Liberty as well as a part of human dignity. It has expressly identified various facets of Right to Privacy, declared it as a limited right and has also raised concern for the protection of Information Privacy, which is the urgent need of the hour. It has directed the Central Government to take appropriate steps for the protection of Data or Information Privacy, which can only be curtailed on the grounds of certain specific legitimate state interests as mentioned in the judgment. Hence, the judgment has placed the Right to Privacy in strong footing in India, the judicial activism for which is no doubt praiseworthy.

6.4.2.9. Standpoint of Aadhaar Card System in India after the Judgment in Justice K.S. Puttaswamy v. Union of India Case

Basically, concern for violation of Information Privacy and Personal Liberty has been raised throughout India after the establishment of *Aadhaar Card System* in India and a number of cases have been filed in different High Courts and in the Supreme Court of India. All these cases have challenged the *Aadhaar Card System* as violation of Fundamental Right to Privacy, which have been filed in the nature of

¹¹⁷ *Id* at pp.262-265.

writ petitions since 2012. Thereafter, a Five-Judge Bench of the Supreme Court of India has been constituted to decide whether Right to Privacy has been violated owing to the *Aadhaar Card System*. But, the Attorney General of India has argued therein, in favour of the Union Government that, Right to Privacy has never been a fundamental right in India. At this juncture, a Nine-Judge Constitutional Bench of the Supreme Court of India has been constituted to examine whether Right to Privacy is a fundamental right or not. As such, the Five-Judge Bench has stopped working due to the solution of the matter under the Nine-Judge Bench. Finally, the Nine-Judge Bench has pronounced its judgment on 24.08.2017 by declaring Right to Privacy as a fundamental right in India. Now the time has come for the Five-Judge Bench to decide the *Aadhaar-Privacy* matter on the basis of the contention drawn by the Nine-Judge Bench. Such issue is still pending before the judiciary in India and is yet to be decided. However, the decision on 24.08.2017 has no doubt shaken the *Aadhaar Card System* to some extent and now the Union Government cannot do anything violating the Individual Right to Privacy.

6.4.3. Privacy versus Sting Operation : An Instrument of Crime Detection

Sting Operation means undercover police work that sets up a situation to catch criminals in the act of an undercover police operation in which police poses as criminals to trap law violators.¹¹⁸ The word “*sting*” derives its origin from 1930s American slang, meaning an act of theft or fraud, especially one that was carefully planned in advance and swiftly executed. In this sense, the term is best known as the title of a Hollywood film. The term then evolved in 1970s American usage to mean a police undercover operation designed to ensnare criminals. In this latter sense, “*sting*” is therefore a synonym for the expression “*set a trap to catch a crook*”.¹¹⁹ In law enforcement, a sting operation is an operation designed to catch a person committing a crime by means of deception. A typical sting will have a law-enforcement officer or co-operative member of the public play a role as criminal

¹¹⁸ Anjana Sharma, *Sting Operations and Law*, Mahaveer & Sons (Publishers and Distributors), New Delhi, 1st Edn., 2008, p.2.

¹¹⁹ *Id* at p.3.

partner or potential victim and go along with a suspect's actions to gather evidence of the suspect's wrongdoing.¹²⁰

Therefore, sting operation is an undercover operation by the police for detection of a crime or for catching a criminal. It is generally done in disguised manner to trap and arrest a criminal. A number of examples can be provided to clear the idea of sting operation. Those are:-

(i) *Purchasing illegal drugs to catch a supplier.*

(ii) *Posing as a client to catch a prostitute or escort agency.*

(iii) *Posing as a prostitute to catch a client.*

(iv) *Posing as someone who likes child pornography to catch a supplier.*¹²¹

In U.S.A., sting operation is conducted by FBI and other law enforcement agencies. The particular features of U. S. Sting Operations are *Targets of Sting Operations, Use of Informants and Laundering Referrals*. Sting Operation is also conducted in U.K. and it is legalised under the *U.K. Money Laundering Legislation*. Undercover operations are also carried on in U.K. under the *Regulation of Investigatory Powers Act, 2000*. India has also conducted number of sting operations, including *Bofors Operation in 1980, Tehelka Operation in 2001 and Operation Duryodhana in 2005*. A number of instances of sting operations are found throughout the world, but in the present social scenario, few questions have been asked regarding the legality and admissibility of evidence obtained by sting operation.

Sting operation is permitted under the personal liberty, called Freedom of Press, which is a constitutional right in U.S.A. guaranteed under *First Amendment of the U.S. Constitution* and in India guaranteed under *Article 19(1)(a) of the Indian Constitution*. In U.K. it is protected under *Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950 and Section 12 of the Human Rights Act, 1998*. As press freedom is not unfettered and reasonable restriction can be imposed on it, sting operation also cannot be conducted in unlimited manner. Here comes the controversy of sting operation with another personal liberty, called Right to Privacy, which is guaranteed under *Fourth*

¹²⁰ *Ibid.*

¹²¹ *Id at pp.3-4.*

Amendment of the U.S. Constitution, Article 21 of the Indian Constitution and Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms, 1950. Therefore, sting operation should be conducted in such a manner, so that, it should not violate the Individual Right to Privacy. In this respect, the Press Councils and Broadcasting Corporations of these countries have incorporated *Norms of Journalistic Conduct*, according to which journalists are bound to obey Right to Privacy and its objective is only the suppression of crime and not the harassment of respectable persons, then it is found legal as well as evidence obtained through it is admissible.

Right to Privacy is also subjected to certain limitations and if a person is engaged in unlawful activities, then he or she cannot take the plea of Right to Privacy against the sting operation. In all these cases, public interest is of paramount consideration, on which ground Right to Privacy can only be curtailed. As such, the *17th Law Commission* in its *200th Report* has recommended that, enactment of a law is the urgent need of the hour to prevent media from interfering with Right to Privacy of the individual citizens in India.

6.4.4. Privacy versus Narco-Analysis, Brain-Mapping and Polygraph Test : An Encroachment on Human Physical Integrity

Criminal Jurisprudence has reached at its highest level with the invention of forensic science. It is the application of tools and techniques of basic science for detection and solving of crime as well as to answer various questions associated with a criminal case. Narco-Analysis, Brain-Mapping and Polygraph Tests are three emerging tools of forensic science, which have been proved to be very useful tools of criminal investigation. Narco-Analysis has become a popular method of crime detection in India. It is a form of psychotherapy and an effective aid to scientific interrogation. It is a process whereby a subject is put to sleep, or into a state of half consciousness by means of dosage of scientific drugs and then interrogated while in a reverie.¹²² Polygraph is another important scientific tool of investigation. It is popularly known as lie detector and sometimes referred to as psycho-physiological detection. It is an instrument which measures and records physiological actions of

¹²² Chapter-2, *Narco-Analysis, Polygraph and Brain-Mapping : A Glimpse*, p.33, 09-Chapter 2.pdf, www.shodhganga.inflibnet.ac.in/bitstream, visited on 21.10.2017.

human body like blood-pressure of the subject, his pulse rate, respiratory system, skin conductivity while the subject is asked questions relating to the crime and he answers them. Polygraph tests measure all the natural changes caused by autonomic nervous system during questioning, which changes are beyond reasonable control of an individual and as such, such response changes transpires when the subject tries to tell a lie.¹²³

Next method of crime investigation is Brain-Mapping. It involves confrontation with a stimulus of special significance with electric signal known as P300 emitted from individual's brain, beginning approximately 300 million milliseconds after the confrontation. Since it is based on EEG signals and graphs, the system does not require the subject speak at all and he in way continues to exercise his right to keep silent. The suspect wears a special hair band with electronic sensor that measures the EEG from several locations on the scalp. The subject views on the computerized screen or even directly anything consisting of words, phrases, pictures etc.¹²⁴ Therefore, Narco-Analysis, Polygraph Test and Brain-Mapping are three important forensic tests of crime detection, which are fully comprised with physical integrity of human beings. Though these only proved to be useful methods of crime detection, but due to the use of human body in these tests, confrontation has come into being of these tests with Right to Privacy.

These three techniques are used in U.S.A. and U.K. as useful crime detection methods since the period of Second World War. In fact, these methods have been supported by the western world for prevention of crime, because these are known as peaceful methods as against the third degree tortures on the suspects of crimes. India has also started using these methods for crime detection in the post-independence era and Indian judiciary has never objected to the use of these methods. But, recently Supreme Court of India in the case of *Selvi v. State of Karnataka*¹²⁵ has raised objections regarding the use of these tests as violation of personal liberty under *Articles 20(3) and 21 of the Indian Constitution*. The court has held that, any involuntary use of these techniques on accused, suspects and witnesses would

¹²³ *Id at p.45.*

¹²⁴ Rajbir Deswal, "Supreme Court Ban on Narco test", The Tribune, 9 May 2010.

¹²⁵ (2010) 7 SCC 263.

amount to violation of their Fundamental Right to Protection against Self-Incrimination under *Article 20(3) of the Indian Constitution*. Again, forcible use of these techniques would amount to violation of Right to Privacy of those persons under *Article 21 of the Indian Constitution*, because in that case, it would seriously jeopardise their physical entity and integrity. It should also be remembered that, these techniques would not be able to produce accurate results every time and in that case, an innocent person may be found guilty. Therefore, these techniques should be used in conformity with the Right to Privacy of individual citizens, because prevention of crime is the urgent need of the hour, but not at the cost of any innocent found guilty or any unreasonable encroachment on Right to Privacy.

6.4.5. Privacy versus LGBT Rights : Recent Trend of Right to Privacy

LGBT (Lesbian, Gay, Bisexual and Transgender) or the homosexual persons should also have their Right to Privacy regarding their choice of partners as have been held by the U.S. Supreme Court in the cases of *Bowers v. Hardwick*, *Lawrence v. Texas* and *Obergefell v. Hodges*. All these cases are burning examples of protecting the marital Right to Privacy of the homosexual persons. Though these relationships have not been recognised previously in U.K., but have been legalised therein since 2010. More specifically, civil partnership of those persons has got legal recognition since 2005, whereas, same-sex marriage has got such recognition since 2014. In India, such activities have not received legal recognition till now due to the presence of *Section 377 of the Indian Penal Code, 1860*, which has declared sodomy or homosexual sex as a punishable offence. But, since few years back concerns have been raised throughout the territory of India for legal recognition of civil partnership and same-sex marriage of LGBT persons in India. In this respect, various cases have been filed in different High Courts and the Supreme Court of India.

The matter has been decided in positive manner in the case of *Naz Foundation v. Govt. of NCT of Delhi*,¹²⁶ which is a landmark Indian case, wherein the Delhi High Court has upheld the consensual homosexual sex between the adult persons as legal. It has held that, any legal provision considering such activity as a crime should be violative of Fundamental Rights under *Articles 14 and 21 of the*

¹²⁶ 2010 Cri L J 94.

Indian Constitution. As such, Delhi High Court has struck down *Section 377 of the Indian Penal Code, 1860* as unconstitutional for violating the Fundamental Rights of the Indian Constitution, so far as consensual homosexual sex between the adult persons are concerned. But, it has kept the *Section 377* valid for the forcible sex and sex with the minors. But, the Supreme Court of India in the case of *Suresh Kumar Koushal v. Naz Foundation*¹²⁷ has reversed the situation by overruling the decision of the Delhi High Court and has upheld the validity of *Section 377* as constitutional.

Again, time has come for the reversal of the situation after the decision of the *Aadhaar Privacy Case* or the case of *Justice K. S. Puttaswamy v. Union of India*, where the Supreme Court of India has clarified various dimensions of Right to Privacy and has included the Right to Sexual Orientation within it. Therefore, the Court has upheld the spirit of LGBT rights by stating that, “. . . *The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the constitution . . . [LGBT] rights are not so-called but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity . . .*”¹²⁸ In this sense, the court has included LGBT rights within the purview of Right to Privacy, which projects the idea that, it would again uphold the decision of the Delhi High Court in the near future. Though the reference of correctness of *Suresh Koushal* case is pending before a Constitution Bench of the Supreme Court, but the *Puttaswamy* case has thrown light on the issue, which has been accepted by the judges in the pending Constitution Bench case. Hence, there is every chance of Right to Privacy of LGBT rights for coming out in near future in line with the decision of the U.S. Supreme Court in the recent past.

6.4.6. Privacy and WikiLeaks : Threats to Secret Information and National Security

A new international non-profit seeking organisation has been established since the year 2006, popularly known as “*WikiLeaks*,” the main function of which is to publish secret information, news leaks and classified media supplied by anonymous sources. An Australian internet activist, called *Julian Assange* is the

¹²⁷ (2014) 1 SCC 1.

¹²⁸ *Supra Note 116 at p.124.*

founder, editor-in-chief and director of the organisation. Generally, this organisation aims at upholding the Public Right to Information as against the state interference and as such, it feels that, every individual has the right to have free and accurate information regarding the governmental and financial secrets for the sake of the protection of democracy throughout the world. Though this organisation itself enjoys Right to Privacy by not publishing the source of information, from where it is disclosed over the internet, but it has continuously violated Individual and State's Right to Privacy by disclosing financial statements, bank details etc. of overseas transactions as well as secret information relating to national security of various countries since last few years.

Here lies the controversy regarding the activity of *WikiLeaks*, because it says that, it is performing the role of whistleblower by exposing illegal and unethical activities of the government. On the contrary, governments of various countries have challenged the legal authority of *WikiLeaks* for disclosing the secret governmental and other information. U.S.A. has severely criticised the activities of this organisation, because it has seriously disturbed the 2016 election of that country. U.K. and India is not so aware about its activities. But owing to the threats posed to *WikiLeaks* by U.S.A., *Julian Assange* has been frightened very much and is seeking political asylum in Sweden, the country very much enriched with the data protection laws and also feels safe in Iceland, its originating country.

Practically, it has increased the controversy between Right to Privacy and Right to Information, because the questions have been raised regarding the demarcation line between these two rights. The question is asked as to who will decide which information is to be disclosed and which not and who has given the authority to it to disclose such information. The question is also asked whether a philanthropic organisation like it has the power to disclose any governmental secret or financial information over the internet. The answers to these questions cannot be affirmative, because that would produce serious threats to Individual Privacy. Hence, worldwide activities of *WikiLeaks* could not be supported owing to the violation of Individual Right to Privacy, especially for the sake of protection of the national security of the states, any leakage of which information could destroy the whole system of defence, internal and external affairs of a state. Therefore, in the

contemporary social scenario, *WikiLeaks* has produced a new threat on Right to Privacy, which can only be prevented by stopping its unauthorised activities.

Contemporary debates on Right to Privacy have shown various new problems which have occurred in the field of Privacy, some of which have been solved, but others are still continuing. In fact, it is an ongoing debate which will again increase with the passage of time and with the invention of new scientific technologies or with the development of new human rights. When some of the debates will be solved, new debates will come into picture. In this sense, the ongoing debates on Right to Privacy will create many new dimensions of Right to Privacy which will be helpful for any future study.

6.5. Limitations of Right to Privacy : An Appraisal

Every fundamental right should have certain limitations and it should not be exercised in such a manner, so that, the fundamental rights of other persons are curtailed. Man is a social being and lives in a society of other human beings. Every society is culmination of both individual and social rights or in other words, personal and civil liberties. Civil societies are induced with personal liberties, without the guarantee of which, the very existence of civil societies will be destroyed. But, simultaneously it should also be remembered that, protection of civil liberties in the nature of public rights is the core element of every society, without the protection of which a civil society would be scattered into pieces in the name of protection of personal liberties. As man cannot live alone and always lives in the society, therefore, he always tries to create a balance between individual and social rights. Every man feels secured in the peaceful environment of a society, which are also the protector and guarantor of all the basic human rights. War and war-like situations only take away huge number of life and property, as such, those situations are unexpected. Instead, peaceful social environment is the expectation of every human being which lies at the balancing of individual and social rights.

Balancing of different rights in a society sometimes brings sacrifices on the part of different sections of the society, which means sacrifice of one's rights to some extent for the sake of protection and enjoyments of the rights of others. Even the Social Contract Theory of medieval period Jurisprudence of Natural Law School has spoken about such sacrifice. According to the Social Contract Theory, the

citizens of a community have to sacrifice certain human rights of themselves to the king or ruler for showing allegiance to him; instead he would protect the whole society and provide security to their lives and properties. This example shows the evidence of sacrifice of individual rights for the sake of protection of community interest or the larger social interest. In fact, Social Contract Theory is the origin of concept of sacrifice of individual rights, which in other words, called the Limitation on individual human rights.

Therefore, sacrifice of personal liberties lies at the core of every democratic civilized society. This age-old concept of sacrifice has led to the development of modern concept of limitation of human rights. In the present social scenario, every human rights instrument, be it international, regional or national, imposes certain restrictions or limitations on different individual human rights for the sake of protection of public interest or social interest. Right to Privacy, being an individual human right, is not an exception to it and is also subjected to such restrictions or limitations. On the one side, Right to Privacy is expected for the prevention of government surveillance in a society and for protection of personal liberty. But, on the other side, absolute enjoyment of Right to Privacy may create disturbances to the administration of justice as well as take away the Freedom of Press totally. Therefore, imposition of limitations on Right to Privacy is the urgent need of the hour.

More specifically, the grounds for limitations on Right to Privacy may be summarised as follows:-

(i) Public Interest is the first and foremost limitation on Right to Privacy and if any private information is circulated for the protection of public interest, violation of Right to Privacy cannot be claimed.

(ii) Next limitation is Public Figure. Public Figures or celebrities have Right to Privacy in respect of their private lives only and not for public lives. As such, any news covering their public lives can be published and they cannot claim violation of their Right to Privacy for that.

(iii) Public Place is the third limitation. Therefore, if any incident occurs in a public place and is reported in the newspaper, then violation of Right to Privacy of the individual concerned cannot be claimed.

(iv) *Public Record is the next limitation, which means, if any information is already available in the public record, it is public information and not private information. Therefore, Right to Privacy of that information cannot be claimed.*

(v) *Public Disclosure is the fifth limitation. If public disclosure of any information is required for the protection of natural justice, then Right to Privacy of that information cannot be enforced against public disclosure.*

(vi) *Consent is another limitation on Right to Privacy, which means, if any person has voluntarily waived his or her Right to Privacy by giving consent for publication of any private information, then that person cannot claim the violation of Right to Privacy in that case at any later period.*

(vii) *Privilege is the next limitation on Right to Privacy. Certain kinds of relationships are called Privileged relations and communication between them is called Privileged Communication, e.g. husband-wife, parent-child etc. personal relationships and doctor-patient, attorney-client etc. professional relationships. Generally, individual persons share certain private information within these relationships, which amounts to private communication and does not amount to publication of the same. Therefore, it does not attract violation of Privacy.*

(viii) *Newsworthiness of any information is another limitation on Right to Privacy, on which ground Press can publish any information and there occurs no violation of Right to Privacy.*

(ix) *Freedom of Information or Right to Information is another limitation on Right to Privacy. Right to Privacy of any information can be curtailed for the sake of this right, if found reasonable.*

(x) *Administration of Criminal Justice is the next limitation on Right to Privacy. For the sake of such Justice, various methods like Sting Operation, Narco-Analysis, Polygraph Test and Brain-Mapping can be conducted as against the Right to Privacy of an individual person, if found reasonable.*

Last but not the least, limitations or restrictions on Right to Privacy can be imposed on any of the grounds mentioned under Article 19(2) of the Indian Constitution. Those are *Security of the State, Friendly relations with Foreign States, Public Order, Decency or Morality, Contempt of Court, Defamation, Incitement of an Offence and the Sovereignty and Integrity of India.* In fact, these are the

protectors of society and any personal liberty can be curtailed on these grounds, be it Right to Privacy or Freedom of Expression.

6.6. Comparative Analysis of Outstanding Facets, Dimensions, Contemporary Debates and Recent Trends of Right to Privacy : Legal Standpoint of U.S.A., U.K. and India

A comparative analysis of the legal standpoint of U.S.A., U.K. and India is required with respect to outstanding facets, dimensions, contemporary debates and recent trends of Right to Privacy. Such analysis will provide an idea regarding which component is more fully protected in which country and which not. This analysis will also help to ascertain the Indian position in comparison to the other two countries. Next part of the study will concentrate on the issue.

The Comparative Analysis is presented hereunder:-

- (i) The first outstanding facet, called Right to respect for Private Life is protected only in U.K., whereas, Right to Privacy is protected in U.S.A. and India.
- (ii) Next come to the question of Right to Privacy of Women, which has got good amount of protection in U.S.A. and India both in the legislative and judicial field. But, it has got limited protection in U.K. only in the legislative field.
- (iii) Next element is the Privacy of Children, which has got good amount of legislative and judicial protection in U.S.A. But, it is neglected in U.K. India is concerned with the protection of this right, but not as much as of U.S.A. The concern is more fully raised only in the recent period.
- (iv) The protection of Privacy at the verge of scientific and technological developments has raised more concern in U.S.A. through legislative and judicial development. U.K. has also enacted few laws and pronounced judgments in this respect. Even India has enacted little legislation in this respect, but judicial development has not been made to such extent.
- (v) Data or Information Privacy is well-protected in U.S.A. since 1974, U.K. has started such protection since 1998, but India is still a novice on the issue. It has just drafted few bills on the subject in 2014.
- (vi) Regarding the contemporary debates, both U.S.A. and U.K. have recognised Freedom of Information, whereas India has recognised Right to Information.

(vii) U.S.A. has enacted the *Freedom of Information Act* in 1966, U.K. has enacted the *Freedom of Information Act* in 2000, but India has enacted the *Right to Information Act* in 2005.

(viii) *Snowden Case* is noteworthy in U.S.A., *AMP v. Persons Unknown* case is noteworthy in U.K. and *Vijay Prakash v. Union of India* case is important in India with respect to the issue of Privacy versus Freedom or Right to Information.

(ix) With respect to the issue of Privacy versus Biometrics Enabled National ID Card, both U.S.A. and U.K. have rejected the proposals for establishment of such system. But, India has established such system and created many new threats on Right to Privacy.

(x) The Biometric Enabled National ID Card is called *Aadhaar Card* in India, which is absent in U.S.A. and U.K.

(xi) The Supreme Court of India has recently pronounced a landmark judgment in the case of *Justice K. S. Puttaswamy v. Union of India* to resolve the dispute between Aadhaar and Privacy. No such initiatives are found in U.S.A. and U.K.

(xii) Sting Operation is practised in all the three countries of U.S.A., U.K. and India, but all these countries have resolved that, it should not be used by violation of Right to Privacy as against the need for crime detection. In this respect, the law is similar in the three countries.

(xiii) Narco-Analysis, Polygraph Test and Brain-Mapping are used as methods of crime detection in all the three countries, but all are of similar view in this respect, that these methods should not violate Right to Privacy. *Selvi v. State of Karnataka* case in India is noteworthy in this respect.

(xiv) Right to Privacy of LGBT persons is recognised in U.S.A. since long. Latest judgment on the issue therein is *Obergefell v. Hodges*. U.K. has started to recognise the right since 2005 and has established it in 2014. Though India has never recognised the right previously, but has recognised it in the recent period. In this respect, the cases of *Naz Foundation v. Govt. of NCT of Delhi*, *Suresh Koushal v. Naz Foundation* and *Justice K. S. Puttaswamy v. Union of India* are noteworthy.

(xv) Limitations on Right to Privacy on the ground of Public Interest or Freedom of Press have been imposed in lesser amount in U.S.A. But, U.K. has always tried to

limit Right to Privacy against the Freedom of Press. India is still in the developing stage on the issue and has not reached at any conclusion.

The above-stated comparative analysis provides the idea that, U.S.A. is the land of civil liberties and as such, it has tried to protect Right to Privacy in full-proof manner as a personal liberty. U.K. has recognised the Right to respect for Private Life and not the Right to Privacy. Therefore, this right is always neglected therein. India has followed the path of U.S.A., but has started its Privacy protection initiatives recently. Hence, its initiatives are only at the developing stage and no such full-proof protection is available till now.

6.7. Sum-Up

The outstanding facets, dimensions and current trends of Right to Privacy in U.S.A., U.K. and India have given the idea that, these three countries are facing many new challenges against the protection of Right to Privacy at the verge of invention of advanced scientific technologies as well as the storing and processing of huge amount of computerised data and thereby need adequate legislative and judicial intervention into the matter. All the three countries have played an important role in this respect, according to their limited capacities to solve problems. But, the extensive legislative and judicial intervention into the matter has sometimes created certain negative impacts on the society, owing to which many new debatable issues have been cropped up. Some of those issues have been solved, but some are still pending, having hoped to be solved in near future. Moreover, Right to Privacy is a limited right and its limitations should always be remembered at the time of enacting any legislation or pronouncing any judgment for its protection. Due to this reason, absolute protection cannot be provided to Right to Privacy at any time. A comparative analysis of the outstanding facets and dimensions of Right to Privacy in U.S.A., U.K. and India has provided that, U.S.A. is the country having strongest protection of Right to Privacy in comparison to other two countries. This is the whole outcome of this Chapter.

More specifically, Chapter-6 can be summed-up in the following manner:-

(1) The idea of Privacy is culminated into the concept of Freedom. Various jurists have opined that, Privacy means freedom from unauthorised interference into one's private life.

- (2) Enjoyment of Privacy is impossible in the environment of absence of individual freedom.
- (3) Individual Freedom is not absolute and always subjected to law and legal control.
- (4) But, Individual Freedom or Right to Privacy can be curtailed by just, fair and reasonable legal procedure acted in accordance with the principles of natural justice.
- (5) Every civil society should try to create a balance between Individual Privacy and larger social interest for the peaceful co-existence of each and every individual in the civil society.
- (6) Privacy, Freedom of Information and Publicity, these are the three essential attributes of a modern democratic society and the peaceful co-existence of a modern democracy depends upon the creation of a balance between the three.
- (7) As such, every modern society has tried to protect these three rights by enacting legislations and pronouncing judgments in this respect.
- (8) In the contemporary social scenario, a number of problems have been cropped up relating to various aspects of Right to Privacy which are closely associated with modern social life.
- (9) In the present day society, human beings are subjected to various new habits and tastes owing to social change, which have created either threats on Right to Privacy or on human life and dignity.
- (10) Such problems have also given birth to many new dimensions of Right to Privacy, which are non-existent in the previous century.
- (11) Those are generally called the outstanding facets of Right to Privacy, because without addressing to those threats and challenges, any discussion on Right to Privacy would remain incomplete.
- (12) More specifically, these areas are *Privacy vs. Private Life*, *Privacy of Women*, *Privacy of Children*, *Privacy vs. Scientific and Technological Developments* as well as *Data and Information Privacy*.
- (13) As regards the outstanding facets, U.S.A. has not recognised the Right to respect for Private Life, rather it has recognised Right to Privacy.

- (14) U.S.A. is equally strong in the protection of Right to Privacy of Women, Privacy of Children, Privacy at the verge of advanced scientific technology as well as Data or Information Privacy.
- (15) U.K. has not recognised Right to Privacy; rather it has protected the Right to respect for Private Life.
- (16) U.K. has neglected the Right to Privacy of Women and Children, but has tried to protect Right to Privacy at the verge of advanced scientific technology and Data or Information Privacy.
- (17) India has recognised Right to Privacy, rather than Right to respect for Private Life.
- (18) In India, Right to Privacy of Women and Children is protected by legislative and judicial initiatives.
- (19) But, India lacks its initiatives for protection of Right to Privacy at the verge of advanced scientific technology and Data or Information Privacy.
- (20) Legislations and judicial decisions on outstanding facets have created *many* new debates on Right to Privacy in the contemporary social scenario.
- (21) Such debates have occurred in the areas of *Freedom of Information, Right to Information and Right to Privacy, Privacy and Biometric Enabled National ID Cards, Privacy versus Sting Operation, Privacy versus Narco-Analysis, Polygraph Test and Brain-Mapping* as well as the *Privacy versus LGBT Rights*.
- (22) Right to Privacy is not an absolute right and limitations can be imposed on it on the grounds of *Public Interest, Public Figure, Public Record, Public Disclosure, Consent, Privilege, Newsworthiness, Freedom of Information or Right to Information and Administration of Criminal Justice*.
- (23) Limitations on Right to Privacy can also be imposed on the grounds specified under *Article 19(2) of the Indian Constitution*.
- (24) The comparative analysis of outstanding facets and dimensions of Right to Privacy as well as the contemporary debates on Right to Privacy provide the idea that, U.S.A. is the strongest country regarding Privacy protection, U.K. is at the middle level and India is a novice country with respect to the measurement of such protection.

Last but not the least, continuous process of social change is giving birth to many new technologies and new infrastructures in our daily lives, which are posing threats to our well-acclaimed human rights and Right to Privacy is not an exception to it. Daily challenges towards this right give birth to many new dimensions of Right to Privacy, which is again increasing judicial activism in the field of Right to Privacy. As such, many new cases are coming out, like *Obergefell v. Hodges*, *AMP v. Persons Unknown*, *Naz Foundation v. Govt. of NCT of Delhi*, *Suresh Kumar Koushal v. Naz Foundation* and *Justice K. S. Puttaswamy v. Union of India*. In this sense, Right to Privacy is not a static, rather a dynamic right and constant social progress and development is responsible for the ever-growing and never-ending process of development of Right to Privacy. But, Right to Privacy is a limited right and hence, it could never come as an impediment on the process of administration of justice in any society.

CHAPTER 7

CONCLUSION AND SUGGESTIONS

*“Privacy is a common value in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a public value in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system ...”*¹

Right to Privacy is a valuable human right for every individual of past, present and future society. It is a variable concept and varies with the passage of time, place and society. Therefore, it is not easy to define ‘Privacy’ in strict sense of the term. Privacy generally means, the right to be let alone (Justice Cooley, 1888). In 1890, Louis Brandeis and Samuel Warren published a seminal article in the Harvard Law Review, titled “The Right to Privacy,” where it was observed that, the object of Privacy is to protect ‘inviolate personality.’ Next important landmark in the field of Privacy, is the book written by Prof. Alan F. Westin, titled “Privacy and Freedom,” 1970. It defines Privacy as the desire of individuals for solitude, intimacy, anonymity and reserve. According to him, Privacy is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent, information about them is communicated to others.

Adam Carlyle Breckenridge in his book, “The Right to Privacy” (November, 1971), has described Right to Privacy as “A most Comprehensive Right.” In view of Carlyle, Privacy is the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means, his right to withdraw or to participate as he thinks fit. It is also the individual’s right to control dissemination of information about himself and it is his own personal possession.

Therefore, Right to Privacy cannot be described as a single human right, rather it is a bundle of rights and it includes human being’s choice over his or her own personal affairs to decide the extent of public disclosure of the same. In brief,

¹ Priscilla M. Regan, *Legislating Privacy : Technology, Social Values, and Public Policy*, 1995, pp.213, 225.

Privacy means, freedom from unauthorized and unwarranted intrusion into one's private and personal life. In the modern age, various new dimensions of Right to Privacy have been emerged, like Privacy of Family, Home and Correspondence, Privacy of Marriage, Privacy of Information, Workplace Privacy, Privacy of Celebrity Life, Health Care Privacy and so on.

Privacy has both material and philosophical aspects. Hence, the term 'Privacy' has been derived from the term 'Private Space.' Every individual, be he of past, present or future society, always acts in search of his own 'Private Space,' where the one can enjoy freedom from outside interference and can act according to one's wishes. The oldest and traditional definition of Right to Privacy was propounded by Thomas M. Cooley as well as by Warren and Brandeis. Though various Indian and Western Scholars have tried to define Privacy in their own terms, but the actual outcome was not very much fruitful, because the idea of Privacy is a variable concept and varies with the societal as well as cultural variation.

Various authors have expressed that, it is impossible to define 'Privacy' universally due to its variable nature based on the social and cultural context. Hence, the Western and Indian Scholars have possessed differences in their opinions while defining Privacy. According to Western Jurists, Privacy is not a single right, rather it is a bundle of rights and as such, the concept of Privacy defined in the Nordic Conference of Jurists, 1967, is appropriate. On the contrary, Indian Jurists have opined that, Privacy is a single concept and whatever may be the nature of the right, actually Privacy lies in the idea of exclusion of all others from the purview of the activities of an individual.

Depending upon the nature and circumstances of each case, Privacy can be classified as Intimate Privacy, Family Privacy, Social Privacy and Individual Privacy. Social Privacy can again be classified into Political or Legal Privacy, Professional Privacy and Community Privacy. But, the classification of Privacy is not an exhaustive one; it may change according to changing time, place and society. Also, the classification is not based on water-tight compartments and is overlapping with each other.

The idea of Privacy is embedded in its nature and basis. The nature of Privacy is characterized by freedom of individual human beings from any outside

interference. Accordingly, Privacy is nothing but the exclusion of all others from various aspects of the life of an individual human being. Hence, the nature of Privacy is embedded in the ideas of freedom and exclusion.

Though there may be various kinds of Privacy Torts, but in all cases, only one right is violated, i.e. right to live with human dignity. Another name for that right is 'inviolable personality.' Hence, it can be said that, whatever may be the nature of privacy violation, ultimately the 'inviolable human personality' is violated. In this sense, to protect right to privacy means, to protect inviolable personality of individual human beings, without the protection of which the Right to Privacy can never be protected. Hence, the basis of Privacy is nothing but the 'inviolable personality' of human beings.

As the idea of Privacy centres around the concept of 'private space,' therefore, the amount of private space which everyone should enjoy freely and the time limit of outside interference over it, will be the scope, ambit and extent of Privacy. On the contrary, significance of Privacy means, the importance of Privacy in a civilized society.

The significance of Privacy can again be sub-divided into two parts – Difference between Privacy and Right to Privacy and Whether Privacy is a Public Right or Private Right. In this sense, Privacy is a condition and hence, it may be foregone, forfeited or invaded. A Right to Privacy includes the notions of control and voluntariness in denoting individual's claims of entitlement to the recognition of their interests in Privacy.

Privacy also has various effects. The effects of Privacy means, prevention of unwanted publicity and interference into human life to protect human dignity by recognition and enforcement of Right to Privacy in a complex social structure.

Over and above, Privacy has to perform different functions in a civilized society. According to Prof. Alan F. Westin, the Functions of Individual Privacy are Personal Autonomy, Emotional Release, Self Evaluation and Limited and Protected Communication. The functions of Privacy play an important role to protect personal autonomy by preventing unlimited and unprotected communication of information, which ultimately protect the right to live with human dignity in a modern democratic society.

The functions of Privacy propounded by Prof. Alan F. Westin can be criticized on the point that, these functions should equally be played during social transformation from primitive to modern or civilized society also. Otherwise, the utilization of those functions would be incomplete. Last but not the least, the functional justification of Privacy as a basic human right is derived from the purpose it serves while protecting individuals from various emotional disturbances, like anxiety, humiliation, embarrassment, disgrace, inconvenience, annoyance, shame and indignities.

The origin of Right to Privacy can be traced back in U.K. to the famous English Case of *Prince Albert vs. Strange, 1848*, where privacy of royal couple Queen Victoria and Prince Albert, was violated by a photographer Strange in their private premises. In U.S.A., *Boyd vs. United States, 1886*, is an important case on Right to Privacy. In this case, it was held that, the purpose of prohibition against unlawful searches and seizures under Fourth Amendment of the U.S. Constitution were to protect security and privacy of persons, houses, papers and effects.

India also had a great historical background and a well-advanced law of privacy since the ancient period. In India, the origin of Privacy was found in the ancient Hindu Jurisprudence, in the description of houses in Grihya-Sutras, Kautilya's Arthashastra and the epics of Ramayana and Mahabharata. In the medieval period, Privacy was found in the habit of observing 'purdah' among the Muslim women to prevent public exposure of their faces.

The development of Right to Privacy in India in the modern period has been marked by a very old case, *Nuth Mull vs. Zuka-Oollah Beg and Kureem Oollah Beg, 1855*. It has been the first Indian case decided by the Sadar Diwani Adalat of the North-Western Provinces, in 1855, where the question of Right to Privacy has arisen. This case shows the evidence that, the Right to Privacy has been broadly recognized in India at least half a century before the U.S.A., where the idea has come in 1890 by the publication of the Warren-Brandeis article. It has been held by the Court in this case that, construction of a house should not be made in such a way, so that, the others premises may be looked into from the roof of the new house and thereby their Right to Privacy is violated. Hence, Customary Right to Privacy has been protected in India since the very old period.

In the absence of express legislative enactments, the law of Privacy has been gradually developed by judicial pronouncements since the very old past in the countries of U.S.A., U.K. and India. In U.K. and U.S.A., it was based on the Law of Confidence, whereas, in India, it was considered as a Customary Right. However, in the International arena, Right to Privacy has become a matter of discussion since the adoption of Universal Declaration of Human Rights, 1948.

With the advancement of modern science and technology, the scope and ambit of Right to Privacy has been expanded to a considerable extent. Though the right has got many new dimensions in the modern age, but it is not a right of recent origin, rather it has a great historical background and has been originated in the very old past.

The term 'Privacy' is derived from the Latin word 'privatus' which means separated from the rest. Though it is a variable concept and varies with cultural or social context, but actually it means, the right to be left alone. The need for Privacy is to create a balance between individual and social interests, which is equally applicable to past, present and future society. In this sense, the necessity of Privacy was found in the dawn of human civilization. The idea of Privacy is as old as Biblical periods. Also the growth and expansion of Privacy varied according to the variation in different stages of human civilization. Hence, the description of origin and history of Right to Privacy should proceed from the ancient period to the modern period. In fact, the idea of Privacy was originated in the animal society and gradually it has been incorporated into the human society.

The idea of Privacy, which was originated in the animal society, has been adopted in the primitive human society, where the traces of it were first found. According to different Anthropological studies, the idea of Privacy varied in respect of different primitive societies. With the evolution of primitive society to ancient society and then gradually to modern society, the idea of Privacy has been developed to get its present shape. The root of Privacy and its protection is embedded in the history of human civilization, which is characterized specially by transformation of primitive society into modern society. The social transformation has increased both the physical and psychological opportunities for Privacy and also proved to be fruitful for conversion of these opportunities into choices of values in

the context of socio-political reality. Social transformation is the responsible factor for changing nature of Privacy as well as the changing character of Privacy violations from primitive societies to modern societies.

The comparison of 'Privacy' between primitive and modern societies, establishes that, whatever may be the nature of society, primitive or modern, the need for Privacy or seclusion would always be there, for fulfilment of physical and psychological desires of man. The history of Privacy in the Western society starts from the evolution of Western political and social institutions since the time of Greek and Roman civilizations. The history of Privacy in modern democratic society is characterized by its political system, which plays the fundamental role for shaping its balance of Privacy. The comparative analysis of Privacy in different Western societies and cultures show that, Privacy is not a static, rather a dynamic concept. For creating an ideal modern society having the Right to Privacy, there should be a balance between the basic postulates of Individual Privacy, called Solitude, Intimacy, Anonymity and Reserve.

The origin of Privacy in ancient India was culminated into the term 'Avarana', in the idea of Meditation in Vedas and Upanishads and embedded in the idea of 'Dharma'. The history of Privacy in India was divided into the Hindu and Muslim periods, both of which were enriched with the rules and regulations of Privacy. Privacy was never an alien in India; rather it was embedded in the deep rooted custom of the rich cultural heritage of India. The development of Right to Privacy in U.S.A. in the modern period has been based on the Warren-Brandeis article and the search and seizure cases under Fourth Amendment of the U.S. Constitution, the final result of which is the Privacy Act, 1974. U.K. had no law of Privacy; instead there was the law of breach of confidence. With the help of various legal developments, the Younger Committee Report was submitted in 1972, the final outcome of which is the Data Protection Act, 1998. Though India is lagging far behind U.K. and U.S.A. for protection of Privacy in the modern period, but it is also enriched with various legislative and judicial developments, which ultimately has given rise to the Right to Privacy Bill, 2011, now known as Privacy Bill, 2014.

Right to Privacy is not a narrower local or regional human right, rather its scope and extent have been broadened so much that, it covers a wide range of

globally accepted human rights within its periphery. In fact, Right to Privacy is considered as a global phenomenon in the modern age. It has international recognition and is effective in all parts of the world. International recognition of Right to Privacy has been started just after the end of Second World War and the establishment of United Nations in the year 1945. It has got a remarkable development under the auspices of the United Nations. Presently, it is an internationally acclaimed human right. As such, it is incorporated as an important human right in numerous International Instruments. In this respect, it has a great international legal perspective.

In the international human rights law, 'Privacy' is clearly and unambiguously established as one of the basic human rights in 1948 with the proclamation of the Universal Declaration of Human Rights. The importance of Privacy as a human right and its need for legal protection has been given in the various other international instruments, like the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966. In the regional level, there are also various human rights Conventions, which deal with the protection of Right to Privacy. Important conventions among them are the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the American Convention on Human Rights, 1969, the African Charter on Human Rights and People's Rights, 1981 and the Asia-Pacific Privacy Charter, 2003.

Apart from the International and Regional legal instruments, Municipal Laws of various Countries are well-advanced on Right to Privacy. The Municipal Laws of different Countries can be divided into the Privacy Laws of Common Law Countries, Civil Law Countries and the Nordic Law Countries. A few other countries are also remaining, the Privacy Laws of which are important in this respect. Moreover, Privacy Laws are found all over the world in an all-round manner. In the modern period, the significance of Right to Privacy has been understood by all legal systems in the world and as such, the laws of Privacy enacted by them have become fruitful to portray the International Legal Arena of Right to Privacy.

The existence of Privacy in different parts of the world is not an isolated event but the outcome of a continuous process of development of Privacy all over the world. The study of Privacy from the social and cultural contexts helps to draw the contention that, Privacy is not a narrower local or regional right; rather it is a universal right having great significance in the context of mankind in general. In the present day society, Individual Privacy is recognized as a basic human right in all the developed and developing countries. In this sense, the internationalization of Privacy is required by prescribing certain norms of Privacy, which should be universally acclaimed and international in character. This process of internationalization of the Privacy Rights has already been started under the auspices of the United Nations all over the world.

Right to Privacy has assumed its universal character in 1948, since the proclamation of the Article 12 of the Universal Declaration of Human Rights. It has been supported by various other International and Regional legal instruments, which have tried to give this right a concrete shape in the context of the world at large. The internationalization of Right to Privacy has received a special significance by a number of Municipal legal instruments of worldwide recognition, like the Nordic Conference of Jurists, 1967 and the Younger Committee Report, 1972. Moreover, the international character of Right to Privacy is characterized by the ideas of Liberty and Human Rights, which are essential for giving it a concrete shape. These ideas have been recognized as the Privacy denoting factors in the international periphery with overwhelming consensus. In fact, in order to give effect to that recognition, this right has been incorporated as an important human right in various international, national and regional human rights instruments as well as separate legal instruments has been created governing Right to Privacy as a whole.

More specifically, the legal instruments for the protection of Right to Privacy can be categorized as the International Legal Instruments mostly made under the auspices of the United Nations, the Regional Legal Instruments and the Municipal Laws of different countries. The Municipal Laws of different countries can again be divided into the Laws of Common Law Countries, Civil Law Countries and Nordic Law Countries. The Privacy Laws of major Common Law Countries include the Laws of U.S.A., U.K., India, Australia, Canada and South Africa whereas; the major

Civil Law Countries in this respect are France, Germany and China. On the contrary, the major Nordic Law Countries having Privacy Laws are Sweden, Denmark and Norway.

The International Legal Instruments on Right to Privacy have tried to give protection to this right in an all-round manner, which have been made under the auspices of the United Nations and by way of adopting these instruments; United Nations has played a very important role for the protection of Right to Privacy in the international field. The regionalization of Right to Privacy is also necessary along with the universalisation of this right and for this purpose, various Regional Legal Instruments have been made, which have become fruitful for the implementation of this right in the regional level. As regards the Municipal Laws of different countries, the Privacy Laws of the Common Law Countries have been found to be well-developed. Though the Common Law Countries are enriched with Privacy Laws, but the Civil Law Countries are not lagging behind them and in fact, Civil Law Countries have, even more advanced Privacy laws under both the constitutional provisions and national legislations. The Nordic Law Countries are important for discussion, because of the Nordic Conference of Jurists, 1967, but practically, the Nordic Law Countries are not much concerned with Personal Privacy, rather they are mainly concerned with the Data Privacy and have enacted the Data Protection Laws.

Though the legal instruments for protection of Right to Privacy are important, but the division of this right into various components is noteworthy for a matter of discussion. Apart from Individual Privacy, there are various other components of Right to Privacy also, like Privacy of Family and Marriage, Privacy of Home, Privacy of Correspondence and Communication and Privacy of Honour and Reputation. The above-mentioned list is not exhaustive, rather inclusive in nature and as such, a number of other components may be found. But, the international and regional legal instruments have confined themselves into these components only and as such, component-wise discussion of those instruments is confined into these components only. Municipal Laws, in this respect have highlighted other components also, but these components are most noteworthy and most of the municipal laws have dealt with these elements. However, protection of

Right to Privacy in all round manner means the protection of all these components of Privacy worldwide, but, all the components are not adequately protected in every legal sphere. Most importantly, municipal laws of each and every country have not dealt with all the components equally; rather each and every country has dealt with one or two components only.

In this respect, the most important point is that, incorporation of Privacy provisions in the Municipal Laws of different countries have become fruitful for the enforcement of Right to Privacy and its various components throughout the world, because most of the international and regional legal instruments are not directly enforceable and can be enforced in indirect manner only by way of incorporating the provisions thereof, either in the national constitutions of different countries or by way of enacting national legislations for the implementation and enforcement of those rights. The inadequacy of municipal laws for protection of various components of Right to Privacy is the biggest problem in this respect and as such, enactment of comprehensive municipal legislations in this field is the need of the hour. Last but not the least, municipal laws are nothing but the extension of international and regional legal instruments, because most of the international and regional legal instruments are mere declaratory in nature, but the municipal laws are enforceable in nature.

Privacy has both positive and negative aspects. When the Right to Privacy is used for the benefit or betterment of the mankind as a whole, it is called Positive Right to Privacy. It means, one should lead a secluded life for the development of one's physical or mental integrity or intellectual quality. But, when the Right to Privacy is used for the destruction of mankind as a whole, like the leading of a secluded life for making a bomb or for the commission of suicide, it is called Negative Right to Privacy. Right to Privacy is a part and parcel of Right to live with Human Dignity. As such, it would always be used for the beneficial perspectives and not for the destructive perspectives. Human beings are social beings, they cannot live alone. In this sense, leading a social life is the very basis of social nature. Though Right to Privacy gives us the freedom to enjoy a secluded life, but that does not mean that, a human being should be left alone by the society to lead a destructive life. It is the duty of the society to look after a person remained secluded

for a long time. In this sense, Right to Privacy is a limited Right and can always be curtailed in the public interest as well as for the larger benefit of the mankind as a whole. This is the bottom line of Right to Privacy and the States should follow this bottom line while enacting legislations on Right to Privacy. The three important countries, whose Privacy protection laws are the matters of discussion hereunder, are U.S.A., U.K. and India; all of whom have tried to legislate on Right to Privacy keeping in mind the above-stated bottom line.

Privacy is a component of Freedom, without the protection of which, guarantee of Freedom remains incomplete. Freedom or Privacy should not be absolute and in this respect, the question of dichotomy between privacy and public interest comes into picture. Protection of both Individual Right to Privacy and State's Right to Information is the urgent need of the hour. Total freedom is a utopian concept, the achievement of which is practically impossible. Absolute solitude or seclusion is called the negative aspect of Privacy, which may lead to disastrous effects. When Privacy brings good to all human beings in general and does not become deadly or futile for anyone, then it is called positive aspect of Privacy and it is permissible. Positive aspects of Privacy are welcomed in a civilized society, where stress is given only on the prevention of unwanted publicity of one's private life. True spirit of the Privacy should be to protect oneself from unwanted publicity and consequential harassments.

Right to Privacy, although had never been guaranteed in the United States as a Constitutional Right, but had been judicially examined therein. With the progress and development of the new American nation, called U.S.A., the growth of Privacy protection laws have been occurred concurrently. There have been six phasic or periodic developments of Right to Privacy in U.S.A. The present Privacy laws in U.S.A. can be categorized as the *U.S. Constitution, 1787, the Federal Privacy Laws and the State Privacy Laws*. The U.S. Federal and State Legislatures have enacted various legislations covering various aspects of Right to Privacy, so that, each and every component of this right would be protected.

At the very beginning, English laws were very slow and unwilling to develop Laws of Privacy. Gradually with the passage of time, recognition of this right came into being with the hands of the judiciary. In comparison to U.S.A., Privacy laws are

not much enriched in U.K. In fact, there has been no existence of Privacy Laws in U.K. before the passing of the *Human Rights Act, 1998 and Data Protection Act, 1998*. Apart from the Common Law protection of Privacy in U.K., there are various statutory provisions enacted in the present era, few portions of which are directly applicable for the protection of Right to Privacy.

Right to Privacy in India is not of recent origin; it is an age-old concept and can be traced back from ancient Indian society. In fact, there are several customary rules prevailing in India which protect Privacy interest of an individual. Apart from that, constitutional provisions have provided protective umbrella to this right in indirect manner. Besides customary rules and constitutional provisions, several other statutes recognise Right to Privacy directly or indirectly in India. Privacy as a Customary Easement right was recognized in India since the very beginning in the *Indian Easements Act, 1882*. The main articles relating to protection of Privacy under the Indian Constitution are *Articles 19 and 21*.

The important statutory enactments in this respect are *the Indian Penal Code, 1860, The Indian Evidence Act, 1872, the Indian Post Office Act, 1898, the Official Secrets Act, 1923, the Special Marriage Act, 1954, the Children Act, 1960, the Medical Termination of Pregnancy Act, 1971, the Press council Act, 1978, the Indecent Representation of Women (Prohibition) Act, 1986, the Information Technology Act, 2000, the Right to Information Act, 2005 and the Juvenile Justice (Care and Protection of Children) Act, 2015*.

The components which have been attracted in this respect are Privacy and the insult on the modesty of women, Privacy of matrimonial proceedings, Privacy and Law of Evidence, Privacy of Correspondence under Indian Postal System, Privacy of Governmental Secrets, Privacy of Children, Privacy of Women, Privacy of the Press vs. Privacy of Public Figures, Privacy vs. Information Technology, Privacy vs. Right to Information and Privacy of the Juveniles.

A Comparative Analysis of the Privacy protection laws of U.S.A., U.K. and India projects the idea that, though India has started protecting Right to Privacy prior to U.S.A. and U.K., but in the present social scenario, it is lagging far behind the other two countries, inspite of having strong Customary Laws of Privacy since the ancient period.

The most important point about all these legislations is that, all the three countries have highlighted the aspects of Data Protection, because in the midst of the era of Information and Communication Technology, none of the countries can go far without the storing and processing of huge computerised personal data. At this juncture, a serious threat lies with the protection of Privacy of those personal data or information. Another important issue is the over-encroaching press and media into human lives. Today, Press is gaining so much freedom that, Press freedom becomes a cause for violation of Privacy of the Public figures. As such, Press freedom should necessarily be curtailed in the interest of the general public. In this respect, all the countries are adopting Code of Conduct for the journalists and the electronic media and India is not an exception to it. Again, another important issue prevails and that is the dichotomy between Right to Privacy and Right to Information. Countries are adopting Right to Information Acts to end this dichotomy. India has also enacted such legislation to determine the line of control between the information to be communicated in the general public interest and the information to be kept secret to maintain the Individual Privacy. In fact, creation of a perfect balance among all these interests of the society is the root of a democratic civilized society and the countries concerned are striving towards reaching such excellence in their respective fields by way of enacting the Privacy protection legislations.

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.

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. 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. 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. 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. On the basis of this bottom-line of the Privacy Principle, the judiciary in U.S.A., U.K. and India, has pronounced judgments for protection of Right to Privacy.

The role of judiciary in a democratic society is to bring social change with the help of judicial creativity and law reform. Judicial activism and judicial creativity have been the main recourse for protection of Right to Privacy in U.S.A., U.K. and India. 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. Without the judicial intervention into the matter, the protections of various aspects of Right to Privacy have not been possible in these countries.

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. 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. The Indian judiciary has taken active steps for protection of Right to Privacy both in the pre-independence and post-independence era. In the pre-independence era, *Nuth Mull v. Zuka-Oollah Beg* case is noteworthy, which has established the Customary Right to Privacy in India. 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.

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. But, Right to Privacy has come out as a comprehensive right in U.S.A. in the *Griswold v. Connecticut* case in 1965. 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.*

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*. 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*. 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.

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. 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. 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.

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.

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.

Moreover, the Researcher may provide concluding remark regarding the paths followed by the judiciary in the three countries. 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, the Researcher can finally place a concluding remark 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.

The outstanding facets, dimensions and current trends of Right to Privacy in U.S.A., U.K. and India have given the idea that, these three countries are facing many new challenges against the protection of Right to Privacy at the verge of invention of advanced scientific technologies as well as the storing and processing of huge amount of computerised data and thereby need adequate legislative and judicial intervention into the matter. All the three countries have played an important role in this respect, according to their limited capacities to solve problems. But, the extensive legislative and judicial intervention into the matter has sometimes created certain negative impacts on the society, owing to which many new debatable issues have been cropped up. Some of those issues have been solved, but some are still pending, having hoped to be solved in near future. Moreover, Right to Privacy is a limited right and its limitations should always be remembered at the time of enacting any legislation or pronouncing any judgment for its protection. Due to this reason, absolute protection cannot be provided to Right to Privacy at any time. A comparative analysis of the outstanding facets and dimensions of Right to Privacy in

U.S.A., U.K. and India has provided that, U.S.A. is the country having strongest protection of Right to Privacy in comparison to other two countries.

The idea of Privacy is culminated into the concept of Freedom. Various jurists have opined that, Privacy means freedom from unauthorised interference into one's private life. Enjoyment of Privacy is impossible in the environment of absence of individual freedom. Individual Freedom is not absolute and always subjected to law and legal control. But, Individual Freedom or Right to Privacy can be curtailed by just, fair and reasonable legal procedure acted in accordance with the principles of natural justice. Every civil society should try to create a balance between Individual Privacy and larger social interest for the peaceful co-existence of each and every individual in the civil society. Privacy, Freedom of Information and Publicity, these are the three essential attributes of a modern democratic society and the peaceful co-existence of a modern democracy depends upon the creation of a balance between the three. As such, every modern society has tried to protect these three rights by enacting legislations and pronouncing judgments in this respect.

In the contemporary social scenario, a number of problems have been cropped up relating to various aspects of Right to Privacy which are closely associated with modern social life. In the present day society, human beings are subjected to various new habits and tastes owing to social change, which have created either threats on Right to Privacy or on human life and dignity. Such problems have also given birth to many new dimensions of Right to Privacy, which are non-existent in the previous century. Those are generally called the outstanding facets of Right to Privacy, because without addressing to those threats and challenges, any discussion on Right to Privacy would remain incomplete. More specifically, these areas are *Privacy vs. Private Life*, *Privacy of Women*, *Privacy of Children*, *Privacy vs. Scientific and Technological Developments* as well as *Data and Information Privacy*.

As regards the outstanding facets, U.S.A. has not recognised the Right to respect for Private Life, rather it has recognised Right to Privacy. U.S.A. is equally strong in the protection of Right to Privacy of Women, Privacy of Children, Privacy at the verge of advanced scientific technology as well as Data or Information Privacy. U.K. has not recognised Right to Privacy; rather it has protected the Right

to respect for Private Life. U.K. has neglected the Right to Privacy of Women and Children, but has tried to protect Right to Privacy at the verge of advanced scientific technology and Data or Information Privacy. India has recognised Right to Privacy, rather than Right to respect for Private Life. In India, Right to Privacy of Women and Children is protected by legislative and judicial initiatives. But, India lacks its initiatives for protection of Right to Privacy at the verge of advanced scientific technology and Data or Information Privacy.

Legislations and judicial decisions on outstanding facets have created *many* new debates on Right to Privacy in the contemporary social scenario. Such debates have occurred in the areas of *Freedom of Information, Right to Information and Right to Privacy, Privacy and Biometric Enabled National ID Cards, Privacy versus Sting Operation, Privacy versus Narco-Analysis, Polygraph Test and Brain-Mapping* as well as the *Privacy versus LGBT Rights*. Right to Privacy is not an absolute right and limitations can be imposed on it on the grounds of *Public Interest, Public Figure, Public Record, Public Disclosure, Consent, Privilege, Newsworthiness, Freedom of Information or Right to Information and Administration of Criminal Justice*. Limitations on Right to Privacy can also be imposed on the grounds specified under *Article 19(2) of the Indian Constitution*.

The comparative analysis of outstanding facets, dimensions and current trends of Right to Privacy as well as the contemporary debates on Right to Privacy provide the idea that, U.S.A. is the strongest country regarding Privacy protection, U.K. is at the middle level and India is a novice country with respect to the measurement of such protection.

Last but not the least, the Researcher may also provide concluding remark that, continuous process of social change is giving birth to many new technologies and new infrastructures in our daily lives, which are posing threats to our well-acclaimed human rights and Right to Privacy is not an exception to it. Daily challenges towards this right give birth to many new dimensions of Right to Privacy, which is again increasing judicial activism in the field of Right to Privacy. As such, many new cases are coming out, like *Obergefell v. Hodges, AMP v. Persons Unknown, Naz Foundation v. Govt. of NCT of Delhi, Suresh Kumar Koushal v. Naz Foundation* and *Justice K. S. Puttaswamy v. Union of India*. In this sense, Right to

Privacy is not a static, rather a dynamic right and constant social progress and development is responsible for the ever-growing and never-ending process of development of Right to Privacy. But, Right to Privacy is a limited right and hence, it could never come as an impediment on the process of administration of justice in any society.

On the basis of the above contention, the Researcher may Sum-Up the Findings of the Study in the following manner :-

- (i) Privacy has been recognised as a Customary Right in India since the ancient period, whereas, no such recognition of Customary Right to Privacy has been found in U.S.A. or in U.K. since the ancient period.
- (ii) The Customary Right to Privacy has got statutory recognition in India under the *Indian Easements Act, 1882*. Though the said law is enacted by the British Government, but the same law has been absent in U.K. and U.S.A.
- (iii) In India, Privacy has been developed as a Customary Right in the principles of construction of houses, but in U.S.A., it has been developed as the principle of ancient light. The U.K. law is silent in this respect.
- (iv) In India, Customary Right to Privacy has been established as a statutory right under the *Indian Easements Act, 1882*, whereas, in U.S.A., it is established by way of judicial development. U.K. has always been reluctant to recognise this right.
- (v) In U.K., Privacy has been recognised as a tort under the law of confidence. In U.S.A., it has also been recognised as a tort, but not under the law of confidence. *William Prosser* has created a separate *Privacy Tort* by way of judicial development. In India, there is also the existence of Privacy Torts, but in implied manner.
- (vi) U.K. has never considered Right to Privacy and has always tried to provide remedy on the ground of breach of confidence in the cases of violation of Privacy. U.S.A. has also been reluctant to consider Right to Privacy at the very beginning, but has never recognised the ground of breach of confidence. In India, there has been the existence of Customary Right to Privacy and not the breach of confidence.
- (vii) In U.S.A. the originator of Right to Privacy has been the *Warren-Brandeis Article of 1890*. In U.K., the originator of Privacy has been the *Prince Albert v. Strange Case of 1849* and in India, the originator of Privacy has been the *Nuth Mull v. Zuka-Oollah Beg case of 1855*.

(viii) In U.S.A., Right to Privacy has got constitutional protection under various amendments of the *U.S. Constitution*. In U.K., in the absence of written constitution, constitutional protection of Right to Privacy is totally absent. In India, constitutional protection of Right to Privacy is also available in limited manner under the *Indian Constitution*.

(ix) Constitutional protection of Right to Privacy is similar in U.S.A. and India, because in both the countries, express constitutional guarantee of Right to Privacy is unavailable and it is the sole creation of judiciary. But, in U.K., absence of written constitution has created the reluctance of judiciary to recognise this right.

(x) At the time of making the Indian Constitution, the Constituent Assembly has tried to incorporate Right to Privacy directly within the Indian Constitution in line with the *Fourth Amendment of the U.S. Constitution*. But, due to absence of unanimity, this right has not been incorporated directly. No such initiatives have been found in U.K. due to the absence of written constitution.

(xi) But, the right similar to *Fifth Amendment of the U.S. Constitution* has been incorporated under *Clause (3) of Article 20 of the Indian Constitution*, which provides protection to the Privacy of Personal Liberty. Again, U.K. laws are silent in this respect.

(xii) In U.S.A., the root of constitutional protection of Right to Privacy has been the '*Right to Literary Property*', which is unavailable in U.K. and India.

(xiii) The *Warren-Brandeis* concept of '*Right to Inviolate Personality*' of U.S.A. has been incorporated under *Article 23 of the Indian Constitution* to protect personal autonomy and individual personality. Both the provisions are guarantors of Individual Privacy, which are absent in U.K.

(xiv) *William Prosser's Privacy Tort of 'appropriation of one's name or likeness'* available in U.S.A. has been incorporated under *Section 3 of the Emblems and Names (Prevention of Improper Use) Act, 1950* in India, which provides protection to Right to Individual Privacy and Privacy of Personality by prohibiting the improper use of one's name or identity. Similar provision is also available under the *Nordic Conference of Jurists, 1967*, by mentioning the heads '*use of one's name, identity or likeness.*' In this respect, Indian laws are far better than the Western laws, because what the *Nordic Conference* has incorporated in 1967, *India* has

incorporated in 1950. U.K. has also the similar provisions available under the Common Law Tort of Breach of Confidence and Trespass to Person.

(xv) U.S.A. has enacted a comprehensive law on Privacy by making the *Privacy Act, 1974*, whereas both U.K. and India have not enacted any such comprehensive legislation. Their Privacy protection laws are scattered in a number of legislations enacted therein.

(xvi) Both U.S.A. and U.K. have enacted laws for protection of *Health and Medical Privacy*, which India is lacking.

(xvii) But, both U.K. and India have enacted *Official Secrets Acts, Telecommunications Privacy Laws, Press Complaints Commission or Press Council Codes of Conduct* as well as *Protection of Freedoms Act, 2012* in U.K. and *Right to Information Act, 2005* in India. On the contrary, U.S.A. has enacted the *Freedom of Information Act, 1966* to provide a comprehensive protection covering all these aspects.

(xviii) When U.S.A. has enacted the *Privacy Act, 1974*, U.K. has been reluctant to do so as evidenced from the *Younger Committee Report, 1972*. India has been lagging far behind them at that point of time.

(xix) U.K. has started its Privacy protection initiatives in 1998 by enacting the *Data Protection Act and Human Rights Act*. Such initiative has been taken by U.S.A. long before by enacting the *Privacy Act, 1974*. India has just started these initiatives by drafting the *Privacy Bill, 2014* and the *Personal Data Protection Bill, 2014*.

(xx) *Maintenance of Privacy and Secrecy in Matrimonial proceedings* by conducting *in camera proceedings* has been established as a legal principle in U.S.A. and U.K. by way of judicial development. India has incorporated this provision under all the matrimonial statutes, like the *Hindu Marriage Act, 1955, the Special Marriage Act, 1954 and the Divorce Act, 1869*.

(xxi) 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.

(xxii) 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.

(xxiii) 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.

(xxiv) 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.

(xxv) 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.

(xxvi) 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.

(xxvii) 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.

(xxviii) 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.

(**xxix**) 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.

(**xxx**) 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.

(**xxxii**) 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.

(**xxxiii**) 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.

(**xxxiiii**) 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.

(**xxxv**) 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.

(**xxxvi**) 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. (xxxvi) 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.

Therefore, in view of the Present Study and Findings derived from this work, Conclusion can be safely drawn as follows :-

- (I) The first outstanding facet, called Right to respect for Private Life is protected only in U.K., whereas, Right to Privacy is protected in U.S.A. and India.
- (II) Next come to the question of Right to Privacy of Women, which has got good amount of protection in U.S.A. and India both in the legislative and judicial field. But, it has got limited protection in U.K. only in the legislative field.
- (III) Next element is the Privacy of Children, which has got good amount of legislative and judicial protection In U.S.A. But, it is neglected in U.K. India is concerned with the protection of this right, but not as much as of U.S.A. The concern is more fully raised only in the recent period.
- (IV) The protection of Privacy at the verge of scientific and technological developments has raised more concern in U.S.A. through legislative and judicial development. U.K. has also enacted few laws and pronounced judgments in this respect. Even India has enacted little legislation in this respect, but judicial development has not been made to such extent.
- (V) Data or Information Privacy is well-protected in U.S.A. since 1974, U.K. has started such protection since 1998, but India is still a novice on the issue. It has just drafted few bills on the subject in 2014.
- (VI) Regarding the contemporary debates, both U.S.A. and U.K. have recognised Freedom of Information, whereas India has recognised Right to Information.
- (VII) U.S.A. has enacted the *Freedom of Information Act* in 1966, U.K. has enacted the *Freedom of Information Act* in 2000, but India has enacted the *Right to Information Act* in 2005.

(VIII) *Snowden Case* is noteworthy in U.S.A., *AMP v. Persons Unknown* case is noteworthy in U.K. and *Vijay Prakash v. Union of India* case is important in India with respect to the issue of Privacy versus Freedom or Right to Information.

(IX) With respect to the issue of Privacy versus Biometrics Enabled National ID Card, both U.S.A. and U.K. have rejected the proposals for establishment of such system. But, India has established such system and created many new threats on Right to Privacy.

(X) The Biometric Enabled National ID Card is called *Aadhaar Card* in India, which is absent in U.S.A. and U.K.

(XI) The Supreme Court of India has recently pronounced a landmark judgment in the case of *Justice K. S. Puttaswamy v. Union of India* to resolve the dispute between Aadhaar and Privacy. No such initiatives are found in U.S.A. and U.K.

(XII) Sting Operation is practised in all the three countries of U.S.A., U.K. and India, but all these countries have resolved that, it should not be used by violation of Right to Privacy as against the need for crime detection. In this respect, the law is similar in the three countries.

(XIII) Narco-Analysis, Polygraph Test and Brain-Mapping are used as methods of crime detection in all the three countries, but all are of similar view in this respect, that these methods should not violate Right to Privacy. *Selvi v. State of Karnataka* case in India is noteworthy in this respect.

(XIV) Right to Privacy of LGBT persons is recognised in U.S.A. since long. Latest judgment on the issue therein is *Obergefell v. Hodges*. U.K. has started to recognise the right since 2005 and has established it in 2014. Though India has never recognised the right previously, but has recognised it in the recent period. In this respect, the cases of *Naz Foundation v. Govt. of NCT of Delhi*, *Suresh Koushal v. Naz Foundation* and *Justice K. S. Puttaswamy v. Union of India* are noteworthy.

(XV) Limitations on Right to Privacy on the ground of Public Interest or Freedom of Press have been imposed in lesser amount in U.S.A. But, U.K. has always tried to limit Right to Privacy against the Freedom of Press. India is still in the developing stage on the issue and has not reached at any conclusion.

Last but not the least, U.S.A. is the land of civil liberties and as such, it has tried to protect Right to Privacy in full-proof manner as a personal liberty. U.K. has

recognised the Right to respect for Private Life and not the Right to Privacy. Therefore, this right is always neglected therein. India has followed the path of U.S.A., but has started its Privacy protection initiatives recently. Hence, its initiatives are only at the developing stage and no such full-proof protection is available till now.

In view of the above observations, few Suggestions may be put forward in order to provide appropriate remedy in the cases of Privacy violation as well as to establish Right to Privacy in the strong footing in U.S.A., U.K. and India. As such the following Suggestions may be cited:-

- (1) Privacy is not a well-defined right in U.S.A., U.K. and India. Therefore, at first it should be properly introduced as a well-defined right in the three countries removing all the vagueness, because without defining a right in concrete sense, its protection cannot be possible in full-fledged manner.
- (2) Express Constitutional protection of Right to Privacy is unavailable in U.S.A., U.K. and India, which is an impediment for its enforcement. Therefore, both U.S.A. and India should incorporate Right to Privacy as a Fundamental Right under their Constitutions. Time has come for U.K. to think seriously for adopting a written constitution, without which no human rights including Right to Privacy can be protected and guaranteed.
- (3) Though various amendments of the *U.S. Constitution* have been recognised as the protectors of Right to Privacy therein by way of judicial interpretation, but that process is subjected to overruling and reversal of the judgment in several times. It prevents safe and sound guarantee of a legal right, which can only be established by a statutory protection. As such, express constitutional protection of Right to Privacy under a fresh amendment of the *U.S. Constitution* is the need of the hour.
- (4) In India, Right to Privacy has been established as Fundamental Right under *Article 21 of the Indian Constitution* by way of judicial activism only. This has continued the debate on the recognition of Right to Privacy as a Fundamental Right, which can only be ended by incorporation of it as a Fundamental Right through constitutional amendment. Therefore, a new article, called *Article 21B* should be inserted with a title "*Right to Privacy*" in the *Part-III of the Indian Constitution*.

(5) Constitutional protection of Right to Privacy is not enough, statutory protection of it is also required. As such, a full-proof statute on Right to Privacy should be enacted. In this respect, the long standing *Privacy Bill, 2014* should be passed into an *Act*, otherwise strong punishment cannot be provided in the cases of Privacy violation.

(6) Besides Right to Privacy, another right is also important in the present social scenario, called the Right to Information, which is firmly established in India by the *Right to Information Act, 2005*. It has also incorporated protection of Privacy of Personal Information under *Section 8 of the Act*. But, without defining the four corners of this right in express manner and establishing this right as a Fundamental Right, the controversy between Right to Privacy and Right to Information cannot be ended. Implied recognition of this right as a part of Freedom of Speech and Expression under *Article 19(1) (a)* is not enough. Therefore, a separate clause should be added under *Article 19 of the Indian Constitution* titled “*Right to Information*” by way of constitutional amendment in India.

(7) The limitations of Freedom of Speech and Expression under *Article 19(2) of the Indian Constitution* should also clearly specify the cases wherein both Right to Privacy and Right to Information could be curtailed. Such clarification should also be made by constitutional amendment.

(8) In both U.S.A. and U.K., four corners of Right to Information should also be clarified by express constitutional protection; otherwise the enactments of *Freedom of Information Act, 1966* in U.S.A. and *Freedom of Information Act, 2000* in U.K. cannot perform in full-fledged manner.

(9) Both U.S.A. and U.K. have highlighted the areas of Data or Information Privacy by enacting the *Privacy Act, 1974* and *Data Protection Act, 1998* respectively. But, now they should seriously think about the protection of Individual Privacy and should legislate accordingly.

(10) Data of Information Privacy is a serious issue in the present social scenario. India should seriously think over the matter now. It has drafted the *Personal Data Protection Bill, 2014*, which is a contemporary legislative initiative no doubt, but now it should be passed into an *Act* in order to define Personal data clearly and to prevent the loss of Personal Data by way of providing strict punishment.

(11) One defect is found in the *Personal Data Protection Bill, 2014* in India; it covers only the cases of loss of personal data owing to the increase of Direct Mail Industries. Though it is a very serious problem and should be prevented, but the other cases of loss of Personal Data should be taken into account by the Indian Legislature.

(12) U.K. should also think about the protection of Right to Privacy, because only protection of Right to respect for Private Life is not enough. Violation of Right to Privacy is a serious matter in the present social scenario, which should also be redressed.

(13) U.K. has not implemented *Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* in the *Human Rights Act, 1998* in the express manner till now. Such incorporation is the urgent need of the hour; otherwise both Right to Privacy and Right to respect for Private Life will suffer from serious violation therein.

(14) Privacy of Children has not been adequately protected in India like U.S.A. It is an emerging issue and India should enact a statute in line with the *Children's Online Privacy Protection Act, 2000* in U.S.A. In this respect, *Section 67B of the Information Technology Act, 2000* is not enough.

(15) In U.S.A., Health and Medical Privacy is protected by the *Health Insurance Portability and Accountability Act, 1996* upgraded by the *Health Information Technology for Clinical and Economic Health Act, 2009*. But, India is lacking such laws, passing of which is the urgent need of the hour herein. As such, the *Health and Family Welfare Department of the Union Government* has drafted a proposed legislation, called the *Health Data Privacy and Security Act*. Enactment of such a statute should be made in India as early as possible for the protection of Health and Medical Privacy.

(16) Both U.S.A. and U.K. have laws relating to protection of Privacy of Communication by enacting the laws on prevention of interception of Communication. But, India is lacking such laws and is still dependent on the age-old *Indian Telegraph Act, 1885*. Hence, time has come for India to enact a fresh law for prevention of interception of communication.

(17) India has tried to protect the Privacy of Matrimonial Proceedings and has incorporated the provisions of *In Camera Proceedings* in all the matrimonial statutes in India. But, U.S.A. and U.K. lack such legal provision, which should be incorporated therein.

(18) *Section 9 of the Hindu Marriage Act, 1955*, which provides for the protection of Restitution of Conjugal Rights, has become a serious impediment on the Right to Privacy of Women in the present social scenario. In the era of empowerment of women, it should not be correct to force women to face male domination in the name of Restitution of Conjugal Rights. They should enjoy their Freedom or Privacy regarding their marital life. In this sense, *T. Sareetha v. Venkata Subbaiah* case is more appropriate than the *Saroj Rani v. Sudarshan* case. Hence, Indian legislature should think over the matter for the protection of Right to Privacy of Women and should strike down *Section 9 of the Hindu Marriage Act, 1955*.

(19) In India, Right to Privacy of HIV/AIDS infected persons and Privacy of Medical Tests have been protected only by judicial interpretation. Such areas also need active legislative intervention.

(20) Right to Privacy of Motherhood is seriously endangered in India by the increase of female foeticide. Enactment of the *Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994* has not become enough to change the scenario. Hence, general awareness campaign should be organised at the grass-root level for the prevention of this heinous crime.

(21) Privacy versus Freedom of Press is a serious issue in India, for the mitigation of which the *Press Council of India* has enacted the *Norms of Journalistic Conduct, 2010*. Journalists should follow these norms in order to avoid violation of Privacy. But, those norms are not adequate enough for balancing the Right to Privacy and Freedom of Press, because these are only voluntary guidelines for the journalists. Therefore, active legislative and judicial interventions are also required in the said field.

(22) Sting Operation is an important method of criminal investigation in India, but without defining the four corners of Right to Privacy, there is every chance of violation of Right to Privacy by Sting Operation. Therefore, the legal procedure of Sting Operation should be defined by express statutory enactment.

(23) Narco-Analysis, Polygraph Test and Brain-Mapping are three important tests of crime detection, but these create serious impact on the Privacy of Physical Integrity of the human beings. Supreme Court of India has recently raised concern on the matter in the *Selvi v. State of Karnataka* case. Now the matter needs an express legislation on the subject to decide what matter would become a violation of Privacy and what not.

(24) Right to Privacy has recently been declared as a Fundamental Right under *Article 21 of the Indian Constitution* by the Supreme Court of India in the *Justice K.S. Puttaswamy v. Union of India* case. But the *Aadhaar-Privacy* matter is still pending before the Five-Judge Bench of the Supreme Court. In this respect, Suggestions may be provided that, *Aadhaar Card* should be introduced for the prevention of terrorism and other fraudulent activities, but it should not convert our society into a surveillance society. Government should take appropriate steps for prevention of disclosure of personal information to any person by the introduction of *Aadhaar Card System*. The *Aadhaar Act* should incorporate strict punishment for the violation of Right to Privacy of Individual persons for the application of *Aadhaar System*. Storing and processing of personal data in the *Aadhaar System* should be kept in the hands of the government and distribution of such activities to large scale private organisations should be avoided. Unauthorised use of those personal data should be prevented by law. Linking of *Aadhaar Number* should not be made compulsory, except the matters of emergent concern. Supreme Court of India should provide extensive guidelines in this respect.

Last but not the least, Right to Privacy of LGBT persons has been protected by the Supreme Court of India in the *Justice K. S. Puttaswamy v. Union of India* case. The matter is pending before a Five-Judge Bench of the Supreme Court in the *Suresh Kumar Koushal v. Naz Foundation* case. The decision of the Supreme Court is required to be provided in that case by upholding the decision of the *Naz Foundation v. Govt. of NCT of Delhi* case in the light of the judgment of the *Puttaswamy* case. Also the *Section 377 of the Indian Penal Code, 1860* is required to be struck down, so far it would violate the Right to Privacy of the LGBT persons. Hence, the Researcher can finally say that, Right to Privacy is an emerging issue in U.S.A., U.K. and India and as such, only a few aspects of it could be covered under

a limited scope of study. Yet, there are other dimensions of this right, which would come with the passage of time.

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11. Civil and Military Law Journal.
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APPENDIX A:LIST OF PUBLICATIONS

1. Sangeeta Chatterjee and Dr. Rathin Bandyopadhyay, “*Confidentiality of Information as Right to Privacy : A Comparative Analysis of Indian, U.S. and British Laws,*” India International Journal of Juridical Sciences, Vol. 1, Issue 1, March 2012, Paragon International Publishers, New Delhi, pp.1-16.
2. Sangeeta Chatterjee, “*Awareness and Implementation of Right to Privacy of Women in SAARC Region : Need of the Hour,*” in Dr. Rathin Bandyopadhyay, Professor Gangotri Chakraborty and Dr. Sujit Kumar Biswas (eds.), *Human Rights and Duties* (A Collection of Modified Research Papers presented in the National Seminar organised by the Department of Law, University of North Bengal on “Human Rights and Duties : Issues and Challenges in SAARC Region,” held during 15-17 November, 2014), Department of Law, University of North Bengal, 1st Published Edition, 2015, pp.281-293.
3. Sangeeta Chatterjee, “*Harassment of Women at Workplace : An Insight vis-à-vis Privacy Laws in India,*” in Professor Kajal De, Dr. Chandan Basu and Sri Srideep Mukherjee (eds.), *Women, Violence and Law : An Intimate Interrogation Open Distance Paradigm*, Volume II, The Registrar, Netaji Subhas Open University, Kolkata, 1st Edition, February 2016, pp.87-110.

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Confidentiality of Information as Right to Privacy : A Comparative Analysis of Indian, U.S. and British Laws

Sangeeta Chatterjee*

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ABSTRACT

Right to Privacy is an absolute and intimate right to an individual, which is a matter of grave concern for everybody in the contemporary social scenario. It is not a right of recent origin, rather it has a great historical background and can be traced back since the very old past. Right to Privacy, at the very outset may mean, the leading of an isolated life, but specifically it denotes the freedom from unauthorized and unwarranted interference into one's private life.

Confidentiality, on the other hand, means, maintaining secrecy or privacy. Confidential information is the information which is kept secret or private, without discussing with others. It flows from the confidential relationships and arises out of various fiduciary relationships, like Doctor-Patient, Principal-Agent, Teacher-Student, Attorney-Client, Master-Servant etc. or out of the intimate relationships, like Husband-Wife, Parent-Children etc. Confidentiality is keeping trust or faith on somebody for not disclosing the secret or private information about oneself.

Both confidentiality and privacy resembles some similarity with each other and therefore, the discussion of right to privacy will be incomplete without the discussion of the right to confidentiality of information. The history of the modern English Law of Confidence can be traced back to the famous English case of Prince Albert v. Strange, 1848. It is the foundation stone of the elaborate edifice of the law of right to privacy. Next important event was the publication of the famous Warren-Brandeis article in 1890, which ultimately gave rise to the full fledged protection of right to privacy in

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U.S.A. In the absence of express legislative enactments, the law of confidentiality is mostly dependant on case laws. It was held in many cases that the confidentiality of an information depends upon the nature and circumstances of the case and may vary from case to case. If the information is valuable, then it must be kept confidential, otherwise not.

This paper specially highlights on the contemporary legal issues involving privacy and confidentiality, like, privacy rights of public figures, confidentiality of medical records, confidentiality of matrimonial proceedings, right to privacy of rape victims during court proceedings, telephone tapping vs. confidentiality of private conversation etc.

The study would like to establish that, the right to privacy and confidentiality are not absolute rights and the state can impose reasonable restrictions on them in public interest. Also it was held that, one cannot claim this right after voluntary waiver of it or after giving consent for publication of the information.

A serious threat on the enjoyment of right to privacy is the media intrusion as a result of investigative journalism. Confidential and private life of the celebrities is in grave danger thanks to this practice. But adequate damages cannot be provided for the violation of their privacy due to the freedom of information and right to privacy dichotomy. The only remedy that remains is to award damages for breach of confidence.

In a nut shell, privacy and confidentiality are the two sides of the same coin or the mirror reflection of each other. Privacy covers almost everything, where confidentiality is a small part. As such, we can call privacy as the genus, of which confidentiality is a species. Maintenance of confidentiality is absolutely necessary to attain the right to privacy. One cannot be achieved without the achievement of the other. Thus, protection and guarantee of confidentiality is must for the protection of right to privacy in itself.

A serious threat on the enjoyment of right to privacy is the media intrusion as a result of investigative journalism. Confidential and private life of the celebrities is in grave danger thanks to this practice. But adequate damages cannot be provided for the violation of their privacy due to the freedom of information and right to privacy dichotomy. The only remedy that remains is to award damages for breach of confidence.

Finally, the study would like to suggest some appropriate suggestions including the making of suitable legislations and proper implementing machineries to prevent the violation of the right to privacy and confidentiality.

Last but not the least, privacy and confidentiality are the two sides of the same coin or the mirror reflection of each other. Privacy covers almost everything, where confidentiality is a small part. As such, we can call privacy as the genus, of which confidentiality is a species. Maintenance of confidentiality is absolutely necessary to attain the right to privacy. One cannot be achieved without the achievement of the other. Thus, protection and guarantee of confidentiality is must for the protection of right to privacy in itself.

INTRODUCTION

Enjoyment of the equal rights of freedom and dignity for every individual is the creation of the Universal Declaration of Human Rights. The importance of the protection of all human rights to guarantee this freedom and dignity of individual human beings was understood by everybody for the first time by this Declaration. Obviously it includes the protection of the individual Right to Privacy, which is a part and parcel of the Right to Life and Personal Liberty as also an integral part of Human Rights Jurisprudence. This right has been expressly guaranteed in the Universal Declaration of Human Rights and in the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, respectively. Also the concept of this right is implied in the various other international, national and regional instruments. In the absence of express statutory enactments, some countries have developed the Right to Privacy through case laws.

In fact, Right to Privacy is an absolute and intimate right to an individual, which is a matter of grave concern for everybody in the contemporary social scenario. But, very few persons have the knowledge that, it is not a right of recent origin, rather it has a great historical background and can be traced back since the very old past. Right to Privacy, at the very outset may mean, the leading of an isolated life, but specifically it denotes the freedom from unauthorized and unwarranted interference into one's private life.

The value of the right to privacy as an inherent human right was understood from the times of our ancient civilizations. This right acts as a catalyst in promoting and developing personality, integrity, dignity, reserveness, intimacy, anonymity, solitude and freedom of individual persons. It is recognized as a valuable human right due to its working towards the furtherance of basic human relationships of love, friendship, respect, parentage, sonship, conjugal relationship etc. Privacy is not merely a good technique for furthering these fundamental human relations, rather without privacy they are simply inconceivable as they require a context or the possibility of privacy for their existence. Thus, privacy can be considered as a factor which forms the basis of our personal and social relationships and every individual enjoys this right as a part of their personal liberty.¹

Confidentiality, on the other hand, means, maintaining secrecy or privacy. Confidential information is the information which is kept secret or private, without discussing with others. It flows from the relationship where there is some amount of confidence. Also it arises out of certain kinds of fiduciary

1. E. J. Jathin, "Human Genome Project : Emerging Challenges of Right to Privacy vis-à-vis Insurer's Right to Know", *Cochin University Law Review*, Vol.XXXI (2007), pp.1-28 at p.3.

relationships, like Doctor-Patient, Principal-Agent, Teacher-Student, Attorney-Client, Master-Servant etc. or out of some intimate relationships, like Husband-Wife, Parent-Children etc. Confidentiality is keeping trust or faith on somebody for not disclosing the secret or private information about oneself.

As such, Confidentiality and Privacy resembles similarity with each other. Both of them are two sides of the same coin. Privacy is the maintenance of solitude or intimacy and Confidentiality is the way of reaching that solitude or intimacy. Therefore, Confidentiality is the means to reach the goal of Privacy. But, how it happens? What is the role of Confidentiality to attain Privacy? What is the actual relationship between the two? Does the breach of Confidentiality amount to the violation of Right to Privacy? What are the problems associated with this? These are the pertinent questions and the objective of this article is to find out the answers.

RIGHT TO PRIVACY - CONCEPTUAL AND HISTORICAL PERSPECTIVES

The foundation of the concept of Right to Privacy was created by Justice Cooley in 1888 by using the words, "the right to be let alone".² It was followed by Louis Brandeis and Samuel Warren in 1890 in the Harvard Law Review, in their article, "The Right to Privacy"³ which is known as the famous Warren-Brandeis view.

The Nordic Conference of Jurists on the Right to Respect for Privacy, 1967 is the next noteworthy instrument to be mentioned for defining the concept of Right to Privacy, where Privacy was described as a bundle of interests, like, freedom from interference with one's private, family and home life, physical or mental integrity or moral or intellectual freedom, the attacks on honour or reputation, being placed in a false light, the disclosure of irrelevant, embarrassing facts relating to private life, the use of name, identity or likeness, the interference with correspondence, the spying, prying, watching and besetting, misuse of communication, written or oral and the disclosure of information given or received by one in circumstances of professional confidence.⁴

As per historical perspective, Article 12 of the Universal Declaration of Human Rights, 1948, Article 17 of the International Covenant on Civil and Political Rights, 1966 and Article 10 of the International Covenant on

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2. Shrinivas Gupta & Dr. Preeti Misra, "Right To Privacy - An Analysis of Developmental Process in India, America and Europe", Central India Law Quarterly, Vol.18 (2005), pp.524-552 at p.524.
 3. 4 Harvard Law Review 193 (1890).
 4. supra note 2, at p.528.

Economic, Social and Cultural Rights, 1966 are worthy of mentioning for the development of the law relating to the Right to Privacy in the international scenario.

EMERGENCE OF CONFIDENTIALITY AS A LEGAL PRINCIPLE

Confidentiality, at first sight, is an ethical principle which is connected with the communication of information.⁵ It also encompasses a moral duty on the person to whom the information is communicated for not

disclosing it to any third person. This term is closely associated with various professions, like medicine, law etc.⁶ In the medical profession, doctors and the hospital authorities are under a duty to maintain confidentiality of information about their patients. Though the patients have communicated the information to the doctors, but that does not mean the publication of the same.

Similarly, lawyers are also under a duty to keep the secrets of their clients admitted to them. The information about the clients should be used for their benefit only and should not be discussed to unauthorised third parties. All the methods of Alternative Dispute Resolution System, like arbitration, conciliation, mediation, negotiation etc. are based on this principle of confidentiality of information between the aggrieved and the dispute settler. Thus, confidentiality has a great role to play in dispute settlement mechanism.

Lawyers are often required by law to keep confidential anything pertaining to the representation of a client. The duty of confidentiality is much broader than the attorney-client evidentiary privilege, which only covers communications between the attorney and the client. Both the privilege and the duty serve the purpose of encouraging clients to speak frankly about their cases. This way, lawyers will be able to carry out their duty to provide clients with zealous representation. Otherwise, the opposing side may be able to take the chance in the court.⁷

The U.S. Supreme Court and many State Supreme Courts have affirmed the right of a lawyer to withhold information in favour of a client and to use it to defend a criminal. California is famous for having one of the strongest duties of confidentiality in the world. There the lawyers must protect the client confidences at "every peril to himself or herself." Until an amendment in 2004, California lawyers were not even permitted to disclose that a client was about to commit murder.⁸

5. 'Confidentiality', from Wikipedia, the free encyclopedia, cited from <http://en.wikipedia.org/wiki/Confidentiality> accessed on 21.3.2012.

6. *id* accessed on 21.3.2012.

7. *id* accessed on 21.3.2012.

8. *id* accessed on 21.3.2012.

Recent legislation in the UK curtails the confidentiality of the professionals, like lawyers and accountants. Accountants, for example, are required to disclose to the state, any suspicions of fraudulent accounting and, even, the legitimate use of tax saving schemes, if those schemes are not already known to the tax authorities.⁹

The history of the modern English Law of Confidence can be traced back to the famous English case, known as *Prince Albert v. Strange*.¹⁰ It is an old English case, which is the foundation stone of the elaborate edifice of the law relating to the right to privacy. In this case, the unauthorized exhibition of the family portraits of Prince Albert and Queen Victoria without their permission was held to be the violation of their right to privacy.¹¹ In that case, the defendant Strange got the pictures by breach of trust of some other person and the Royal couple asked for an injunction to prevent the publication of the same. The Court granted the injunction as the pictures were made for the private use of the couple. Hence the Judge concluded that, they were entitled to keep them in state of privacy. It did not matter that, they had given the copies to their few friends. Finally, it was contended that, it would be their discretion only to decide whether, when, how and for whose advantage their property shall be made use of.¹²

Thus, the Law of Confidence has emerged in England for the first time vides that case. Though that case was concerned about the right to privacy, but the decision granted ultimately turned towards the law of confidentiality, because it was the absolute private and confidential matter of the Royal couple to share their pictures to someone or not.

This decision left the field open for further development, which occurred with the publication of the seminal article, "The Right to Privacy", by Samuel Warren and Louis Brandeis, in 1890, in the Harvard Law Review, which upon citation in courts throughout the United States gave rise to the full fledged protection of privacy and that is in force there today.¹³ Apart from this article relating to the right to privacy, a series of judgments and various articles came into being after the publication of this article which ultimately helped in the development of the law relating to confidentiality.

9. *id* accessed on 21.3.2012.

10. (1848) 2 De G & Sm 652.

11. 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.

12. Prof. S.S.Lal, "Human Rights and Right of Privacy : In Historical and Present Perspective", *Journal of the Legal Studies*, Vol.XXXVII (2006-07), pp.124-139 at p.133.

13. *supra* note 11 at p.177.

LAW OF PRIVACY AND CONFIDENTIALITY IN U.S.A.

Since the publication of the famous *Warren-Brandeis* view in their article, a well developed law of right to privacy has been gradually established in U.S.A. Two comprehensive statutes, the Privacy Act, 1974 and the Children's Online Privacy Protection Act, 1998 must be mentioned in this respect. The instances of this right are found in various parts of the U.S. Constitution since 1965, like, the First Amendment, Fourth and Fifth Amendments, Penumbra of the Bill of Rights, the Ninth Amendment and the concept of liberty guaranteed by the first section of the Fourteenth Amendment. But, the U.S. Constitution has never guaranteed it expressly as a separate fundamental right, rather it is the mercy of the U.S. Supreme Court that, the law of privacy has developed in that country which is far beyond the privacy laws in other countries.

In U.S.A., as we have already stated, the law of privacy was developed by various cases. A noteworthy American judgment on this point is, *Griswold v. Connecticut* case.¹⁴ In this case, a general Constitutional right to privacy was articulated for the first time in U.S.A. Here, the Connecticut Law, making the birth control measures a criminal offence was held unconstitutional as violative of the marital right to privacy of husband and wife.

Position of the law of confidentiality is more or less same in U.S.A. like the law of privacy. No separate law was developed there as the law of confidentiality, rather it was just a part and parcel of the law of privacy. An important case is worth mentioning in this respect. In the case of *Jane Roe v. Henry Wade*¹⁵, the U.S. Supreme Court recognized the right to privacy of a pregnant woman to terminate her pregnancy or the abortion of the foetus as and when she wishes.

Though in that case, the right to privacy of motherhood was recognised and it was held that, it would be the absolute confidential matter between the pregnant woman and her physician to deal with the matter after considering all the relevant factors, but the state can impose reasonable restriction on this right in the public interest. As such the "right to privacy is not absolute".¹⁶

After studying about 300 cases, *Dean Prosser* identified four private torts which relate to right to privacy –

- (i) Intrusion on seclusion, solitude or private affairs.

14. 381 U.S. 479 (1965).

15. 410 U.S. 113 (1973).

16. S.K.Sharma, Privacy Law – A Comparative Study, Atlantic Publishers & Distributors, New Delhi, 1994, p.329.

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- (ii) Publication of embarrassing private facts which includes unreasonable publicity of one's private life.
 - (iii) Publicity that portrays someone in a false light.
 - (iv) Appropriation of a person's name or likeness.¹⁷

Therefore, we can say that, the law of confidentiality is not developed independently in U.S.A. and still it is considered as a part of the right to privacy. The above mentioned four classes of torts can be regarded as the violation of the law of confidentiality, because if those are performed, the law of confidentiality is destroyed.

POSITION OF U.K. AFTER THE MILESTONE OF PRINCE ALBERT VS. STRANGE:

Long time has elapsed after the *Prince Albert v. Strange* case and there are numerous decisions in U.K. which have established legal principles derived out of that case on strong footing. Since Queen Victoria's case, the courts have also developed the law of confidence to prevent the damage caused by disclosure of private information. In 1968, Mr. Justice Megarry summed the case law on confidence into a classic three parts test –

- (i) The information must have the necessary quality of confidence about it.
- (ii) The information must have been imparted in circumstances importing an obligation of confidence. It means that there must be some relationship between the parties. It cannot be used against the complete strangers.
- (iii) There must be an unauthorized use of that information to the detriment of the party communicating it.¹⁸

After this judgment, the law of confidentiality took a shape in U.K. and now the law is firmly established there. But in the absence of any express statutory enactment, the country is mostly dependant on the case laws or the judge-made laws. Only Article 10 of the Human Rights Act, 1998 and provisions of the Data Protection Act, 1998 can be mentioned in this respect. These are the sole legal provisions in U.K. as far as the right to privacy or confidentiality is concerned.

One important judgment is worth mentioning in this respect which helped the law of confidentiality to pave a long way after *Prince Albert v. Strange* and that is *Douglas v. Hello!*¹⁹ case. In that case, Michael Douglas and Catherine Zeta-Jones sold the exclusive rights to photograph their wedding to OK!

18. *id* at p.133.

19. (2001) 2 All.E.R. 289.

magazine. But, a freelance photographer, inspite of every precaution, took some photos of the wedding and sold them to OK!'s rival Hello! magazine. The couple and OK! then sought an urgent injunction to stop Hello! from publishing these unauthorized photographs. They succeeded on their claim under the breach of confidence.²⁰

Thus, this is another judgment which helped to develop the law of confidentiality in U.K. It is also important on the point that, it has some contribution to bring the laws of privacy and confidentiality into one footing. In this case, though the claim of right to privacy was not granted, but damages were awarded on the ground of breach of confidence. It was held that, according to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and the Human Rights Act, 1998, two rights were protected – Right to Privacy and Right to Freedom of Expression and in that particular case, there was a conflict between these two rights. To remove the difficulties cropped up, due to that conflict, the compensation was given on the ground of breach of confidence and not on the ground of violation of privacy. Therefore, a new dimension was created regarding the law of confidentiality and privacy in U.K.

LAW OF PRIVACY AND CONFIDENTIALITY – INDIAN CONTEXT:

In the foregoing paragraphs, we have seen important articles and landmark judgments on the law of privacy and confidentiality in U.S.A. and U.K. which definitely direct towards a well developed law of privacy and confidentiality in these two countries. That does not mean that, India is lagging behind them with respect to the law of privacy or confidentiality. India also had a well advanced law of privacy since the ancient period, but somehow it is deteriorated in the modern period and needs further protection for its improvement.

In India we find the origin of privacy in the ancient Hindu Jurisprudence, like the description of the houses in the Grihya-Sutras, Kautilya's Arthashastra and the epics of the Ramayana and the Mahabharata.²¹ In the medieval period, privacy was found in the habit of observing 'purdah' among the Muslim women to prevent public exposure of their faces. This was prevalent in India as a customary right.²² In spite of the well advanced law relating to right to privacy in India in ancient and medieval period, we do not find any comprehensive legal provision in India concerning this right in the modern

20. *supra* note 11 at pp.178-179.

21. Prof. G. Mishra, Right to Privacy in India, 1st Edition, Preeti Publications, Delhi, 1994, p.48.

22. M. L. Upadhyay & Prashant Jayaswal, "Constitutional Control of Right to Pivacy", Central India Law Quarterly, Vol.2 (1989), pp.39-58 at p.44.

period. To specify it more clearly, only the Articles 19 and 21 of the Indian Constitution are guaranteeing the privacy rights to some extent.

Apart from the two constitutional provisions mentioned above, no express statutory enactments are found in India dealing with a separate law of privacy. Though some Statutes, Acts and Codes contain some sections which indirectly guarantee the right to privacy, but no direct provision is found anywhere. Therefore, in our country, the only credit goes to the judiciary for recognizing the concept of privacy, because neither the Constitution nor any other statute has defined this concept. As a matter of fact, this concept is quite in primitive stage of its development and a lot more has to be done for the recognition and protection of privacy by law in India.²³

As regards the law of confidentiality, it can be clearly assumed that, in the absence of well developed law of privacy, the law of confidentiality is also neglected. What is recognized here is the concept of 'breach of trust'. This provision is found under Section 23 of the Indian Trusts Act, 1882, remedy for breach of trust is available under the Law of Torts and also the provision for criminal breach of trust is available under Section 405 of the Indian Penal Code, 1860. Last but not the least is the provision of unjust enrichment under the Indian Contract Act, 1872.

Two express statutory enactments should be considered in this respect – The Official Secrets Act, 1923 and the Public Records Act, 1993. These are the statutes made by the Indian Government for maintaining the secrecy of the government records, but a specific law dealing with the confidentiality of information as opposed to the Freedom of Information Act, 2002 and the Right to Information Act, 2005 is absent altogether.

On the other hand, there are various cases, by the judgments of which the law of privacy has been enriched in India. Prominent among them is the *Kharak Singh v. State of U.P.*²⁴ case. The concept of right to privacy for the first time emerged under the Indian Constitution in 1963 from this case. Here, the sole question for determination by the court was whether 'surveillance' under the U. P. Police Regulations constituted an infringement of the citizens' fundamental rights guaranteed by Part III of the Constitution. The court held that, since regulation 236(6), which authorized domiciliary visits, was violative of Article 21 as there was no law on which the same could be justified, it was unconstitutional.

Next important case is the *People's Union for Civil Liberties v. Union of India*.²⁵ It is an important Indian case on the right to privacy, confidentiality

23. Shrinivas Gupta & Preeti Mishra, op.cit.at p.530.

24. AIR 1963 SC 1295.

25. AIR 1997 SC 568.

and maintenance of secrecy. In this case, Section 5(2) of the Indian Telegraph Act, 1885, which empowers the State to intercept telephonic conversation, held in private, on specific grounds of national interest, was challenged. The Hon'ble Supreme Court held that, telephone tapping is a serious invasion of the individual right to privacy guaranteed under Articles 19 and 21 of the Constitution and it can be permitted only in the gravest of grave circumstances in the public emergency.

CONTEMPORARY LEGAL ISSUES INVOLVING PRIVACY AND CONFIDENTIALITY:

The law of confidentiality is absolutely important in the contemporary social scenario to maintain the right to privacy in every respect. As we all know, there are various problems associated with the violation of right to privacy now-a-days, like right to privacy in matrimonial proceedings, right to privacy of HIV/AIDS patients, right to privacy vs. telephone-tapping, security concerns and right to privacy, trade secrets and right to privacy, media power and privacy, right to privacy vs. freedom of press, right to privacy and homosexual acts, freedom of expression and the right to privacy, right to privacy and the veil system of Muslim women, right to privacy of women of easy virtue, right to privacy after death, right to privacy vs. counter-terrorism laws, right to privacy of a woman under criminal law etc. Some of them require special attention to identify the current trends of confidentiality as well as right to privacy.

PRIVACY RIGHTS OF PUBLIC FIGURES:

In the case of *Manisha Koirala v. Shashilal Nair*²⁶, the question was whether the public figures have the right to privacy or they have waived it as being a public figure. The court held that, if the public figure has voluntarily consented in the publication of the private matters, then there is no question of confidentiality and afterwards the person cannot argue for the violation of the right to privacy.²⁷

One can bring the similarity of this case with the *Douglas v. Hello!* case. But the basic difference between the two is that, here the question was regarding the publication of an actress in a Hindi movie, where it was open to all and in the *Douglas v. Hello!*, the publication of the pictures were restricted to one magazine only. It is in the hands of the public figure to control the

26. 2003(2) Bom. C. R. 136.

27. Nirupama Pillai and Kalyani Ramnath, "Trumping Public Interest : Should Violation of Privacy be a Tort?", Cochin University Law Review, Vol. XXX (2006), pp.258-286 at p.265.

limitation of the right to privacy one would like to have. Therefore, the question of confidentiality is dependent on that.

CONFIDENTIALITY OF MEDICAL RECORDS AND RIGHT TO PRIVACY:

There are innumerable cases on HIV/AIDS, where the right to privacy of the patients came into question. According to the law of confidentiality, doctors and hospital authorities should keep the information of the HIV/ AIDS patients' secret and should not disclose them publicly. But, in various cases the court held that, the Government can disclose those informations in the public interest and can keep those patients separately to treat them better.²⁸

CONFIDENTIALITY OF MATRIMONIAL PROCEEDINGS:

As we have already discussed, the husband and wife relationship is the most intimate relationship in the society and the privacy of this relationship should be kept altogether. Therefore, maintenance of privacy and confidentiality during the matrimonial proceedings is must. Hence, in most of the matrimonial statutes *in camera* or closed door proceedings in matrimonial matters are recognized to avoid the personal mud-slinging in front of everybody and the publication of the same is restricted.

RIGHT TO PRIVACY OF RAPE VICTIMS AND THE CONFIDENTIALITY IN THE COURT PROCEEDINGS:

It is often said that, the rape victims are again raped during the court proceedings, because absolute personal questions are asked to them while interrogation in front of everybody. Therefore, their privacy is violated. To prevent the situation and to keep the confidentiality, DNA test is prescribed in some judgments.

The prescribed DNA test should be conducted privately and it would be helpful in detecting the accused without unnecessary harassment and humiliation of the rape victim in front of everybody.²⁹

RIGHT TO PRIVACY AND TELEPHONE TAPPING–CONFIDENTIALITY OF PRIVATE CONVERSATION:

With the advancement of information and communication technology, many serious threats are causing to the right to privacy. One such threat is

28. *id* at p.266.

29. *id* at p.269.

the telephone-tapping of private conversation. It is not only the violation of right to privacy but also the breach of confidentiality of private conversation. There are a number of judgments on this point. The most important is the *People's Union for Civil Liberties v. Union of India*, where it was held that, telephone tapping is a serious invasion of the individual right to privacy guaranteed under Articles 19 and 21 of the Indian Constitution and it can be permitted only in the gravest of grave circumstances in the public emergency.³⁰

The aforesaid discussion indicates that, the right to privacy as well as the confidentiality should be maintained in the society.

But in the contemporary social scenario, there are many instances of the violation of the same. Therefore, laws should be appropriate to remedy the same. On the other hand, we have found some cases where the courts have allowed the infringement of privacy or breach of confidentiality in some exceptional circumstances. This area needs to be highlighted here.

EXCEPTIONS TO THE LAW OF CONFIDENTIALITY:

As we have already seen, there are some exceptions to the law of confidentiality which are as under :

- (i) **Public Interest:** The Courts overshadowed confidentiality in the public interest. In *Naomi Campbell's* case³¹, the High Court decided that, public interest permitted the newspaper to reveal the fact of her drug addiction and therapy, but not the details.
- (ii) **Information must in reality be Confidential:** Once the information is in public domain, it loses its confidentiality. Thus, material on Internet though on hidden website may lose confidentiality.
- (iii) Court protects significant information and not the gossips.
- (iv) Claimant's consent, express or implied, waives his right to sue.
- (v) News in good faith to explain the truth is also a good defence.³²

The above-mentioned exceptions provide that, the law of confidentiality as well as the law of privacy is not absolute. It can be waived by the person himself and by the governmental machinery in the public interest. Public interest is above all and in the public interest, state can take any action. Apart from that, one significant point is that, what information is confidential and what is not, that depends upon the nature and circumstances of the case and may vary from case to case. Similarly, the nature of the right to privacy

30. *id* at p.267.

31. *Campbell v. MGN* [2004] E.M.L.R. 15.

32. *supra* note 17 at p.134.

may change with the change of a particular case. Above all, confidentiality of the information depends upon the value of the information and if the information is valuable, confidentiality of it should be maintained, otherwise not.

FREEDOM OF INFORMATION VS. CONFIDENTIALITY:

The dichotomy of freedom of information and right to privacy is age old. The law of confidentiality is a part of that. Since the *Prince Albert v. Strange* this controversy started, came into question again in the *Douglas v. Hello!*, continued in the *People's Union for Civil Liberties v. Union of India* and still it is continuing. The right to freedom of information has given birth to the concepts, like, media intrusion, long-lens photography and investigative journalism, all of which are the instruments of violation of right to privacy. Hence, this dichotomy.

As far as the right to privacy of the Celebrities is concerned, media is always an intruder. When sued by a celebrity, it takes the plea of investigative journalism. There are various instances of harassment, humiliation, accident and even death of the celebrities due to the media intrusion. Still it is continuing. The result is that, due to this conflict, adequate damages cannot be provided for the violation of the right to privacy. *Douglas v. Hello!* is the best example of that, where damages for the violation of right to privacy could not be provided due to the controversy between the right to privacy and freedom of expression. Instead, damages were awarded on the ground of breach of confidence.

Investigative journalism, if allowed to be continued, will be the main instrument for the violation of confidentiality. Nothing will remain private or confidential due to this media intrusion in the private life. It is increasing day by day and now the time has come to check it with strong hands by implementing appropriate legislative measures all over the world.

CONCLUSION AND SUGGESTIONS:

It is often said that, a man's house is his own castle and any intruder is not allowed there. A man is independent to act according to his will in his castle and as such nobody is there to prevent him. It is impossible in the outside world. Therefore, everyone needs privacy to a certain extent to enjoy solitude, intimacy and freedom. This is the right to privacy which has many facets and dimensions, like privacy of family, marriages, child-bearing, motherhood, education, information, reputation, personal liberty etc.

Confidentiality is associated with information or data privacy only. Therefore, it is a part of the right to privacy. It is one of the many facets of the right to privacy. Privacy covers almost the whole world, where

confidentiality is a small thing. As such, we can call privacy as the genus, of which confidentiality is a species. Maintenance of confidentiality is absolutely necessary to attain the right to privacy. One cannot be achieved without the achievement of the other. Hence, if one is violated, consequently the other is also violated.

Advancement of the civilization has brought with it advancement of the communication and information technology which is posing constant threat to the right to privacy and confidentiality. As a result, violation of the right to privacy and breach of confidentiality is a very common practice in the contemporary social scenario. Inadequacy of the existing legal framework, absence of express statutory enactments and the failure of existing law implementing machineries are the causes of the violation of this right. Therefore, appropriate suggestions are required to be provided to remedy the situation.

The following suggestions can be cited accordingly:

- (i) More research work is required to study the nature of the violation of the Right to Privacy and the breach of confidentiality.
- (ii) The sufficiency of the existing laws on the right to privacy and confidentiality in U.S.A., U.K. and India should be checked.
- (iii) A separate law relating to Data Protection should be enacted in India.
- (iv) Separate Laws of Confidentiality should be made in India, U.S.A. and U.K.
- (v) The Right to Privacy Bill, 2011 of India should be made into an Act.
- (vi) Special laws should be made to prevent media intrusion and investigative journalism into private life.
- (vii) Comprehensive legislations covering the individual right to privacy including confidentiality should be enacted all over the world.
- (viii) General Awareness Programmes and media campaigns should be initiated to generate mass awareness.
- (ix) Right to Privacy should be guaranteed as a separate fundamental right in the Constitutions of different countries.

Last but not the least, co-operation and co-ordination should be made at all levels of the society to remove the difficulties associated with the problems of violation of right to privacy and breach of confidentiality as also the efforts should be made to bring out the appropriate solutions for the same. If proper steps are taken, then we can hope for a better future where the violation of the right to privacy can be suitably remedied.

Finally, everything remains incomplete without saying that, the privacy and confidentiality are the two sides of the same coin or the mirror reflection of each other. Therefore, one remains incomplete without the other and the

guarantee of one is dependent on the guarantee of the other. If one is protected, the other is simultaneously protected. If one is violated, the other is automatically violated. Thus, the right to privacy should be adequately redressed by appropriate legislative measures for the redressal of the right to confidentiality of information.

CHAPTER – 25

Awareness and Implementation of Right to Privacy of Women in SAARC Region: Need of the Hour

Sangeeta Chatterjee

I. Introduction

All are equal in the eyes of the law – this is a universally acclaimed truth. It is also an accepted and recognised human right all the world over, which is formally known as 'Right to Equality.' Article 7 of the Universal Declaration of Human Rights, 1948 has given it a worldwide recognition by specifically mentioning that, all are equal before law and are entitled without any discrimination to equal protection of the law. Therefore, it can be said that, human rights of men and women are protected equally all over the world. Though this contention is true theoretically, but practically, it has no basis, because nearly half of the world population, called 'women' have not yet achieved their equality with men.

In this modern world of cyber age, when women have gone to the space, are driving cars, flying aeroplanes, fighting at battlefields, running big business houses etc. side by side with men and have proved their equality along with men, it is very sad to say that, still they are considered as members of vulnerable groups. In fact, the number of modern women who are educated and working equally with men, are very limited, which situation shows that, a large number of women are still remaining in the darkness of illiteracy, underdevelopment, malnutrition, undernourishment, poverty, economic inequality and over exploitation. As such, the human rights of women are not adequately protected in the practical field. The deplorable condition of women is persisting in every region of the world, inspite of numerous international, national and regional legislations. SAARC countries are not exceptions to this situation.

Right to Privacy is an important Human Right in the contemporary social scenario, under which everyone gets freedom from unwanted interference by the outside world. Women are entitled to enjoy this right for better protection of their lives in a healthy manner and to uphold their human dignity. Unfortunately, along with the problem of non-implementation of this right, a large number of women are not even aware of their Right to Privacy. In spite of several international and national legal instruments, this situation has cropped up. The situation is even worse in the SAARC region. Hence, this study has taken up. The objective of this study is to generate awareness regarding Right to Privacy of Women as well as to

analyze the problems and prospects of implementation of this Right in the SAARC region.

II. The Backdrop

Louis Henkin, in his book 'The Age of Rights,' has defined Human Rights as the rights of individuals in society. According to him, every human being has legitimate, valid, justified claims upon his or her society to acquire various 'goods' and 'benefits,' which are defined, particular claims listed in international instruments and are deemed essential for individual well-being, dignity as well as those reflect a common sense of justice, fairness, and decency.¹ The human rights, thus defined, are necessary for protection of both men and women in society. Speaking in the same line, the Preamble of the United Nations Charter has declared that, the object of the United Nations shall be "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." This is the biggest attempt in the international sphere for moving towards protection of human rights of every human being.

India is not lagging behind the scenario. It has enacted the Protection of Human Rights Act, 1993 in this respect. Section 2 (1) (d) of the Act, defines 'Human Rights' as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India. Other SAARC countries have also tried to implement the provisions of Universal Declaration of Human Rights, 1948 and the two International Covenants, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights, both passed in the year 1966 and have made national legislations in this respect.

In this backdrop, it can be said that, inspite of taking various steps to protect the human rights of every section of the society, certain group of persons are still remaining in neglected position, such persons are called vulnerable groups or sections of the society. They are actually the disadvantaged persons of the society and thereby need special care for their upliftment and development. Women, children, aged, disabled, migrant workers and displaced persons will come under this group. The main problem of these people is not the inadequacy of laws for their protection and development, but the lack of awareness among them regarding the availability of laws as well as the problem of implementation of those laws.

1 Dr. Rega Surya Rao, "Lectures on Human Rights and International Law", Asia Law House, 2005, p.271.

Therefore, it is high time to take proper steps for the eradication of such problems.

III. Vulnerable or Disadvantaged Groups – The Concept:

The human rights of 'Disadvantaged' or 'Vulnerable' groups need special attention in the international and national scenario. In this context, it is also necessary to define 'Vulnerable Groups.' According to Dictionary meaning, the term 'Vulnerable' means 'capable of being wounded' or 'not adequately protected'.² In the broad sense, Vulnerable means, the inability of an individual, for certain specified reasons, to exploit opportunities presented by society for their self-betterment. But, in the narrow sense, it means, membership of one or more of the 'Target Groups' defined in various surveys and reports of different NGOs and other persons or institutions engaged in the social development of these people.³

The definition of disadvantaged groups varies between countries, but the most important defining characteristics of the group are age, sex, ethnicity and location. At the same time, other important rudiments are people with disabilities and stigmatized illnesses, such as mental ill-health. In case of the areas facing war or civil conflicts, displaced people and refugees form an important part of vulnerable group. Most significantly, there are certain classes of persons, who by virtue or nature or deep-rooted custom are weak, vulnerable and disadvantaged, e.g. women, children, disabled persons, aged persons, migrant workers, persons belonging to a particular race etc. Such persons, being human beings are always deprived of their human rights and fundamental freedoms. Therefore, their protection is absolutely necessary in the international, national and regional level.

IV. A Study of Women – The Vulnerable Section of Society:

In the present era of human rights development, women are still considered as members of vulnerable groups along with the other members, like Children, Disabled, Tribals, Aged and Minorities. As they are the weaker sections of society, they always need special protection by law. Women are occupying major portion of the vulnerable section and the most important point is that, even after elapsing of long time since the adoption of Universal Declaration of Human Rights 1948, no change is found in the condition of women. Hence, it is high time to give better protection to human rights of women and in this respect, awareness generation about the

2 Nani Gopal Aich, Progressive English-Bengali Dictionary, 1991, p.1415.

3 Vulnerable Groups in Rural Vietnam: Situation and Policy Response, A Report based upon the Sample survey, www.aduki.com.au/VulnerableGroups.pdf, visited on 25.12.2014.

human rights of women is also necessary. This is a global problem and everyone is concerned with this. As the SAARC region is not an exception, therefore, the problem is equally applicable in that area.

There are many issues relating to women all over the world and in the SAARC area. As for example, problems relating to culture of male dominating society, the lack of leading quality among women, illiteracy and lack of education, poverty, inequality of income, over dependence on men, undernourishment and malnutrition including poor health condition, limited access to economic resources and limited mobility. In addition to that, nobody is willing to acknowledge women's reproductive role as a social responsibility and thereby there is lack of social insurance and maternity benefit legislations in the SAARC region or there is inadequacy of comprehensive social insurance and maternity benefit legislations protecting the rights of women. Hence, many women may be forced to discontinue their jobs after having children. Moreover, the overall social structure in the SAARC region is the responsible factor for vulnerability of women.

V. The Causes of Vulnerability of Women

There are various causes of vulnerability of women, which are as follows :-

- ❖ Lack of education.
- ❖ Lack of ability to work.
- ❖ Women are most exposed to diverse risks (natural and man-made).
- ❖ Women have limited means to manage these risks.
- ❖ High vulnerability causes them to be risk adverse.

Due to the above reasons, women are called vulnerable sections of the society. These factors are present in every part of the world and more specifically in the developing and underdeveloped countries. As the SAARC countries are all developing countries, therefore, all the causes of vulnerability of women are present thereby.

VI. The Major Obstacles in the realisation of Equal Rights of Women

The Third World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace were held at Nairobi, 1985. According to the Nairobi Conference, following factors create the major obstacles in the realisation of the equal rights of women :-

- (a) Psychological differences.
- (b) Gender inequalities.
- (c) Fundamental resistance.
- (d) Sharp contrasts between legislative changes and effective implementation of these changes.
- (e) Introduction of legislative changes with proper understanding of the relationship between existing legal systems.
- (f) In some countries, discriminatory legislative provisions in the social, economic and political spheres still exist.⁴

Above all, there is still a deep rooted resistance on the part of conservative elements in society to bring change in attitude necessary for a total ban on discriminatory practices against the women at the family, local, national and international levels.⁵

VII. Right to Privacy – A Valuable Human Right

Right to Privacy is an important human right in the existing social structure. Under this right, everyone gets freedom from unwanted interference by the outside world. The foundation of the concept of Right to Privacy was created by Justice Cooley in 1888 by using the words, "the right to be let alone."⁶ According to Samuel Warren and Louis Brandeis, Privacy mean, the right to protect 'inviolable personality' of human beings.⁷ Prof. Alan F. Westin said there are four basic tenets of Privacy – Solitude, Intimacy, Anonymity and Reserve.⁸ Right to Privacy is considered as a notable human right, because it is not an independent human right in itself only, but it helps in the fulfilment of different basic human relationships, which become incomplete without the existence of this right. In this sense, Privacy is not made of one particular interest only, rather it is a bundle of rights. It consists of many interests and as such the right to privacy should be meant as the right of the individual to protect one's life against a number of encroachments. In a civilized human society, all these rights of an

4 United Nations Action in the field of Human Rights, United Nations, New York and Geneva, 1994, p.209, para 1764.

5 Ibid.

6 Shrinivas Gupta & Dr. Preeti Misra, "Right to Privacy – An analysis of Developmental Process in India, America and Europe," Central India Law Quarterly, Vol.18 (2005), pp.524-552 at p.524.

7 Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harvard Law Review, 1890, pp.193-220 at p.193.

8 Alan F. Westin, Privacy and Freedom, Atheneum Publication, New York, 1970, p.7.

individual should be protected. But, in no manner, Privacy is an absolute right and as such, reasonable restrictions can be imposed on this right in the interest of the society at large. Moreover, the nature and basis of Privacy lies in the balancing of individual and social interests in a civilized society.

The value of Right to Privacy as an inherent human right was realised since time immemorial, rather since the times of ancient human civilizations. This right acts as a catalyst in promoting and developing personality, integrity, dignity, reserfulness, intimacy, anonymity, solitude and freedom of individual persons. It is recognised as a valuable human right due to its working towards the furtherance of basic human relationships of love, friendship, respect, parentage, sonship, conjugal relationship etc. Privacy is not only a good technique for furthering these fundamental human relations, but also without privacy, these are simply unthinkable. In fact, all these fundamental human relations require a context or the possibility of privacy for their existence. Therefore, privacy is considered as a factor forming the basis of our personal and social relationships and every individual enjoys this right as a part of his or her personal liberty.⁹

VIII. Right to Privacy of Women – The Importance in SAARC Region

Right to Privacy is an important human right necessary for better protection of the lives of every human being in a healthy manner. It is equally applicable to men and women both. It is also necessary to uphold the human dignity of every individual in a civilized society. In this sense, every human being should enjoy the privacy of family, marriage, home, correspondence, honour and reputation. Apart from these privacy rights, there are certain privacy rights, which are specifically applicable to women, like privacy of child-birth, motherhood, use of contraception, right to abortion, protection against female foeticide including the natural modesty and morality of women. Also there are other types of privacy rights, like Privacy of Information, Privacy in Cyberspace, Workplace Privacy and Healthcare Privacy. Though these privacy rights are equally applicable to men and women both, but women are more fully subjected to Workplace Privacy and Healthcare Privacy, because women are suffering from workplace harassment and lack of workplace privacy as well as poor health conditions all over the world. The SAARC countries are not exceptions to this situation. Hence, the women need special care for the protection of these rights.

9 E. J. Jathin, "Human Genome Project : Emerging Challenges of Right to Privacy vis-à-vis Insurer's Right to Know," *Cochin University Law Review*, Vol. XXXI (2007), pp.1-28 at p.3.

IX. The Position of Women in SAARC Region

The first SAARC Ministerial Meeting on the Development of Women, held in 1986 has reviewed the overall situation of women in South Asian countries and has identified the areas which require the greater attention, such as the low level of literacy, poor enrolment in schools, high drop-out rates, the lack of vocational and technical training as well as marketing and credit facilities and the low level of political participation and involvement in policy making and its implementation. Moreover, after thorough investigation, it has been found that, women's participation in Parliament in South Asia is the lowest of all the regions.¹⁰

In spite of taking various initiatives for the development of position of women in the SAARC region, it is found that, SAARC has not taken a solid move forward to improve women's lives and promote gender equality and women's empowerment. Still now, it is a challenge to get national attention and reprioritize the women's participation in all sectors within SAARC. Particularly on women's issues, various difficulties are seen, because there is absence of unanimity among all the SAARC member states in matters of understanding and perceiving women's rights in national or regional levels. As for example, Pakistan and Bangladesh have ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979 with a reservation. In addition to the institutional and relationship challenges among the member states, there are social, economic and cultural challenges that impede the empowerment and inclusion of women at the decision-making level in the SAARC region. Moreover, Patriarchal societies and attitudes have not been challenged in SAARC, as in many countries in the world. Hence, women face problems in moving ahead in equally with men, because social attitudes towards participation of women in every sector along with men are negative.¹¹

X. Right to Privacy of Women in SAARC Region – The Scenario

The cases of lack of privacy rights and violations of privacy are found in large numbers in the developing and underdeveloped countries rather than the developed countries, because in these countries, along with the problem of non-implementation of the privacy rights, a large number of

¹⁰ Indu Tuladhar, "SAARC : A Step Forward, Women's Inclusive Political Participation," Ch. 4, *Inclusive Political Participation and Representation: The Role of Regional Organizations*, International Institute for Democracy and Electoral Assistance 2014, International IDEA Publications, Stromsburg, Stockholm, Sweden, p.87, www.idea.int/publications/inclusive-political-participation-and-representation/upload/Inclusive-Political-Participation-chapter4.pdf, visited on 26.12.2014.

¹¹ Id at pp.87-88.

women are not even aware of their rights. Again, SAARC countries are exceptions to this scenario. SAARC countries are all developing countries and hence, there is absence of express legislations on right to privacy including right to privacy of women. Moreover, due to the importance of family privacy and values, right to privacy of women are neglected in SAARC countries. There is absence of social, legal and regulatory framework for right to privacy of women in SAARC region.

Women are subjected to every kind of violation of Privacy in SAARC region. They are not safe in the family, educational institutions and at the workplace moreover they are prone to various crimes there. The most important problem of women at workplace is the Sexual Harassment of Women at Workplace, which is derogatory to the dignity of women. Moreover, Sexual Harassment of women at workplace may amount to loss of Workplace Privacy and Human Dignity of women. It is not the only issue, but there are other issues of violation of privacy of women. Lack of privacy in the family is most important for women. In a joint family system, still today women are having no say for the use of contraceptives or birth of a girl child. Even today, girl children are unwelcome in many families and a woman would be mother is forced to abort her girl child without her consent and thereby the heinous crime called, female foeticide is caused. Hence, there is no right to privacy of motherhood available for women in the SAARC countries.

Again, women are suffering from poor health conditions and are subjected to healthcare privacy. In many cases, in rural areas they are forced to give child-birth in public, their treatment of diseases are not done with their consent as well as there is lack of availability of lady doctors for women. Also women are prone to deadly diseases, like Tuberculosis and HIV/AIDS in many SAARC countries. Another problem of lack of privacy is that, women have no say in matters of choice of education, job, marriage and procreation or upbringing of children in some societies in the SAARC region. In fact, they are having no right to privacy for taking decisions in various private matters of their lives. Hence, the situation is alarming in the SAARC region.

XI. The Legal Framework of Right to Privacy of Women in SAARC Region

Right to Privacy is not a narrower local or regional right, rather its scope and extent has been broadened so much that, it covers a wide range of globally accepted human rights within its periphery. In fact, Right to Privacy is considered as a global phenomenon in the modern age. It has international recognition and is effective in all parts of the world. In this respect, it should also be mentioned that, Right to Privacy of Women is also

a universally acclaimed human right. A number of legal instruments are made in the international level and in the SAARC region for protection of Right to Privacy which include the protection of Right to Privacy of women.

XII. The International Legal Scenario

International recognition of Right to Privacy has been started just after the end of Second World War and the establishment of United Nations in the year 1945. It has got a remarkable development under the auspices of the United Nations. There are various international instruments, like Conventions, Declarations, Protocols etc. dealing with the provisions of Right to Privacy including Right to Privacy of Women.

In the international field, the following legal instruments are available on Human Rights of Women including the Right to Privacy of Women –

- a) Article 12 of the Universal Declaration of Human Rights, 1948.
- b) Convention on the Political Rights of Women, 1953.
- c) Convention on the Nationality of Married Women, 1957.
- d) Article 17 of the International Covenant on Civil and Political Rights, 1966.
- e) Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966.
- f) Declaration on Elimination of Discrimination against Women, 1967.
- g) Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979.
- h) Declaration on the Elimination of Violence against Women, 1993.
- i) Optional Protocol to the Convention on the Elimination of Discrimination against Women, 1999.
- j) Commission on Status of Women.
- k) Four World Conferences on Women held in Mexico City 1975, Copenhagen 1980, Nairobi 1985 and Beijing 1995.

Among all these instruments, the comprehensive international legislation for protection of human rights of women is the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). It has been enacted with the objective of prohibition of discrimination against women of any nature. Article 1 of the CEDAW

defines Discrimination against women on the basis of sex. Article 16 of this Convention provides for the Right to Privacy of Women in matters of family, marriage, procreation and upbringing of children. But, there is no specific Convention in the international field dealing separately with Right to Privacy of Women only.

XIII. The Legal Scenario in SAARC Region

Human Rights of Women are very much neglected in the SAARC region mostly due to the lack of unanimity among the SAARC countries in this respect. There has been no Convention focusing specifically on Human Rights and Fundamental Freedoms in the SAARC region. There is no specific legal instrument on Right to Privacy of Women in the SAARC region. Only Convention on Human Rights of Women is the SAARC Convention on Preventing and Combating the Crime of Trafficking in Women and Children for Prostitution, 2002. Hence, Right to Privacy of Women in this area is not only neglected, but also nobody has considered for enacting a law on this issue. Moreover, apart from the Constitutional Provisions, no national legislation is available on this issue in the SAARC countries.

The legal scenario on Right to Privacy of Women in the SAARC region is analysed hereunder :-

- i) South Asian Association for Regional Cooperation (SAARC) has been founded in December 1985 to promote peace, development and stability in South Asia.
- ii) SAARC is constituted by the heads of the states of Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri-Lanka, and later Afghanistan.
- iii) 18 SAARC Summits have been held since 1985 to 2014, most of which include the women's issues, but none of the Summits has specifically dealt with the Right to Privacy of Women in this region.
- iv) There have been four ministerial-level SAARC meetings on women's issues, since its inception, in 1986, 1990, 1993 and 1995, but the issue of Right to Privacy of Women is neglected.
- v) The SAARC Convention on Preventing and Combating the Crime of Trafficking in Women and Children for Prostitution, 2002 has failed to include the important issues, like pornography, confidentiality and Right to Privacy of Women.
- vi) The People's SAARC Regional Planning Meeting, 2014 has listed various issues for consideration in the 18th SAARC Summit, 2014.

which include Freedom of Expression and Right to Privacy, but ultimately Right to Privacy has not been considered in the 18th SAARC Summit.

- vii) One important national law on Right to Privacy including Right to Privacy of Women is Article 21 of the Indian Constitution.
- viii) Except Sri Lanka, all other SAARC countries are having express constitutional provisions on Right to Privacy, but Right to Privacy of Women is not treated separately there under.

XIV. Role of Judiciary in the SAARC Region

In India, various judgments have been given by the Indian Supreme Court on the issue of Right to Privacy of Women, which have recognised various types of Privacy Rights of Women. Among these rights, most important are the Right to Privacy and Sexual Autonomy of Women, Right to Privacy of a Prostitute and Right to Privacy of Natural Modesty as well as Morality of Women. Right to Privacy and Sexual Autonomy of Women was considered as an important human right in the case of *Re Ratanmala*,¹² where the raid on a brothel by a police officer without knocking the door was held as an outrage of the modesty of a girl. In the case of *State of Maharashtra v. Madhukar Narayan Mardikar*,¹³ it was held that, even a woman of an easy virtue or a prostitute would have her Right to Privacy and no one can invade her Privacy as and when wishes. In the case of *Neera Mathur v. Life Insurance Corporation of India*,¹⁴ it was held that, any quarry which adversely affects the modesty and self-respect of a woman would amount to violation of Right to Privacy of the Woman. The above mentioned Indian cases have played an important role in the development of Right to Privacy of Women in India. The other SAARC countries are also taking initiatives for the development of this right in the like manner.

XV. Problems of Implementation of the Right in the SAARC Region

Apart from the lack of awareness regarding the Right to Privacy of Women in the SAARC region, there are various problems for implementation of this right in the said area. The Problems are stated herein below :-

- 1) SAARC countries are developing countries and hence, there is absence of express legislations covering the area.

¹² AIR 1962 Mad. 31.

¹³ AIR 1991 SC 207.

¹⁴ AIR 1992 SC 392.

- 2) There is absence of balanced male-female ratio due to the growing menace of female foeticide in large number in the SAARC region.
- 3) Presence of crimes like sexual harassment of women, domestic violence, immoral trafficking of women including prostitution etc in large number in the SAARC region.
- 4) Existence of social problems like poverty, inequality of income, illiteracy, unemployment and lack of general awareness among women.
- 5) Lack of social, economic, cultural, technical and scientific development.
- 6) Moreover, there is lack of law enforcement machineries.
- 7) The SAARC Convention on Preventing and Combating the Crime of Trafficking in Women and Children for Prostitution, 2002 has not included Right to Privacy of Women within its purview.
- 8) The SAARC Summits and Ministerial-level Conferences on women's issues have neglected Right to Privacy of Women for their consideration.

Over and above, the social infrastructure in the SAARC region does not permit the recognition of Right to Privacy of Women and in most of the cases, individual rights of women are suppressed by the family values which are considered more sacred than the Right to Privacy of Women.

XVI. Suggestions

In spite of the above-stated problems, there is a hope for a better future for the Right to Privacy of Women in the SAARC region. If the problems are eradicated with adequate remedies, then the progress and development of this right in the SAARC region is possible. In this respect, following suggestions may be provided :-

- 1) Right to Privacy should be considered as a valuable human right all over the world including the SAARC region.
- 2) Guarantee of Right to Privacy is required to uphold the right to live with human dignity of all women in the SAARC region.
- 3) Express Regional Convention is required in the SAARC region for protection of Right to Privacy including the Right to Privacy of Women.
- 4) Various heinous crimes on women in SAARC region should be prevented by legal regulation.

- 5) Different social evils should be eradicated by social welfare schemes of the government.
- 6) Social, economic, cultural, technical and scientific environment in the SAARC region should be developed.
- 7) Right to Education of Women should be recognised and protected.
- 8) General awareness campaign should be organised among the women regarding their Right to Privacy in SAARC region.
- 9) Adequate law enforcement machineries should be established.
- 10) The SAARC Summits and Ministerial-level Conferences should consider Right to Privacy of Women as an important right and try to implement it.

VII. Conclusion

Human resource is the greatest resource of the earth and if properly utilised, it can create miracles. Women are the sources of human resource generation, hence, development of women is utmost important for the development of human beings at large. If mother is healthy, educated and well-balanced, then only the child becomes a healthy, wealthy and balanced citizen. A dignified mother can only create a dignified future citizen. Guarantee of right to privacy is obvious to guarantee the human dignity of women. It is severely neglected along with other human rights of women in the SAARC region. Hence, proper legal and regulatory measures should be undertaken in the SAARC region to uphold this right. Then only it is possible to uplift the deplorable condition of women in the SAARC region.

HARASSMENT OF WOMEN AT WORKPLACE : AN INSIGHT VIS-À- VIS PRIVACY LAWS IN INDIA

Sangeeta Chatterjee

Introduction

Harassment is a behaviour which is intended to trouble or annoy someone. It includes repeated attacks or attempts to cause problems to fellow human beings. Harassment is a serious problem in the contemporary social scenario resulting into various social evils, like depression, death, suicide, murder and other heinous crimes. Therefore, growing concern for prevention of harassment not only in India, but also all over the world is a natural phenomenon. Right from preventing 'Malala' in Pakistan to get education to the honour killing of 'Arushi' by her parents in India - all are recent instances of harassment of women which show the menace called harassment is grasping our society.

Harassment does not only mean harassment of women, it includes harassment of men also. But, this Paper would like to confine itself within the periphery of harassment of women only and that too regarding harassment of women in workplace. Workplace Harassment is not sexual harassment only. There might be other types of harassments, like mental torture, ragging, teasing, unhealthy competition, workplace politics to defeat someone etc. One form of Workplace Harassment is the infringement of Workplace Privacy. Again, it attacks men and women both, but in most of the cases it affects severely on women. Violation of Workplace Privacy

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is a very common issue in the present day society. In spite of several International Legal Instruments and well-established national legislations in different countries, no change is observed in the scenario. The situation is even worse in India, because the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act is passed only in 2013 in India. Moreover, the Act is not providing adequate protection to invasion of Workplace Privacy of women.

In this backdrop, the present study would like to trace the origin and development of law relating to prevention of harassment in India. The objective of this Paper is to highlight causes and consequences of harassment including violation of Workplace Privacy in Indian society. Finally, the Paper would like to provide a set of Suggestions for prevention of harassment in workplace by specifically providing suggestions for preventing violation of Workplace Privacy in India.

Harassment – The Concept, Origin and Historical Development

I) The Concept

Harassment covers a wide range of behaviours of an offensive nature. It is commonly understood as behaviour intended to disturb or upset and it is characteristically repetitive. In the legal sense, it is intentional behaviour which is found threatening or disturbing.² Therefore, harassment is nothing but to disturb others intentionally in order to create loss or damage to them. Harassment is always coupled with offensive nature without any reason, whereas the other side in harassment in most of the cases, is innocent sufferer. The person harassing others might act with the intention of causing physical, emotional, intellectual or professional harm to others and sometimes might act with the intention of having 'fun' only due to the loss or damage of the sufferers.

Harassment is generally defined as a course of conduct which annoys, threatens, intimidates, alarms or puts a

person in fear of safety. It is unwanted, unwelcomed and uninvited behaviour that demeans, threatens or offends the victim and results in a hostile environment for the victim. Harassing behaviour may include, but is not limited to epithets, derogatory comments or slurs and lewd propositions, assaults, impeding or blocking movement, offensive touching or any physical interference with normal work or movement and visual insults, such as derogatory posters or cartoons.³

Harassment is also described as the act of systematic and /or continued unwanted and annoying actions of one party or a group, including threats and demands. The purpose of harassment may vary depending upon the nature and circumstances of each and every case. It may include racial prejudice, personal malice, an attempt to force someone to quit a job or grant sexual favours, apply illegal pressure to collect a bill or merely gain sadistic pleasure from making someone fearful or anxious. Such activities may be the basis for a lawsuit, if created due to discrimination based on race or sex, a violation on the statutory limitations on collection agencies, involve revenge by an ex-spouse or be shown to be a form of blackmail.⁴

Therefore, harassment may be a single act or may be collection of activities, but the intention behind harassment is important. If the activity includes threat or intimidation towards others or for putting someone under pressure, then it would definitely be called harassment. It includes the element of depriving someone in any manner by the use of force, threat, insult or any sort of unwanted behaviour. The very purpose of harassment is to create a hostile environment, so that one may take the advantage of the situation to cause loss or damage towards some other person. Harassment is nothing but a misnomer in the society, because it threatens the very structure of the society and cause social imbalance as well as anarchism.

II) The Types

Harassment may be of various types, depending upon the nature of the activity created, like Workplace Harassment, Psychological Harassment, Community-based Harassment, Racial Harassment, Religious Harassment, Sexual Harassment, Police Harassment and many others.

III) The Origin

Etymologically the term 'Harassment' was based on English ideology since circa 1618. But, it was originated in France and was taken in England as a loan word from the French term '*harassment*', which was recognised in 1572. It meant torment, annoyance, bother or trouble.⁵ Later on, in 1609, it was also referred to the 'condition of being exhausted or overtired'.⁶ The origin of 'harass' is thought to be old Scandinavian 'harr' with the Roman suffix 'as', which meant grey or diminish horsehair.

IV) The Historical Background

The historical background of the term 'Harassment' can be traced back since the very old period, but the laws for prevention of harassment have been the creation of modern period only. During the 18th, 19th and 20th centuries, laws have been passed the entire world over for protection of individuals from the heinous crime, called harassment. The study specifically highlights the development of laws preventing harassment in U.S.A., U.K. and India.

(a) The Laws of U.S.A.

In 1964, the United States Congress passed Title VII of the Civil Rights Act which prohibited discrimination at work on the basis of race, colour, religion, national origin and sex. This later became the legal basis for early harassment law. The practice of developing workplace guidelines prohibiting harassment was pioneered in 1969, when the US Department of Defence

drafted a Human Goals Charter, establishing a policy of equal respect for both sexes. In *Meritor Savings Bank vs. Vinson*, 477 U.S. 57 (1986), the US Supreme Court recognised harassment suits against employers for promoting a sexually hostile work environment. In 2006, US President George W. Bush signed a law which prohibited the transmission of annoying messages over the internet, that is spamming, without disclosing the sender's true identity.⁷

(b) The Laws of U.K. -

In the U.K., there are a number of laws protecting people from harassment including the protection from Harassment Act, 1997 and the Criminal Justice and Public Order Act, 1994.⁸

(c) The Laws of India -

Historically, harassment in India meant sexual harassment of women, which traditionally confined within the purview of 'rape'. Originating in the 1860s, at a time when women had no influence over the shape or substance of legislation affecting them, the rape law remained on the statute books for 123 years before any attempt was made to challenge it. Hence, laws of harassment in India are the Indian Penal Code, 1860, the Protection of Women from Domestic Violence Act, 2005 and the recent Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Harassment of Women at workplace – The Genesis

I) The Workplace Harassment in General

Workplace Harassment is the hateful dealing through harsh, malevolent, hurtful or embarrassing attempts to undermine an individual worker or groups of workers. It is almost unseen and the executive leaders (managers) are almost reluctant or unconscious about it in the third

world countries.⁹ Workplace harassment may be made towards both men and women. It may be by sexual harassment or otherwise. It can be made by the employer or co-workers.

The workplace harassment is defined, more or less in the same manner with civil harassment. The basic difference between the two is the workplace harassment primarily occurs at work. For getting the remedy in case of workplace harassment, the employer of the harassed employee has to ask for protection of the employee or the family members of the employee. In that case, a reasonable proof is required on the following grounds:-

- (a) The employee has suffered unlawful violence, like assault, battery, stalking or a credible threat of violence.
- (b) The unlawful violence or the threat of violence can reasonably be construed to be carried out or to have been carried out at the workplace.
- (c) The conduct is not allowable as part of a legitimate labour dispute.
- (d) The person accused is not engaged in constitutionally protected activity.¹⁰

II) The Sexual Harassment of Women at Workplace

In the modern day society, men and women are enjoying constitutionally equal rights all over the world. Hence, women are taking part equally with men, in the educational, social, cultural and professional activities. They are working for their social and economic development as well as for the maintenance of their family. But, sexual harassment of women at workplace has become a great barrier for their professional development. It creates a hostile working environment for women where they are facing degraded and humiliating treatment.

Sexual Harassment includes such unwelcome sexually

determined behaviour (whether directly or by implication) as –

- (i) Physical contact and advances;
- (ii) A demand or request for sexual favour;
- (iii) Sexually coloured remarks;
- (iv) Showing pornography;
- (v) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.¹¹

According to American Employment Law, Sexual Harassment is an unwelcome sexual advance or conduct on the job, having the effect of making the workplace intimidating, hostile or offensive. Sexual harassment is considered as a form of illegal discrimination.¹²

III) Sexual Harassment of Women at Workplace - The Types

Sexual Harassment at workplace can be divided into the following types :-

(a) Quid Pro Quo Sexual Harassment -

Quid Pro Quo Sexual Harassment occurs when an employee is offered to be retained in his or her job or be promoted in exchange for sexual favours. The person who commits quid pro quo sexual harassment is a person with power to influence victim's employment or educational situation, like a supervisor, manager or a teacher.

(b) Hostile Work Environment -

Hostile Work Environment Sexual Harassment occurs when a co-worker, manager or supervisor in the workplace makes unwelcome sexual advances which interferes with work performance or creates an intimidating, hostile or offensive work and/or learning environment.

Whatever may be the nature or type of sexual harassment, it provides degrading and humiliating treatment to women at workplace. It always creates a

hostile working environment which becomes a barrier for progress and development of women. As women are considered as half of the human society, hence stagnation and backwardness of women means stagnation and backwardness of the society at large. Moreover, Sexual Harassment of women workplace may also have other serious repercussions, like violation of workplace privacy.

Right to Privacy – The Concept, Origin and History

I) The Concept

Right to Privacy is an absolute and intimate right of an individual, which is a matter of grave concern for everybody in the contemporary social scenario. But, very few persons have the knowledge that, it is not a right of recent origin, rather it has a great historical background and can be traced back since the very old past. Right to Privacy, at the very outset may mean, the leading of an isolated life, but specifically it denotes the freedom from unauthorized and unwarranted interference into one's private life.¹³

II) The Origin and History

The origin of Right to Privacy can be traced back since the Biblical period. The first idea of Privacy as a recognized human right was generated by the famous article "Right to Privacy", written by Samuel Warren and Louis Brandeis, published in Harvard Law Review in 1890, in U.S.A. In U.K., the Prince Albert vs. Strange case, 1848 was considered as the foundation of Right to Privacy. In India, the first instance of Right to Privacy was derived from the Nuth Mull vs. Zuka Oollah Beg and Kureem Oollah Beg, Sr. D. A. N.-W. P. Rep., 1855 case. However, the Right has received concrete shape in the modern period with the adoption of the Younger Committee Report, 1972 and the Nordic Conference of Jurists, 1967.

Rights to Privacy – The kinds or types

In the modern day society, the growth and expansion of Right to Privacy have been increased so much, that it covers various kinds or types of Right to Privacy. More specifically, those are Privacy of Family, Home and Correspondence, Privacy of Marriage and Child Bearing, Privacy of Information, Privacy of Celebrity Life, Workplace Privacy, Health Care Privacy and so on. All these are considered as new dimensions of Right to Privacy. Among all these Privacy Rights, the study will specifically consider the Right to Workplace Privacy.

What is Workplace Privacy and its Violation

Right to Privacy at workplace means, freedom from unnecessary interference into the activity of an employee by the employer or co-workers, e-mail checking, keeping unreasonable employee information, CCTV or electronic surveillance, except as provided by the Government, etc. Violation of Workplace Privacy may be caused by unnecessary peeping into the cubical of other employees or by interfering into their activities which is not the concern of others. Sexual Harassment at Workplace is also another form of violation of Workplace Privacy. Therefore, violation of Workplace Privacy may be physical, mental or psychological. The issue of Workplace Privacy has become an important question in the recent period. It raises conflicting expectations between the employer and the employee. On the one hand, employees assert that their privacy rights are being trampled upon by ruthless, prying employers. Employers, on the other hand, claim the need to protect business assets from employee theft, accidents caused by employees, drug abuse and other problems as justification for employment practices that may threaten an employee's perceived privacy right. The issue of Workplace Privacy covers a wide variety of employment practices. Such as, individuals seeking employment are subjected to a variety of inquiries, investigations and background checks. Businesses collect and maintain a wide

range of data on employees. Drug testing is now a major screening tool used by a majority of large and small firms. Employees on the job are increasingly likely to be subject to performance monitoring, drug or alcohol testing, searches and other kinds of employer surveillance. Employee computer files, e-mail, voice mail and telephone calls are often subject to employer monitoring. Even employee activity off the job has been subject to employer's scrutiny and corrective action. In all these cases, employees usually complain for the violation of their workplace privacy.¹⁴

Harassment of Women at Workplace Vis-à-Vis Invasion of Workplace Privacy – An Insight

Harassment of women at workplace is a very common phenomenon. It is growing at an alarming rate everyday with the growing number of working women. Though in the modern society, it is expected that, everyone would respect the idea of equality for men and women, but practically somewhat reverse situation is seen everywhere. Workplace is just the reflection of this perversion. When a woman is going to work, she should be judged according to her educational, professional qualification and working capacity, instead she is treated like a commodity. A working woman is not a woman of easy virtue, but due to the poor social infrastructure and backwardness, she is considered alike. Hence, the cases of harassment of women at workplace come into the picture.

Workplace harassment of women is not only one type, but there are many. Most important type of harassment is sexual harassment of women at workplace. It is created by employer or co-workers by offering better job opportunities in exchange of sexual favours, taking advantage of the poor monetary or family condition of the victimized woman. If such an intimidating or hostile work environment is created, then ultimately the working capacity and confidence of the victimized woman is shaken. Moreover, the physically and mentally harassed woman gets degraded and ashamed of herself in front of everybody in the workplace and outside,

the ultimate consequence of which is loss of job as well as loss of future job opportunity and career advancement. Hence, sexual harassment of women at workplace is such a heinous crime, which is enough to end the career of a promising woman.

Workplace harassment of women is not sexual harassment only. There might be other types of harassments, like mental torture, ragging, teasing, unhealthy competition, workplace politics to defeat someone etc. Any of these harassments may create hostile work environment resulting into humiliating treatment of a woman, likely to affect her health and safety. Moreover, these can also generate implied an explicit threat about her present or future employment status. It can be made not only by sexual harassment, but also by asking unnecessary favours, like employer steals the project work made by the employee and uses it in his or her own name, refusal of which may be a threat to prevent the future scope of employment of the employee. Most important, such types of workplace harassments are not created by men only, but are created by women to harass other women in the workplace also.

Harassment of women at workplace may cause invasion of Workplace Privacy of women. If it is sexual harassment, then no doubt it amounts to loss of Privacy and Human Dignity of women at workplace. But, if it is of other types, like unnecessary checking of computer files, e-mail scanning, surveillance over voice mails and telephone calls, keeping unnecessary employee information of their credit reports and past service records, CCTV or electronic surveillance, except on Government instruction, plagiarism etc., then also the harassment amounts to violation of Workplace Privacy. If the surveillance at workplace is conducted by the employer in controlled and reasonable manner, then only it is supported, otherwise it would amount to employee harassment resulting into invasion of Workplace Privacy for both men and women. Hence, laws are needed to change the scenario.

International Legal Scenario

According to the report of International Labour Organisation (ILO), 68% of women suffer from mental harassment out of which 26% suffer from physical harassment at workplace.¹⁵ Therefore, the rate of harassment of women at workplace can be easily understood. To change the scenario and to give better protection of human rights of women, various international laws are made, some of which are related to prevention of harassment of women at workplace and some are related to protection of workplace privacy.

I) Harassment of Women at Workplace - The International Laws

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) provides Discrimination against women on the basis of sex. This article is considered as the basis for prevention of discrimination against women, may be of any nature.

The CEDAW is the most important international legal instrument for prohibition of sexual harassment. It contains the following provisions for prevention of harassment of women at workplace:-

- (a) **Article 11** - States should take appropriate measures to eliminate discrimination specifically against women in the field of employment.
- (b) **Article 22** - Equality in employment can be seriously impaired when working women are subjected to gender specific violence, such as sexual harassment at workplace.
- (c) **Article 24** - States should include in their report, information about sexual harassment and on measures to protect women from sexual harassment and other forms of violence or coercion in the workplace.

The other International Legal Instruments on this aspect are as under:-

- (a) **Articles 7 & 23 of the Universal Declaration of Human Rights, 1948.**
- (b) **Article 26 of the International Covenant on Civil and Political Rights, 1966.**
- (c) **Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966.**
- (d) **The Human Rights Instruments adopted by the International Labour Conference.**
- (e) **Various Seminars and Conferences of ILO.**
- (f) **The Fourth World Conference on Women at Beijing, 1995.**

II) Invasion of Workplace Privacy - The International Laws

Though there are no direct international legal instruments dealing with invasion of workplace privacy, but the instruments are available concerning the Right to Privacy of human beings, including the Right to Privacy of women. Some of such laws are as follows:-

- (a) **Article 12 of the Universal Declaration of Human Rights, 1948.**
- (b) **Article 17 of the International Covenant on Civil and Political Rights, 1966.**
- (c) **Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966.**
- (d) **Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.**

But, the most important problem is that, inspite of several international, regional and national instruments on human rights, every aspect of Right to Privacy is not adequately protected. One of such neglected area is Workplace Privacy, which is not directly protected by any of these international

legal instruments. Hence, the broader interpretation and combined effect of laws on harassment of women at workplace as well as the laws on Right to Privacy can give protection to this issue only to a limited extent.

Indian Legal Perspective

The problem of gender-based violence is getting worse every day. In India, the National Crime Records Bureau statistics show crimes against women are increased by 7.1% nationwide since 2010. There has been a rise in the number of incidents of rape and other sexual harassments also. In 2011, 24206 incidents were recorded, a rise of 9% from the previous year. A total of 228650 incidents of crimes against women were reported in the country during 2011.¹⁶

In this backdrop, a comprehensive law for prevention of sexual harassment of women, including the harassment of women at workplace is the need of the hour. There are various constitutional provisions and national legislations in this respect, which are discussed below.

I) The Constitutional Provisions

Some relevant Articles of the Indian Constitution preventing harassment of women are stated hereunder :

- (a) **Article 14** - It provides equality before law for men and women both.
- (b) **Article 15(1)** - It prohibits discrimination among persons on the ground of race, religion, caste, sex, colour and place of birth.
- (c) **Article 15(3)** - It empowers state to make special provisions for women and children.
- (d) **Article 16** - It provides equal opportunity for all citizens (including women) in matters of public employment.
- (e) **Article 21** - It guarantees the protection of right to life and personal liberty of every individual. The right to

live with human dignity and right to privacy, both are expansions of this right.

- (f) **Article 23** - It guarantees right against exploitation and prohibits trafficking of women and children.
- (g) **Article 39(a)** - It ensures that, all men and women have the right to adequate means of livelihood.
- (h) **Article 39(d)** - It states that, there shall be equal pay for equal work.
- (i) **Article 39(e)** - It provides that, the health and strength of the workers should not be abused.
- (j) **Article 42** - It provides for maternity leave.
- (k) **Article 51(c)** - It gives power to the Parliament to create laws for implementing international connections and norms by virtues of **Article 253**, read with Entry 14 of the Union List, in the 7th Schedule of the Constitution. **Article 73** is also relevant in this respect.
- (l) **Article 51(e)** - It declares the fundamental duty of every citizen to renounce practices derogatory to the dignity of women.

The Constitutional provisions are strong enough to curb the menace of harassment of women at workplace. Various decisions of Indian Judiciary have been pronounced and various legislations of Union Parliament have been enacted based on these Constitutional provisions, but the ultimate effects have not reached the cherished goal. Instead of decreasing, the crime called harassment is increasing every day. The main reason behind this, is the lack of infrastructure, general awareness and guilty mind of the general people.

II) The Other Legislative Enactments

Apart from the Constitutional provisions, there are also other statutory enactments in India, which are pertinent to mention in this respect:-

- (a) **The Indian Penal Code, 1860** - It had no direct provision in relation to sexual harassment as a crime

in India before the passing of the Criminal Laws (Amendment) Act, 2013, however, it provided for the provisions dealing with the violation of modesty of a woman. **Section 294** makes obscene acts in any public place punishable. It provides punishments for offence or assaults or for the use of force on woman with intent to insult the modesty of a woman. Eve teasing or sexual teasing of a woman is also considered punishable.

- (b) **The Industrial Disputes Act, 1947** - It prevents the discharge of a person by way of victimisation as unfair. This provision confines quid pro quo sexual harassment. After the Vishaka case, the Industrial Employment Act was amended and sexual harassment has been made a misconduct.
- (c) **The Factories Act, 1948** - It restricts working hours for women at 8 hours and prohibits employment of women except between 6 am and 7 pm.
- (d) **The Equal Remuneration Act, 1976** - It prescribes equal wages for equal work for both men and women.
- (e) **The Protection of Human Rights Act, 1993** - It has set up National and State Commission for protection of human rights.
- (f) **The Indecent Representation of Women (Prohibition) Act, 1986** - It prohibits indecent representation of women through advertisements, publications, writings, paintings, figures or in any other manner. It does not directly prohibit sexual harassment, but often women are forced to view such materials at workplace, which amounts to sexual harassment. In that case, this Act becomes helpful.
- (g) **The Criminal Laws (Amendment) Act, 2013** - This new Act has expressly recognised certain acts as offences which were dealt under related laws. These new offences, like Acid Attacks, Sexual Harassment

(Section 354A), Voyeurism (Section 354C), Stalking have been incorporated into the Indian Penal Code. Section 354A can be used in case of workplace harassment and Section 354C can be used in case of invasion of workplace privacy.

In spite of all these statutory enactments, the crime could not be checked, rather it has been increased at an alarming rate in India. At this juncture, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been enacted by the Union Parliament. Now, the hope of aspirations of everyone has been tucked into this piece of legislation.

III) The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

This new Act came into force in India on 9th December, 2013, which seeks to protect women from sexual harassment at their place of work. This is a very important piece of legislation in this era, when the menace called sexual harassment of women is grabbing our society and the workplace is not an exception to it. The importance and various parts of the Act are discussed hereunder.

(a) Important Provisions of the Act -

The Act contains the following important features:-

- (i)** The Act defines sexual harassment at the workplace **u/ s. 2(n)** and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.
- (ii)** The definition of "aggrieved woman" **u/s. 2(a)**, who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organized or unorganized sector, public or private and covers clients, customers and domestic workers as well.

- (iii) While the “workplace” in the Vishaka Guidelines is confined to the traditional office set-up, where there is a clear employee-employee relationship, the Act goes much further to include in the definition of “workplace” **u/s. 2(o)**, organizations, department, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment including the transportation.
- (iv) Every employer is required to constitute an Internal Complaints Committee **u/s. 4** at each office or branch with 10 or more employees. The District Officer appointed **u/s. 5**, is required to constitute a Local Complaints Committee **u/s. 6** at each district, and if required at the block level.
- (v) The Committee is required to complete the inquiry within a period of 90 days **(S.11)**. On completion of the inquiry, the report will be sent to the employer or the District Officer as the case may be, they are mandated to take action on the report within 60 days **(S.13)**.
- (vi) The Complaints Committees have the powers of civil courts for gathering evidence **(S.11)**.
- (vii) The Complaints Committees are required to provide for conciliation before initiating an inquiry, by the Complainant **(S.10)**.
- (viii) Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine up to Rs. 50,000/- **u/s. 26**. Repeated violations may lead to higher penalties and cancellation of license or registration to conduct business.

(b) Circumstances Amounting to Sexual Harassment of Women at Workplace under the Act -

Under **Section 3** of the Act, the following circumstances are amounting to Sexual Harassment :-

- (i) Implied or explicit promise of preferential treatment in her employment.
- (ii) Implied or explicit threat of detrimental treatment in her employment.
- (iii) Implied or explicit threat about her present or future employment status.
- (iv) Interference with her work or creating and intimidating or offensive or hostile work environment for her.
- (v) Humiliating treatment likely to affect her health or safety.

Hence, it can be said that, this is a comprehensive legislation for prevention of sexual harassment of women at workplace. With a broader interpretation of **Section 3** of the Act, it can be made available for others harassments also. It is a good attempt to create an umbrella legislation on this issue, but still it has certain loop holes and defects.

Role of Judiciary Concerning the Issue – Indian Perspective

In every democratic country Judiciary has to play an important role for solving legal issues. Judiciary is known as cornerstone of democracy. In the absence of the Judicial Review of Legislative Actions, Legislature will proceed according to its whims and will gradually become the source of oppression and tyranny. Only Judiciary can prevent this situation. Hence, the Role of Judiciary is vital in democracy like India.

In the context of the present study, Indian Judiciary has played a very important role by providing a long list of guidelines for prevention of sexual harassment of women at workplace, including protection of workplace privacy. Those Guidelines were provided in the case of **Vishaka vs. State**

of Rajasthan and Others, AIR 1997 SC 3011. In the absence of express legislative provisions, those guidelines have been continued till 2013.

The Guidelines provided by the Supreme Court of India in that case are stated below:-

- (i) Expressly prohibit sexual harassment at workplace and notify the workers.
- (ii) Rules or Regulations conducting discipline should include provisions prohibiting sexual harassment.
- (iii) Appropriate working conditions should be provided and all workers should be made aware of their rights.
- (iv) No hostile work environment towards women should be created.
- (v) The provision should be included in the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946.
- (vi) The victim of sexual harassment should have option to seek transfer of the perpetrator or her own transfer.

An analysis of Problems Concerning the Issue

The following Problems can be highlighted in the present study concerning this issue:-

- (i) Sexual Harassment of women at workplace is increasing every day at an alarming rate.
- (ii) Besides sexual harassment, other types of harassments are also prevalent, which are not specifically highlighted.
- (iii) Laws have given coverage only to the sexual harassment at workplace.
- (iv) No such law is found in India on Workplace Privacy.
- (v) Only the two recent legislations, Criminal Laws (Amendment) Act, 2013 and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 are available to redress the issue.

- (vi) There is absence of laws in India to prevent plagiarism at workplace.

Suggestions and Conclusion

In the present era of modern scientific technology, Human Right to Privacy is threatened in every sphere including the workplace. Alongside, the menace of sexual harassment is also grasping our workplace. To prevent this unwanted and unwelcome situation, the following Suggestions may be cited accordingly:-

- (i) Every kind of harassment at workplace should be prevented without causing unnecessary delay.
- (ii) The defects or loop holes in the existing Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 should be removed.
- (iii) More unbiased attitude should be taken while constituting the Committees under the Act, so that the victim can never go unredressed.
- (iv) Jurisdiction of the Courts should also be entertained on the issue instead of total dependence on Committees and Conciliation.
- (v) Comprehensive legislation is required in India on Right to Privacy including workplace privacy.
- (vi) Express law is required to prevent plagiarism at workplace in India.
- (vii) General awareness campaign should be organised to make everyone aware about the issue.
- (viii) Social infrastructure and mindset of the people should be changed to show respect towards women, so that sexual harassment is prevented from the root of the society.

Crimes are deeply rooted in social structure and human activities are the reflection of the society. If the society is

backward, stagnant, suffering from poor socio-economic conditions, illiteracy and underdevelopment, then the number of crimes will be increased therein. Progressive societies are less subjected to different crimes. But, the crime, like sexual harassment is equally found in every society. This is nothing but the result of degrading thought about women. Hence, social change is required to change the thought process of human mind, so that women are treated with respectful behaviour in every part of the society. To guarantee the human right to just and favourable condition of work, prevention of harassment is must in the workplace, which in other way will also protect the workplace privacy. Harassment of Women leads to social backwardness. Hence, it should be prevented to increase social progress and development. In this respect, law and society should maintain a well balance between them. Media should also have to play an important role for prevention of harassment of women at workplace as well as to prevent invasion of privacy at workplace.

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