

CHAPTER-8

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The idea of privacy was found in the ancient Indian texts and the protection was available to various aspects of privacy under the moral codes. However, much attention was not paid to such aspects of privacy by the world of scholarship. Attention was not paid even by the Indian scholars. As a result the ‘right to privacy’ as we know today is a product of modern western jurisprudence. When we come to the state and the course of development of the right to privacy, we find the situation unsatisfactory in all aspects ; as to its definition, its protection, its location, its limitation, its enforcement and the like. Incidentally, the right which emerged as a part of the public law was initially treated as a part of the private law. Subsequently, the natural urge for privacy came into conflict with the public curiosity. This conflict in the nature of the right to privacy is perceptible in the United States as well as in England. For a long time the legislature hardly paid any attention to lay down the parameters for protection of privacy and resolve its conflicts and the issue was left for discussion in the academic world and to be settled by judicial decisions. During the period, there were a lot of deliberations in the academic circles in the United States. These deliberations cannot be overlooked in a consideration on the emergence of right to privacy in India. The celebrated writing of Warren and Brandeis in 1890 not only

provided comprehensive answer to issues involved in privacy but it also produced detailed discussions on various aspects of privacy and attracted attention of subsequent scholars. The above two scholars, however, it is submitted, could not establish a right to privacy on the constitutional front. In the early twentieth century there was major threat to privacy by the state in view of the development of radio, tape-recorders, bugging and listening devices, television and computers etc. In the name of the defence of state the surveillance and domiciliary visits by the police also increased. After the mid-twentieth century the protection of privacy and the development of the constitutional right to privacy took a new turn in the United States as a result of the Supreme Court decisions. In England, attempts were made to establish the right to privacy by setting up Committee and introducing bill in Parliament. The famous jurist Lord Denning favoured the recognition of right to privacy under English law. Similar developments took place in some other Common-wealth countries. Coming to Indian Constitution, we find that neither there is an independent right to privacy nor there is separate protection against unreasonable searches and seizures under the Fundamental Rights. All these aspects are therefore covered under the right to life and personal liberty under Article 21. Although some aspects are protected under the civil, criminal and the procedural laws, the right to privacy as a comprehensive right has, it is submitted, to be protected as a Fundamental Right in the Constitution. In this situation the judiciary came forward to evolve a right to privacy in Article 21. However, initially the judiciary was hesitant to declare a Fundamental Right to privacy. By case to case development the right to privacy was included in the right to life and personal liberty.

Coming to the definition of privacy we find the task of defining it more complex for the simple reason that various scholars have included in their definition either one or other aspect of privacy. Various terms like freedom, autonomy, secrecy, confidentiality, intimacy, dignity etc. have been used to define privacy. The matter was so complex that some scholars tried to explain it in terms of ‘inviolate personality’ while other scholars refusing to accept it as an independent value, treated it as a ‘composite of interests in reputation, emotion and intangible property’. One scholar wanted to protect ‘any intrusion into one’s intimate life’ while other regarded it as ‘zero-relationship’. The desire for privacy and the desire for disclosure both are natural instincts of man and an attempt to protect one brings the other into conflict. The right to be let alone was declared more than a century ago but the parameters were not explained. The exclusion of others or withholding of certain information is not sufficient to cover all aspects. The pursuit of happiness and the inviolate personality may include many other aspects of life and liberty. It may be pointed out here that the concept of privacy may be distinguished from a legal right to privacy and for this purpose the right to privacy needs to be defined in definite terms.

It is significant to note here that the Universal Declaration of Human Rights, 1948 is the first international document to declare the right to privacy as an independent right. It is further emphasized and elaborated in the subsequent international human rights covenants and instruments. India is party to some of these international human rights instruments and those have been ratified by the Government of India. The importance of this right to privacy brings home the conclusion that the right should find an independent place in our Constitution. However, it is yet to get its appropriate place. The judicial decisions in our country generally relate to

police surveillance, matrimonial rights, sexual autonomy, modesty and self-respect of woman, publication of private information and protection of telephonic conversation. There are some instances of protection of privacy under other laws. The laws of defamation protects the person's interest in reputation. The law of Evidence and the Telegraph Act protect communications in some cases, the privacy as customary right has been recognized under the Easements Acts and the modesty of women and privacy of female have also been protected under the criminal law and family law including the hearing *in camera* of matrimonial proceedings. It may be noted here that the recently enacted Information Technology Act, 2000 concentrates on the protection of privacy of communications. Nevertheless, the right to privacy, it is submitted, should be added under the Fundamental Rights in order to provide the constitutional base and foundation to this important right in the similar way as the protection against arrest and detention under Article 22 and the right against exploitation under Article 24 or found under any other statutory provisions.

No right can be guaranteed in absolute terms. When we talk about right to privacy its scope must be clearly determined and it is also necessary to prescribe the limitations on the right within which it is to operate. A right is generally available to free men, therefore, the right to privacy is also available to all innocent persons. However, the aspect of right to privacy as to police surveillance, it is submitted, should be restricted to habitual offenders and cases of persons posing danger to community security at large. There is need to examine and differentiate such cases very carefully in order to uphold or deny the claim of privacy and the right should be denied only when an important countervailing interest is shown to be superior. It may be suggested here that the

innocent persons and those earning an honest livelihood should not be subjected to surveillance unless there is contradictory evidence on the record. A significant question in this respect arises as to what extent the right to privacy may be available to accused and criminals. The matter has been considered by the judiciary and the principles have been firmly established in this respect. In view of this fact the right to life and liberty has been guaranteed to all persons, the right to privacy is also available to all. Convicts are not by mere reason of their conviction denuded of all the Fundamental Rights which they otherwise possess. The prisoners, however, cannot enjoy some of the rights which are contradictory to their incarceration, for example, a prisoner cannot have liberty to move out of the prison. The right to privacy, therefore, in such cases has to operate within that limitation. Even in such cases the judiciary has rightly laid down that a prisoner or a press with his consent has the right to publish his autobiography and the state cannot prevent its publication even if it might contain private information about state functionaries. In respect of the relevancy of character for extending the right to privacy the judiciary has adopted a liberal view and extended the right to privacy even to the prostitutes. There is a need to distinguish; however, it is submitted, in some cases between good characters and bad characters while extending the right to privacy in economic matters. The nature of the right to privacy is to protect individual's interest and while doing so it cannot overlook the larger interest of the public in general. It is therefore necessary that privacy has to give way for public or general interest. There are other limitations also which may curtail the operation of the right to privacy. The privileged communications largely protect the private interest. In such cases either it may be published in the absence of special danger or with person's consent. It may be pointed out here that

although the doctrine of waiver is not applicable in cases of fundamental rights the right to privacy may well be waived by the person who enjoys it. The protection of privacy in some cases may be withdrawn for prevention of crime, matters contained in public record, concerning public officials or protection of health or morals. It has been rightly laid down that the right to privacy of one may be curtailed in order to protect the right of others. In this respect , it is submitted, however, that the matter should be considered very carefully and the decision should be based on the ground of public interest. The most important aspect of any right is its effective enforcement and in this respect the existing remedies play an important role. As a fundamental right the public remedy of writs is equally available in cases of right to privacy. The matter may be brought before the court even by way of public interest litigation. The compensatory remedy has been most effective for the redressal of the grievances of the victims whose fundamental right has already been violated. It is submitted that the aforesaid remedies should be extensively used for effectively enforcing the right to privacy.

The sanctity of home has always been recognized since ancient times. It is one of the important liberties which was guaranteed during the Vedic period. Subsequently, the privacy of home enjoyed the privilege of customary law and the common law. In the early development of the right to privacy in the United States privacy of home obtained a prominent place. Under the Constitution of America when the right to privacy was established as a fundamental right as part of the Bill of Rights the personal intimacies of the home was included in its content with the privacy of family, marriage, motherhood, procreation and child-rearing. We find that the above broad parameters laid down by the American Supreme Court were generally quoted by the Supreme Court of India in a

series of judicial decisions in this context. A significant question as to inclusion of right to sleep and comfort as part of the privacy of home came up before the Supreme Court. The Court laid it down firmly that the right to sleep which was the normal comfort and necessity for human existence was part of the right to life. Therefore, the personal intimacy of the home included in right to privacy must be protected because every individual needs a place of sanctuary where he can be free from societal control. Another aspect of privacy in this respect is the protection against police surveillance. The police surveillance cannot be carried out without intrusion on one's privacy. This intrusion may assume various forms like physical surveillance, data surveillance and psychological surveillance. The problem in this respect has been exacerbated in view of the development of electronic listening and recording devices in modern times. The problem to protect the individuals against police surveillance becomes more complex in view of the society's interest to provide security to individuals against crime. The role of law in this respect, therefore, is to strike a balance between the permissibility of police surveillance and protection against it. It is submitted in this respect that the innocent citizens should not be subjected to any kind of police surveillance. It may be permissible only if , on the basis of criminal record and the character of the individual, there is clear and present danger based upon credible material which makes the movement and act of the person in question dangerous.

Another significant aspect which has been considered is the privacy of communication. We find that the limited protection of communication between persons has been included in the right to privacy. This protection is necessary for two reasons. First, it provides the individual with the opportunities he needs for sharing confidences and intimacies with those

he trusts and secondly, it serves to set necessary boundaries of mental distance in inter-personal situations ranging from the most intimate to the most formal and public. The privacy of communication has two-fold operation; the right of individual and the right of organizations. The information acquired by organization from individual, as well as, communication between one organization and other organization may require protection in such cases. It may be pointed out here that certain communications are protected from disclosure under the Indian Evidence Act including the private professional and state communications. It is submitted in this respect that without disturbing the framework of privileged communications and state secrets, the nature of protection may be raised to the status of a general fundamental right to privacy. In such cases, thus, the remedy of writ and compensation would be available in addition to the existing remedies of injunction and damages.

The tapping of telephone has been another area where the right to privacy is attracted in the United States. The American Supreme Court first considered the issue in *Olmstead's* case wherein the majority laid down that wire-tapping violated the Fourth Amendment. The minority also held it illegal on other grounds. Since then the Fourth Amendment protection against illegal searches was extended to protect privacy against bugging. In our country although there is no express guarantee under the Constitution against telephone-tapping it was included in the personal liberty since *R.M.Malkani's* case. Since then the telephonic conversation of an innocent citizen is protected against wrongful or highhanded interference by tapping the conversation. Telephone-tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated 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 submitted in this respect that the protection against telephone-tapping should not be extended in cases of guilty citizens. As the right to communication flows from article 19(1)(a) , the restrictions may also be imposed on grounds mentioned in Article 19(2). The photography or videography by the journalists and subsequent attempt to publish or telecast such information may also attract the violation of privacy. The people's right to know cannot go beyond propriety and decency, therefore, a balance has to be struck between the right to know and the right to privacy. The reasonable scope of a person's privacy expectation depends partially on the methods of information collection available to the press and the public – once the press establishes a law or custom that permits a form of news gathering that was previously uncommon, then the person will no longer have a reasonable expectation of privacy with respect to that form of news gathering. Some protections are available in this respect under the law of torts. In our country the privacy claim is not available in cases of publication of matters based on public records. On the publication of private matters the law of defamation may also be attracted. The computer has posed tremendous threat to privacy in modern times. The existing cyber laws are aid to cope with the emerging threat to privacy of computer users. Although the click-through agreements imposes heavy penalty in cases of violation of privacy it has not been much effective in our country. In view of the importance of this matter Parliament enacted the Information Technology Act, 2000 which protects the digital signature from other users and provides remedy in cases of breach of privacy.

Marriage has been regarded as the basic civil right of man and fundamental to our very existence and survival. The freedom of choice to marry has been recognized in almost all democratic countries. This

freedom derives its basis from the right to privacy. The Universal Declaration of Human Rights which guarantees the right to privacy independently also recognized the right to marry and other related aspects. It was subsequently followed by the European Convention and the International Covenant on Civil and Political Rights. The American Convention on Human Rights also recognizes the right to marry in principle and it may be restricted only on specified grounds. In some countries of the West the issue of same-sex marriages on the basis of freedom of intimate association as basic incidence of marriage is also debated. The state may impose restrictions on the right to marry in view of the interest of the society or national interest. In our country the population growth has been the greatest national problem. There has been development of right to health and some other rights which may restrain the right to marry in appropriate cases. In view of the dominant rider on the right to marry we find that it is difficult to recognize a general right to marry in India. However the limited right to marry in the form of the freedom of choice will still be available. The procreation of children is the natural instinct of marriage. The right to privacy includes procreation as a right of the person. The procreation of a child depends upon the capacity of a human being which has been elevated to the status of a right, however, it does not impose a duty to reproduce. The individual freedom also includes the freedom not to reproduce children. The reproductive autonomy has been recognized by the American courts and the international human rights instruments. The individual's right to procreation includes the right to adopt any means of control including voluntary sterilization. A significant question which arises in this respect is whether the state can impose compulsory sterilization in view of the population-control measures. The judiciary has upheld the restriction up to

two children, in view of the overwhelming population growth and urgent need to put a check upon it. The restriction up to one child would not be invalid. In view of the prevailing situation and the state's interest in curbing population growth, even compulsory sterilization may not be invalid.

The issue of abortion attracted the attention of the court that resulted in the landmark decision of the American Supreme Court in *Roe's* case indicating the right to privacy of woman as including the right to abortion. In some cases the abortion has to be done depending upon the doctor's advice. In other cases the decision may depend upon the pregnant woman. There are some restrictions which operate in cases of abortion by unmarried pregnant woman. In view of the constitutional provisions guaranteeing life and liberty the right to abortion was included in the privacy of woman. It is, however, submitted that some restrictions on this aspect of right to privacy included in the right to life should be allowed to operate in view of protection of the life of the foetus. The privacy of a woman also includes the dignity, modesty and self-respect of woman. In this respect the privacy interest protects the individual desires. The society has a strong interest in protecting the sanctity, dignity and the integrity of the human person. Safeguarding health of individual and protecting inherent right of bodily integrity are example of state protection of social interest. In our country the right to human dignity, modesty and self-respect of woman have been upheld by the judiciary as part of the fundamental right . The sexual autonomy is integral to one's personality. An individual enjoys autonomy to choose his or her partner to a sexual act. Forced sex has been regarded as the grossest form of violation of individual's right to privacy. The right to sexual autonomy should not be allowed to go unrestricted as it attracts even consensual homosexual

relations between adults in some countries of the West. However, this aspect of sexual autonomy has no scope in India.

In view of the aforesaid discussion we conclude that the right to privacy is emerging as a Fundamental Right under the Constitution. It has been considered to be part of the right to life and personal liberty under Article 21, however, some of its important aspects are also covered under Article 19(1). Moreover, beyond “the procedure established by law” the right to privacy in relevant areas is also subjected to other limitations. This constitutional trend of this important aspect of right to privacy may further create confusion and uncertainty as it was prevailing in the earlier stage of the development of this right. In order to remove any difficulty and bring out certainty as to the definition and protection of this right effectively, as it has been suggested earlier, it is pointed out here that the right to privacy with its parameters and grounds of restrictions should be separately incorporated in Part III of the Constitution by appropriate constitutional amendment. For the effective protection of this right it is suggested here to either insert a new clause in Article 19 viz., Article 19(1)(h) or an independent article after Article 21. The amendment may be as follows :“(The right) to privacy in relation to person, family, marriage, sex, correspondence and domestic affairs.” The amendment should also provide for reasonable restriction under Article 19(7) or under the independent article after Article 21, as the case may be, in the following words : “ Nothing in the above clause (cl.(h) in case of Article 19) shall affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said clause either in the interest of general public or security of the state”. The term “interest of general public” here, means public health, morality or prevention of

crime. The state may be able to impose restrictions on the above-mentioned grounds. At the same time the reasonableness of restrictions shall be subject to judicial review. In a welfare state that we are, it is important to strike a balance between the individual's liberty and the social control. The proposed amendment would be adequate to protect the individual right to privacy and provide for state regulation subject to judicial review.